

1 BINGHAM McCUTCHEM LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MINO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN 161074)
9 KENDRA FOX-DAVIS (SBN 248757)
131 Steuart Street, Suite 400
10 San Francisco, CA 94105
Telephone: (415) 543-9697
11 Facsimile: (415) 543-0296
Email: osellstrom@lccr.com

12 *[Additional Counsel listed on signature pages.]*

13 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association for
14 the Advancement of Colored People,
San Diego Chapter

15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA
17 SACRAMENTO DIVISION

18 ASSOCIATED GENERAL CONTRACTORS
19 OF AMERICA, SAN DIEGO CHAPTER, INC.,
a nonprofit California corporation,

20 Plaintiff,

21 v.

22 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

23 Defendants,

24 COALITION FOR ECONOMIC EQUITY and
25 NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
26 SAN DIEGO CHAPTER,

27 Defendant-Intervenors.

No. 2:09-cv-01622-JAM-GGH

**NOTICE OF MOTION AND
MOTION OF COALITION FOR
ECONOMIC EQUITY AND
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE, SAN DIEGO
CHAPTER FOR LEAVE TO
INTERVENE UNDER FEDERAL
RULE OF CIVIL PROCEDURE 24**

Date: November 4, 2009
Time: 9:00 a.m.
Place: Courtroom 6
Judge: Hon. John A. Mendez

28 A/73122607.4/0999997-0000929484

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 4, 2009 at 9:00 a.m., or as soon thereafter as the matter may be heard, in the United States District Court, Eastern District of California, Proposed Defendant-Intervenors Coalition for Economic Equity (“CEE”) and National Association for the Advancement of Colored People, San Diego Chapter (“NAACP”) (collectively, “Defendant-Intervenors”) will and hereby do move this Court for an order granting them leave to intervene in the above-captioned case as Intervenor-Defendants as a matter of right pursuant to Federal Rule of Civil Procedure Rule 24(a)(2), or, alternatively, as a matter of permission at the discretion of the Court, pursuant to Federal Rules of Civil Procedure, Rule 24(b)(2), and to permit Defendant-Intervenors to file the Answer in Intervention attached to this motion as Exhibit A. This motion is made on the grounds that Defendant-Intervenors have significant, legally protectable interests that relate to the subject of this action; the disposition of this action will, as a practical matter, impair or impede their ability to protect their interests; and the present Defendants are unlikely to adequately represent Defendant-Intervenors’ interests in this case. The motion is timely.

This motion is based on this Notice of Motion and Motion, on the accompanying Memorandum in Support thereof, on the Declarations of Aileen C. Hernandez, Lei-Chala Wilson, and Michael I. Begert, on the [Proposed] Answer in Intervention filed concurrently, on the [Proposed] Order each filed and served herewith, and on the papers, records and pleadings on file in this matter, and on such oral argument as the Court allows.

Counsel for Intervenor-Defendants has provided Counsel for Defendants a copy of this motion on September 10, 2009.

1 DATED: September 14, 2009

BINGHAM McCUTCHEN LLP

2
3
4 By: /s/ Michael I. Begert

5 BINGHAM McCUTCHEN LLP
6 MICHAEL I. BEGERT (SBN 141969)
7 michael.begert@bingham.com
8 SUJAL J. SHAH (SBN 215230)
9 sujal.shah@bingham.com
10 ERIN S. CONROY (SBN 241042)
11 erin.conroy@bingham.com
12 CARLOS P. MINO (SBN 247022)
13 carlos.mino@bingham.com
14 Three Embarcadero Center
15 San Francisco, CA 94111-4067, U.S.A.
16 Telephone: 415.393.2000
17 Facsimile: 415.393.2286

18 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
19 OREN SELLSTROM (SBN 161074)
20 KENDRA FOX-DAVIS (SBN 248757)
21 131 Steuart Street, Suite 400
22 San Francisco, CA 94105
23 Telephone: (415) 543-9697
24 Facsimile: (415) 543-0296
25 Email: osellstrom@lccr.com

26 EQUAL JUSTICE SOCIETY
27 EVA JEFFERSON PATERSON (SBN 67081)
28 260 California Street, Suite 700
San Francisco, CA 94111
Telephone: (415) 288-8700
Facsimile: (415) 288-8787
Email: epaterson@equaljusticesociety.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
ALAN L. SCHLOSSER (SBN 49957)
JORY C. STEELE (SBN 206944)
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
Email: aschlosser@aclunc.org

Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National
Association for the Advancement of Colored People,
San Diego Chapter

1 BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MIÑO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN 161074)
9 KENDRA FOX-DAVIS (SBN 248757)
131 Steuart Street, Suite 400
10 San Francisco, CA 94105
Telephone: (415) 543-9697
11 Facsimile: (415) 543-0296
Email: osellstrom@lccr.com

12 *[Additional Counsel listed on signature pages.]*

13 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association
14 for the Advancement of Colored People,
San Diego Chapter

15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA
17 SACRAMENTO DIVISION

18 ASSOCIATED GENERAL CONTRACTORS
19 OF AMERICA, SAN DIEGO CHAPTER, INC.,
a nonprofit California corporation,

20 Plaintiff,

21 v.

22 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

23 Defendants,

24 COALITION FOR ECONOMIC EQUITY and
25 NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
26 SAN DIEGO CHAPTER,

27 Defendant-Intervenors.
28

No. 2:09-cv-01622-JAM-GGH

**MEMORANDUM IN SUPPORT OF
MOTION OF COALITION FOR
ECONOMIC EQUITY AND
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE, SAN DIEGO
CHAPTER FOR LEAVE TO
INTERVENE UNDER FEDERAL
RULE OF CIVIL PROCEDURE 24**

Date: November 4, 2009
Time: 9:00 a.m.
Place: Courtroom 6
Judge: Hon. John A. Mendez

1 **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

2 The Coalition for Economic Equity (“CEE”) and National Association for the
3 Advancement of Colored People, San Diego Chapter (“NAACP”) (collectively, “Defendant-
4 Intervenors”) seek to intervene as parties in Case No. 2:09-cv-01622-JAM-GGH brought by the
5 Associated General Contractors of America, San Diego Chapter, Inc. (“Plaintiff”) against the
6 California Department of Transportation (“Caltrans”), its Director, Randell Iwasaki,¹ and Olivia
7 Fonseca, its Deputy Director of Civil Rights (collectively, “Defendants”). CEE’s and NAACP’s
8 intervention would raise no new issues. It would not delay or complicate the case, nor otherwise
9 increase the burden on the existing parties. The sole effect of CEE’s and NAACP’s intervention
10 would be to ensure that the intended beneficiaries of the government program being challenged
11 are represented before this Court.

12 **I. FACTUAL BACKGROUND**

13 **A. The Interests At Stake**

14 Plaintiff seeks to terminate the federally-authorized and federally-approved public
15 contracting program (“DBE program”) implemented by Caltrans. (*See* Plaintiff’s Complaint
16 (“Compl.”), ¶ 42, Prayer for Relief, ¶ 2.) The contracting program includes procedures designed
17 to ensure fair participation by Disadvantaged Business Enterprises (“DBEs”) in federally-funded
18 highway and transportation projects. Defendant-Intervenors, as coalitions of minority and
19 women-owned business groups, represent the businesses that the challenged program is designed
20 to ensure have equal opportunity to compete. (Declaration of Aileen C. Hernandez (“CEE
21 Decl.”), ¶ 3; Declaration of Lei-Chala Wilson (“NAACP Decl.”), ¶ 3.) Caltrans can be expected
22 to defend its program, but it is Defendant-Intervenors whose true interests are at stake.

23 Federal law requires all recipients of federal funding to establish a DBE program
24 as a condition of receiving federal funds. *See* Safe, Accountable, Flexible, Efficient

25

26 ¹ Will Kempton was previously named as the defendant in this case in his official capacity as
27 Director of the California Department of Transportation. Pursuant to Federal Rule of Civil
28 Procedure 25(d), his successor, Randell Iwasaki, is automatically substituted as the named
defendant.

1 Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”), P.L. 109-59, § 1101(b), 119
2 Stat. 1144 (2005). The DBE program is modest: it does not guarantee contracts to any business,
3 nor does it provide bid discounts. *Id.* Rather, what it aims to do is ensure that businesses such as
4 those represented by Defendant-Intervenors are allowed equal opportunity to compete for
5 contracting opportunities. *See., e.g.*, 49 C.F.R. § 26.1. Thus, recipients must establish overall
6 goals for DBE participation, based on the availability of DBEs that are ready, willing, and able to
7 participate on federally-funded contracts in their jurisdiction. In striving to meet these goals,
8 recipients may use a combination of race and gender-neutral means and race and gender-
9 conscious means, such as setting contract-specific DBE subcontracting goals for large prime
10 contracts. *See., e.g.*, 49 C.F.R. § 26.1. Unless they fail to administer their program in good faith,
11 federal funding recipients cannot be penalized for failing to meet the overall DBE goal. 49 CFR
12 § 26.47. Similarly, there is no requirement that prime contractors meet contract-specific
13 subcontracting goals, so long as they demonstrate good faith efforts to do so. 49 CFR § 26.53.

14 The DBE program stems from Congress’ longstanding efforts to ensure that
15 federal highway and transportation funds are not expended in a manner that reflects or reinforces
16 patterns of discrimination in that industry. While some progress has been made over the years,
17 Congress has repeatedly found that the problem of discrimination and exclusion in federally-
18 funded contracts persists.² Thus, by the late 1980s, Congressional evidence showed that equity
19 was still far off: minority businesses only received about 2.7 percent of the prime contract
20 dollar. H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 1987. In 1998, Congress re-enacted the
21 United States Department of Transportation’s (“DOT”) DBE program in the Transportation
22 Equity Act for the 21st Century (“TEA-21”) as a way to continue to guard against using taxpayer

23

24 ² *See, e.g.*, Federal Contracting Opportunities for Minority and Women-Owned Businesses--An
25 Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm. on Small
26 Business, 98th Congress., 2d Sess. (1984); Disadvantaged Business Set-Asides in Transportation
27 Enterprise Development of the House Comm. on Small Business, 100th Cong., 2nd Sess. (1988)
28 Barriers to Full Minority Participation in Federally Funded Highway Construction Projects:
Hearings Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 2d
Sess. (1988).

1 funds to perpetuate a discriminatory contracting system. *See* TEA-21, P.L. 105-178, § 1101, 112
2 Stat. 107 (1998). As before, Congress did so only after considering substantial evidence and
3 thoroughly debating the evidence. Congress determined that real, pervasive, and injurious racial
4 and sexual discrimination continues to exist and that the effects of that discrimination hinder the
5 ability of minority and women-owned firms to participate equally in federal contracting. Among
6 other evidence cited by members of the House and Senate was that women own 9.2 percent of
7 the nation's construction firms, but their companies earn only about half of what is earned by
8 male-owned firms. (S1409.) Additionally, evidence showed that, for transportation-related
9 contracts, minority-owned firms get only 61 cents for every dollar of work that white male-
10 owned businesses receive. *See* 64 Federal Register 21 (2 February 1999), pp. 2000 *et seq.*
11 Congress also found that goal-based programs like those in the DBE program were the only
12 effective means to combat the continuing effects of discrimination:

13 *Throughout the debate on the compelling governmental interest,*
14 *the bipartisan majority of both houses of Congress repeatedly*
15 *described the necessity of the DBE program's goal-based*
16 *approach to remedying the effects of discrimination in DOT-*
17 *assisted contracting. The most significant evidence demonstrating*
18 *the necessity of a goal-oriented program is the evidence cited of*
19 *the fall-off in DBE participation in state contracting when goal-*
20 *oriented programs end, compared to participation rates in the*
21 *Federal DBE program.*

22 *Id.* (emphasis added).

23 Prior to 2006, Caltrans found that race and gender-conscious and race and gender-
24 neutral means were both necessary to meet its obligations under the federal DBE program. (*See*
25 Compl., Ex. 1.) In 2006, the Ninth Circuit's decision in *Western States Paving* required states to
26 show the effects of discrimination in the state's contracting business in order to constitutionally
27 include race and gender-conscious elements in their DBE programs. *Western States Paving Co.,*
28 *Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005). As a result, California
suspended those portions of the program, and, in June 2007, Caltrans commissioned an extensive
"disparity study" that thoroughly documented such discrimination within California. (BBC
Research & Consulting "Availability and Disparity Study" *available at*
http://www.dot.ca.gov/hq/bep/study/Avail_Disparity_Study_Final_Rpt..pdf (last accessed

1 August 20, 2009.) The same year, Caltrans submitted a plan, based on the study, to the DOT that
2 would allow reinstatement of race and gender-conscious measures that would comply with
3 *Western States Paving*. (See Compl., ¶ 32; Defendants' Answer ("Ans."), ¶ 32.)

4 In August 2008, the DOT approved Caltrans' request. (See Compl., ¶¶ 33-34, 37;
5 Ans., ¶¶ 33-34.) Caltrans announced in March 2009 that it was reinstating race and gender-
6 conscious contracting goals for those groups found by the disparity study to be suffering from
7 ongoing discrimination in its federally-funded contracts. (See Compl., Ex. 5.)

8 This action was initiated by Plaintiff against Caltrans on June 11, 2009. The suit
9 was filed pursuant to the Fourteenth Amendment of the U.S. Constitution; 42 USC §§ 1981,
10 1983, and 2000d; and Article I, section 31 of the California Constitution (Proposition 209). The
11 Defendants' Answer was filed on July 7, 2009.

12 **B. The Defendant-Intervenors**

13 CEE is an umbrella coalition that has represented diverse minority and women-
14 owned businesses for more than 27 years, seeking to ensure that such businesses are not unfairly
15 excluded from public contracting systems. (CEE Decl., ¶ 2.) It was first formed in 1982 in
16 response to an almost total exclusion of MBEs and WBEs from San Francisco's public
17 contracting system. (*Id.* ¶ 3.) For the past 27 years, the Coalition has worked to strengthen and
18 defend contracting equity programs throughout the Bay Area, as well as at the state and federal
19 levels. (*Id.* ¶ 3.) Members of CEE include minority contracting associations whose members
20 qualify as DBEs under the Caltrans program and federal laws, such as the African-American
21 Chamber of Commerce, Asian American Business Association, and California Hispanic
22 Contractors Association. (*Id.* ¶ 2.) CEE's affiliates include certified DBEs that have submitted
23 bids as contractors or subcontractors on Caltrans projects receiving federal funds, and that are
24 willing and able to submit bids for future Caltrans contracts. (*Id.* ¶ 4.)

25 Because of this direct interest, CEE has been actively involved in pressing
26 Caltrans to ensure that its DBE program is as effective as possible. For example, when it became
27 clear in 2006 that Caltrans was considering suspending the race-conscious elements of its DBE
28 program in response to the *Western States* case, CEE affiliates and their members pressed

1 Caltrans to maintain these parts of the program while a disparity study was being commissioned.
2 (*Id.* ¶ 7.) When Caltrans declined to do so, they urged Caltrans to expeditiously complete the
3 disparity study so that the race-conscious elements of the program could be reinstated. (*Id.* ¶ 7.)
4 Earlier this year, CEE again pressed Caltrans to reinstate the race-conscious elements of the
5 program, particularly as federal stimulus dollars were starting to flow. (*Id.* ¶ 8, Ex. A.)

6 In addition to working administratively and legislatively to bolster the
7 effectiveness of the DBE program and other contracting equity programs, CEE has also been
8 involved in a number of court actions in support of equitable public contracting programs as
9 intervenor, as plaintiff, and as amicus curiae. *See, e.g., Associated General Contractors v.*
10 *Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991); *Associated General Contractors*
11 *v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Coral Construction, Inc. v.*
12 *City and County of San Francisco* (review granted Aug. 8, 2007, CA Supreme Court No.
13 S152934); *C&C Construction v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284
14 (2004).

15 San Diego Chapter of the NAACP is an organization that was founded in 1919 to
16 ensure the political, educational, social, and economic equality of rights of all persons and to
17 eliminate racial hatred and racial discrimination. (NAACP Decl., ¶ 2.) NAACP has long been
18 concerned about ongoing discrimination in local and statewide construction contracts involving
19 DOT funds. (*Id.* ¶ 4.) Members of NAACP include individuals and businesses who seek to do
20 business with Caltrans on federally-funded contracts and who are certified as DBEs with
21 Caltrans, and who have in the past been unable to secure contracts with public agencies. (*Id.*
22 ¶¶ 3-6.)

23 Plaintiff asks this Court to invalidate Caltrans' 2009 DBE program as
24 unconstitutional, and seeks a preliminary and permanent injunction to stop Caltrans from
25 implementing its 2009 DBE program, or any other race or gender-conscious DBE program.
26 (Compl., ¶ 42, Prayer for Relief, ¶ 2.) Members of CEE and NAACP are among the intended
27 beneficiaries of Caltrans' 2009 DBE program. (CEE Decl. ¶¶ 1-4; NAACP Decl. ¶ 3.) Because
28 Plaintiff is seeking the elimination of this level playing field, Defendant-Intervenors' members

1 have strong, protectable interest in a contracting system that allows fair participation. This
2 interest is directly threatened by Plaintiff's case, and thus intervention should be granted.

3 **II. ARGUMENT**

4 **A. DEFENDANT-INTERVENORS ARE ENTITLED TO**
5 **INTERVENE IN THIS ACTION AS A MATTER OF RIGHT.**

6 Defendant-Intervenors are entitled to intervention as a matter of right under
7 Federal Rule of Civil Procedure 24(a)(2). Rule 24(a)(2) provides:

8 On timely motion, the court must permit anyone to intervene who:
9 . . . claims an interest relating to the property or transaction that is
10 the subject of the action, and is so situated that disposing of the
11 action may as a practical matter impair or impede the movant's
12 ability to protect its interest, unless existing parties adequately
13 represent that interest.

14 Fed. R. Civ. P. 24(a)(2). The Ninth Circuit construes Rule 24 liberally in favor of movants for
15 intervention. *See Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v.*
16 *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). "Courts are guided primarily by practical and
17 equitable considerations." *Id.*

18 The Ninth Circuit has broken down the requirements of Rule 24(a)(2) into four
19 elements:

20 (1) the application must be timely; (2) the applicant must have a
21 "significantly protectable" interest relating to the transaction that is
22 the subject of the litigation; (3) the applicant must be so situated
23 that the disposition of the action may, as a practical matter, impair
24 or impede the applicant's ability to protect its interest; and (4) the
25 applicant's interest must be inadequately represented by the parties
26 before the court.

27 *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (citing
28 *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)). For reasons set
forth below, Defendant-Intervenors satisfy the requirements of Federal Rule of Civil Procedure
24(a)(2) to intervene as a matter of right in the present action.

29 **1. Defendant-Intervenors' Motion to Intervene is Timely.**

30 In determining whether a motion for intervention is timely, the Court generally
31 considers the following three factors: "(1) the stage of the proceedings; (2) whether the parties

1 would be prejudiced; and (3) the reason for and any delay in moving to intervene.” *Northwest*
2 *Forest Resource Council*, 82 F.3d at 836 (citing *United States v. Oregon*, 913 F.2d 576, 588 (9th
3 Cir. 1990)).

4 Defendant-Intervenors’ motion is timely. The proceeding is in its nascent stage.
5 This application is being filed within three months from the filing date of the initial complaint.
6 See *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *Utah Ass’n of*
7 *Counties v. Clinton*, 255 F.3d 1246, 1250-51 (10th Cir. 2001). Discovery will not close until
8 September 3, 2010 and dispositive motions are not due to be filed until October 20, 2010. (Dkt.
9 No. 11.) No party can claim prejudice. Caltrans filed its answer about 60 days ago. No
10 discovery has taken place, and the parties have yet to appear before the court. Since the motion
11 is “filed before the district court [has] made any substantive ruling,” while the proceedings are
12 still in the early stages and the court has not substantially engaged with the issues, Defendant-
13 Intervenors’ motion has not prejudiced the existing parties. See *Northwest Forest Resource*
14 *Council*, 82 F.3d at 837.

15 **2. Defendant-Intervenors have a Significantly Protectable**
16 **Interest in the Subject Matter of the Action.**

17 Defendant-Intervenors absolutely can claim “an interest relating to the property or
18 transaction that is the subject of the action.” Fed. R. Civ. Proc. 24(a)(2). Defendant-Intervenors
19 represent the very businesses that stand to lose equal opportunities to compete for California’s
20 federally-funded public works contracts if Plaintiff’s attack succeeds. “It is generally enough
21 that the interest [asserted] is protectable under some law, and that there is a relationship between
22 the legally protected interest and the claims at issue.” *Sierra Club v. United States EPA*, 995
23 F.2d 1478, 1484 (9th Cir. 1993); see also *Donnelly*, 159 F.3d at 409; *U.S. v Alisal Water Corp.*,
24 370 F.3d 915, 919 (9th Cir. 2004).

25 Defendant-Intervenors more than satisfy this standard. CEE and NAACP have an
26 interest in ensuring a “level playing field” for DOT-assisted contracts, and their members have
27 an interest in equitable competition for federally-funded contracts, *i.e.*, in competing on a “level
28 playing field.” These interests are protected under 49 C.F.R. Section 26, whose purpose is, *inter*

1 *alia*, “(a) [t]o ensure nondiscrimination in the award and administration of DOT-assisted
2 contracts in the Department’s highway, transit, and airport financial assistance programs” and
3 “(b) [t]o create a level playing field on which DBEs can compete fairly for DOT-assisted
4 contracts.” 49 C.F.R. § 26.1. CEE and NAACP are composed of the very contractors who will
5 be excluded from public contracts if that playing field tilts further.

6 The Ninth Circuit has “taken the view that a party has a sufficient interest for
7 intervention purposes if it will suffer a practical impairment of its interests as a result of the
8 pending litigation.” *California ex rel. Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2006). The
9 injunction sought by Plaintiff will have “direct, immediate, and harmful effects” upon
10 Defendant-Intervenors’ members’ interest in equitably participating in state contracting
11 opportunities funded with federal dollars. *See Forest Conserv. Council v. U.S. Forest Service*,
12 66 F.3d 1489, 1494 (9th Cir. 1995) (noting that when “the injunctive relief sought by plaintiffs
13 will have direct, immediate, and harmful effects upon a third party’s legally protectable interests,
14 that party satisfies the ‘interest’ test”); 42 C.F.R. § 26; CEE Decl., ¶ 5; NAACP Decl., ¶¶ 5-6.
15 The consequences of such an injunction to Defendant-Intervenors’ interests is not in doubt:
16 when Caltrans abandoned race-conscious contract goals program between FY 2005-2008, DBE
17 participation on federal contracts in California dropped from 10.9 percent to 4.6 percent.
18 (Compl., Ex. 3 [Feb. 25, 2009 *Letter from U.S. DOT to Kempton*].) For 2009, it is a paltry 2.2
19 percent. That decrease has harmed Defendant-Intervenors’ members. (CEE Decl., ¶ 5; NAACP
20 Decl., ¶ 4.) Accordingly, Defendant-Intervenors have a significantly protectable interest in this
21 case’s subject matter.

22 **3. Defendant-Intervenors’ Interests Would Be**
23 **Substantially Prejudiced By Any Judgment Or**
Settlement Rendered in its Absence.

24 To intervene, a movant must show the disposition of the action may “as a
25 practical matter impair or impede” the ability to protect movant’s interest, unless the interest is
26 adequately represented by existing parties. Fed. R. Civ. Proc. 24(a)(2); *Cunningham v. David*
27 *Special Commitment Ctr.*, 158 F.3d 1035, 1038 (9th Cir. 1998). This only requires a showing of
28 “practical” impairment, “not whether the decision itself binds them.” *Yniguez v. Arizona*, 939

1 F.2d 727, 735 (9th Cir. 1991). The Ninth Circuit follows the “guidance of Rule 24 advisory
2 committee notes that state ‘[i]f an absentee would be substantially affected in a practical sense by
3 the determination made in an action, he should, as a general rule, be entitled to intervene.’”
4 *Southwest Ctr. for Biological Diversity*, 268 F.3d at 822 (citation omitted); *see also*, *Sierra Club*,
5 995 F.2d at 1486.

6 Defendant-Intervenors’ ability to protect their interests and the interests of their
7 members will be practically impaired if they are not allowed to intervene. An invalidation or
8 modification of Caltrans’ DBE program would impair Defendant-Intervenors’ members’ ability
9 to obtain public highway and transportation contracts. If Defendant-Intervenors are excluded
10 from this case, Caltrans’ federally mandated and approved DBE program could be struck down.
11 Equally threatening to Defendant-Intervenors’ interests, the parties could negotiate changes in
12 the program in a settlement without participation or input by those most directly impacted by any
13 changes. This is not a case where CEE can simply file its own separate lawsuit to defend
14 Caltrans’ program. The validity of the current DBE program is under attack by Plaintiff in this
15 lawsuit, and, accordingly, the program must be defended in the instant action.

16 **4. Defendant-Intervenors’ Interests Are Not Adequately**
17 **Represented By The Parties.**

18 Intervention is appropriate where existing parties do not adequately represent the
19 Defendant-Intervenors’ interests. *Donnelly*, 159 F.3d at 409 (citation omitted). The Ninth
20 Circuit considers three factors in determining the adequacy of representation: “(1) whether the
21 interest of a present party is such that it will undoubtedly make all of a proposed intervenor’s
22 arguments; (2) whether the present party is capable and willing to make such arguments; and (3)
23 whether a proposed intervenor would offer any necessary elements to the proceeding that other
24 parties would neglect.” *Arakaki*, 324 F.3d at 1086 (citing *California v. Tahoe Reg’l Planning*
25 *Agency*, 792 F.2d 775, 778 (9th Cir.1986)). “The most important factor...is how the [movant’s]
26 interest compares with the interests of existing parties.” *Id.* (citation omitted).

27 Caltrans, a public agency with a statewide constituency, cannot adequately
28 represent the interests of Defendant-Intervenors’ members. Caltrans is not a DBE. It is not even

1 a highway contractor. Its survival does not depend on whether highway and transportation
2 contracts are equitably awarded. Moreover, Caltrans is accountable to the public at large, and
3 thus has competing institutional objectives (including being subject to political and funding
4 pressures). There is no assurance, and in fact significant reason to doubt, that Caltrans will
5 present, or even be familiar with, all of the arguments that Defendant-Intervenors will assert to
6 defend the program. Defendant-Intervenors will offer perspectives and knowledge that the
7 existing Plaintiff and Defendants are likely to lack, overlook, or undervalue. “The court also
8 may find that a proposed intervenor’s interests are not adequately represented where the
9 intervenor would bring a perspective none of the other parties to the litigation have.” *Defenders*
10 *of Wildlife v. Johanns*, No. C 04-4512 PJH, 2005 WL 3260986, at *8 (N.D. Cal. Dec. 1, 2005))
11 (citation omitted); *see also, e.g., Sierra Forest Products, Inc. v. Kempthorne*, No. CV-07-00060
12 JAM, 2008 WL 2384047 (E.D. Cal. June 9, 2008); *National Ass’n of Home Builders v. San*
13 *Joaquin Valley Unified Air Pollution District*, No. CV-07-0820 LJO, 2007 WL 2757995 (E.D.
14 Cal. Sept. 21, 2007); *California ex rel. Lockyer v. U.S.*, 450 F.3d 436 (9th Cir. 2006); *Forest*
15 *Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995); *Associated*
16 *General Contractors of California v. Sec’y of Commerce of the United States Dep’t of*
17 *Commerce*, 459 F.Supp. 766 (C.D. Cal. 1978), vacated 448 U.S. 908 (1980); *Georgia v. United*
18 *States Army Corps of Engineers*, 302 F.3d 1242, 1259 (11th Cir. 2002); *Sierra Club v. Espy*, 18
19 F.3d 1202, 1208 (5th Cir. 1994).

20 Plaintiff may argue that Caltrans, CEE, and NAACP have the same objective
21 since the three seek to preserve the 2009 DBE Program; however, at this stage, no one can know
22 whether Caltrans and Defendant-Intervenors have the same ultimate objective in the case. A
23 solution that satisfies Caltrans may be wholly inadequate for Defendant-Intervenors.
24 Furthermore, the parties’ interests are sufficiently divergent to show that Caltrans’ representation
25 is inadequate.

26 Only a minimal showing is needed to establish that a government defendants’
27 representation “*may*” be inadequate. *City of Los Angeles*, 288 F.3d 391, 401-402 (9th Cir. 2002)
28 (emphasis added) (holding that the district court erred in denying a Police League’s intervention

1 as a matter of right where, among other things, “the record of this case and the past dealings of
2 the parties indicate a marked divergence of positions concerning key elements of the decree and
3 underlying theories of liability [at issue in the case].”). Courts have held that the broad interest a
4 government agency must represent in itself shows that representation may be inadequate where
5 the “more narrow and focused” interests of a particular industry group, such as Defendant-
6 Intervenor’s public contractor members, are involved. *Natural Res. Def. Council v. Costle*, 561
7 F.2d 904, 912-13 (D.C. Cir. 1977). *See also Southwest Ctr. for Biological Diversity*, 268 F.3d at
8 823 (finding that “FWS, a federal agency, and other defendants also cannot be expected under
9 the circumstances presented to protect these private interests”).

10 The Ninth Circuit has found the same type of divergence in interests sufficient to
11 meet this requirement. *See Californians for Safe & Competitive Dump Truck Transp. v.*
12 *Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998). As an agency of the state, Caltrans has
13 multiple mandates and strategic objectives that may influence its strategy in this case to
14 Defendant-Intervenor’s detriment. For example, Caltrans’ delivery goals are a key part of its
15 objective to “build credibility with the public.” *See* Caltrans Strategic Plan 2007-2012, *available*
16 *at* http://www.dot.ca.gov/perf/StrategicPlan2007-2012_with_Bookmarks.pdf (last accessed on
17 August 20, 2009). Meeting delivery goals brings Caltrans monetary benefits that it may believe
18 could be compromised by continuing this suit. *See id.* (“Because of Caltrans’ laudable success in
19 delivering projects, the Department will receive an additional \$120 million in federal funding for
20 the transportation program in FY 2007/08.”). Additional obligations of Caltrans, such as with
21 respect to the federal Economic Stimulus Package and disbursement of said funds, also may
22 influence its strategy where they would not impact Defendant-Intervenor’s approach. In
23 contrast, Defendant-Intervenor are coalitions of the specific businesses that will lose access to
24 publicly funded contracts.

25 Were this not enough, there is ample evidence that Caltrans’ interests and those of
26 the proposed intervenors are divergent, often widely so. As noted above, proposed intervenor
27 CEE has over the years often been at odds with Caltrans over its administration of the DBE
28 program. For example, CEE affiliates and their members disagreed with Caltrans’ decision to

1 suspend the race-conscious elements of the DBE program while the disparity study was being
2 conducted. (CEE Decl., ¶¶ 7-8.) As CEE feared, this suspension led to substantial decreases in
3 already low rates of DBE participation on Caltrans' federally-funded contracts. (*See* Compl.,
4 Ex. 5.) CEE repeatedly attempted to break through the bureaucratic logjams that Caltrans
5 claimed prevented it from immediately reinstating race-conscious elements into the DBE
6 program even after the disparity study clearly showed they were warranted. (CEE Decl., ¶ 8.)
7 For example, Caltrans communicated to the DBE community last fall that the DOT had not
8 approved a new race-conscious DBE program for California, when in fact Caltrans had received
9 approval in August 2008. (CEE Decl., ¶ 8.) Despite that approval, several months later federal
10 authorities chastised Caltrans because it had "not implemented [its] DBE program waiver and
11 utilized contract goals for [African American-, Asian American-, Native American-, and women-
12 owned DBE firms]." (Declaration of Carlos P. Mino, Ex. A (*Letter from U.S. DOT to Mr. Will
13 Kempton, Director of Caltrans, December 19, 2008*) and Compl., Ex. 3 (*Letter from U.S. DOT to
14 Kempton, Feb. 25, 2009*)).) Until it received pressure from the DOT, CEE, and other non-
15 governmental entities, Caltrans failed to implement its new program. (CEE Decl., Ex. C (*Letter
16 from Mr. Will Kempton, Director of Caltrans, to Transportation Construction Community,
17 March 4, 2009*)).

18 Even when Caltrans decided to take such action in March 2009, CEE urged
19 Caltrans to move more quickly to reinstate the race-conscious elements so that DBEs would not
20 lose opportunities on federal stimulus projects that were already beginning to be awarded. (CEE
21 Decl., ¶ 9, Ex. D.) CEE also has pressed Caltrans to increase its goals and extend the DBE
22 program's reach to groups that are currently excluded. (CEE Decl., ¶ 9, Ex. D.) Caltrans and
23 proposed Defendant-Intervenors have divergent interests.

24 Finally, Caltrans is unlikely to fully admit its own culpability for the low DBE
25 participation numbers that necessitate the DBE program under attack. Indeed, Caltrans' Answer
26 bears out this concern. (*See* Ans., ¶ 39 ("admit[ting] that no Caltrans officials have engaged in
27 discrimination.")) DBE participation on federally-funded California highway and transportation
28 contracts steadily decreased from 10.9 percent in FY 2005 to 4.6 percent in FY 2008. (Compl.,

1 Ex. 3.) As the disparity study found, qualified DBEs are ready and available to participate in
2 much higher numbers. (Compl., Ex. 2.) Defendant-Intervenors believe that Caltrans itself has
3 exacerbated the problem by failing to enforce the DBE as vigorously as necessary. (CEE
4 Decl., ¶ 9.) This casts doubt on Caltrans' capability and willingness to "undoubtedly make" the
5 necessary arguments regarding past discrimination within California's public contracting system
6 that Defendant-Intervenors will make. *See Proposed Answer*. Because Caltrans is unlikely to
7 fully develop these and other arguments, it will not adequately represent Defendant-Intervenors'
8 interests.

9 **B. EVEN IF DEFENDANT-INTERVENORS HAD NO RIGHT**
10 **TO INTERVENE, THE COURT SHOULD PERMIT**
11 **INTERVENTION.**

12 Even if the Court finds Defendant-Intervenors are not entitled to intervene as a
13 matter of right, the Court should exercise its discretion and permit intervention in this matter.
14 Under Federal Rule of Civil Procedure 24(b), a court may grant permissive intervention
15 whenever the movant "has a claim or defense that shares with the main action a common
16 question of law or fact," and when the intervention would not "unduly delay or prejudice the
17 adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). As explained above,
18 Defendant-Intervenors meet all of these requirements as Defendant-Intervenors seek to uphold
19 the DBE program for the very reason Plaintiff seeks to have it eliminated. Under the
20 discretionary standard, Defendant-Intervenors' burden is far lower than that required for
21 intervention as a matter of right. Defendant-Intervenors need not establish that they have a
22 protectable interest in the survival of the DBE program; they can simply point to the fact that
23 their defense of the DBE program and Plaintiff's attack on that program implicate the same
24 questions of law or fact. *See Defenders of Wildlife*, 2005 WL 3260986, at *2 (citing *Kootenai*
25 *Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108-09 (9th Cir. 2002)); *see also Northwest Forest*
26 *Res. Council*, 82 F.3d at 839. As is self-evident, the questions of law and fact are identical.

27 Permissive intervention is also justified because Defendant-Intervenors'
28 participation will facilitate an equitable result. *See Spangler v. Pasadena Board of Education*,
552 F.2d 1326, 1329 (9th Cir. 1977) (the court may consider whether intervenors "will

1 significantly contribute to the full development of the underlying factual issues in the suit and to
2 the just and equitable adjudication of the legal questions presented.”). Here, Caltrans does not
3 contest Defendant-Intervenors’ intervention because Defendant-Intervenors can provide a crucial
4 perspective on these important issues. The Court should grant intervention because “the
5 magnitude of this case is such that intervention will contribute to the equitable resolution of this
6 case.” *Kootenai Tribe*, 313 F.3d at 1111. The implications of the case are significant – both in
7 terms of potential elimination of a federally-approved DBE program and in terms of the
8 important precedent the case may set on these issues. As a result, it is essential that all
9 arguments in defense of the DBE program receive full attention. Defendant-Intervenors’ early
10 intervention would significantly contribute to the equitable resolution of these important matters.

11 The early presence of intervenors may serve to prevent errors from
12 creeping into the proceedings, clarify some issues, and perhaps
13 contribute to an amicable settlement. Postponing intervention in
14 the name of efficiency until after the original parties have forged
 an agreement or have litigated some issues may, in fact, encourage
 collateral attack and foster inefficiency.

15 *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998); *see also Forest Conservation*
16 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1993) (“A liberal policy
17 in favor of intervention serves both efficient resolution of issues and broadened access to the
18 courts.”) (citation omitted).

19 **III. CONCLUSION**

20 Defendant-Intervenors have significant, legally protectable interests that relate to
21 the subject of this action. The disposition of this action without Defendant-Intervenors’
22 involvement may, as a practical matter, impair or impede their ability to protect their interests.
23 Defendants cannot adequately represent Defendant-Intervenors’ interests in this case as it has
24 been shown above that Defendants’ and Defendant-Intervenors’ interests diverge. The motion is
25 timely and will not prejudice any party. Therefore, CEE and NAACP are entitled to intervene as
26 of right under Federal Rule of Civil Procedure 24(a)(2). Alternatively, CEE and NAACP request
27 permissive intervention.

28

1 DATED: September 14, 2009

BINGHAM McCUTCHEN LLP

2

3

4

By: /s/ Michael I. Begert

5

BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)

6

michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)

7

sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)

8

erin.conroy@bingham.com
CARLOS P. MINO (SBN 247022)

9

carlos.mino@bingham.com
Three Embarcadero Center
San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
Facsimile: 415.393.2286

10

11

12

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN 161074)

13

KENDRA FOX-DAVIS (SBN 248757)
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9697
Facsimile: (415) 543-0296
Email: osellstrom@lccr.com

14

15

16

EQUAL JUSTICE SOCIETY
EVA JEFFERSON PATERSON (SBN 67081)

17

260 California Street, Suite 700
San Francisco, CA 94111

18

Telephone: (415) 288-8700
Facsimile: (415) 288-8787

19

Email: epaterson@equaljusticesociety.org

20

21

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

22

ALAN L. SCHLOSSER (SBN 49957)
JORY C. STEELE (SBN 206944)

23

39 Drumm Street
San Francisco, CA 94111

24

Telephone: (415) 621-2493
Facsimile: (415) 255-8437

25

Email: aschlosser@aclunc.org

26

Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National
Association for the Advancement of Colored People,
San Diego Chapter

27

28

EXHIBIT A

1 BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MIÑO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN 161074)
9 KENDRA FOX-DAVIS (SBN 248757)
131 Steuart Street, Suite 400
San Francisco, CA 94105
10 Telephone: (415) 543-9697
11 Facsimile: (415) 543-0296
Email: osellstrom@lccr.com

12 *[Additional Counsel listed on signature pages.]*

13 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association
14 for the Advancement of Colored People,
San Diego Chapter

15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA
17 SACRAMENTO DIVISION

18 ASSOCIATED GENERAL CONTRACTORS
19 OF AMERICA, SAN DIEGO CHAPTER, INC.,
a nonprofit California corporation,

20 Plaintiff,

21 v.

22 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

23 Defendants,

24 COALITION FOR ECONOMIC EQUITY and
25 NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
26 SAN DIEGO CHAPTER,

27 Defendant-Intervenors.

No. 2:09-cv-01622-JAM-GGH

**DEFENDANT-INTERVENORS
COALITION FOR ECONOMIC
EQUITY'S AND NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE, SAN DIEGO CHAPTER'S
[PROPOSED] ANSWER IN
INTERVENTION**

Judge: Hon. John A. Mendez

1 **[PROPOSED] ANSWER IN INTERVENTION** —

2 Defendant-Intervenors Coalition for Economic Equity and National Association
3 for the Advancement of Colored People, San Diego Chapter (collectively, “Defendant-
4 Intervenors”) hereby answer the allegations in the Complaint of Plaintiff, Associated General
5 Contractors of America, San Diego Chapter, Inc. (“Plaintiff”) against the California Department
6 of Transportation, Will Kempton and Olivia Fonseca (“Defendants”), as follows:

7 **RESPONSE TO INTRODUCTION**

8 1. Responding to paragraph 1 of the Complaint, Defendant-Intervenors deny
9 that Plaintiff is entitled to any relief and deny that the 2009 DBE Program being implemented by
10 Defendants is unlawful or unenforceable or violates 42 U.S.C. §§ 1981, 1983, Title VI of the
11 Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d, the Fourteenth Amendment of the
12 United States Constitution or Article I, Section 31 of the California Constitution (“Prop. 209”).
13 The allegations of this paragraph constitute arguments or conclusions of law which Defendant-
14 Intervenors are not required to admit or deny. Defendant-Intervenors lack sufficient knowledge
15 to either admit or deny the remaining allegations of said paragraph and on that basis deny them.

16 **RESPONSE TO JURISDICTION AND VENUE**

17 2. Responding to paragraph 2, Defendant-Intervenors deny that the court has
18 jurisdiction of the state law claim under 28 U.S.C. § 1367 and otherwise admit that the court has
19 jurisdiction over the federal claims enumerated in said paragraph. Defendant-Intervenors
20 acknowledge that Plaintiff requests a declaratory judgment, but deny that Plaintiff is entitled to
21 such relief and further deny that this Court has jurisdiction to grant such relief.

22 3. Responding to paragraph 3, Defendant-Intervenors lack sufficient
23 information to either admit or deny allegations contained therein and on that basis deny said
24 allegations.

25 **RESPONSE TO PARTIES**

26 4. Responding to paragraph 4, the allegations of this paragraph constitute
27 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
28 Defendant-Intervenors lack sufficient knowledge to either admit or deny the allegations and on

1 that basis deny said allegations.

2 5. Responding to paragraph 5, the allegations of this paragraph constitute
3 conclusions of law which Defendant-Intervenors are not required to admit or deny. Defendant-
4 Intervenors admit that Defendants have a duty to comply with state and federal law. Defendant-
5 Intervenors otherwise lack sufficient knowledge to admit or deny the allegations and on that
6 basis deny them.

7 6. Responding to paragraph 6, the allegations of this paragraph constitute
8 conclusions of law which Defendant-Intervenors are not required to admit or deny. Defendant-
9 Intervenors deny the allegations of this paragraph.

10 7. Responding to paragraph 7, the allegations of this paragraph constitute
11 conclusions of law which Defendant-Intervenors are not required to admit or deny. Defendant-
12 Intervenors admit Olivia Fonseca is Deputy Director of Civil Rights for Caltrans and otherwise
13 deny the remaining allegations of this paragraph.

14 **RESPONSE TO ALLEGATIONS: SAFETEA-LU**

15 8. Responding to paragraph 8, Defendant-Intervenors admit President Bush
16 signed “SAFETEA-LU” and otherwise deny the allegations contained therein.

17 9. Responding to paragraph 9, Defendant-Intervenors lack sufficient
18 information to either admit or deny said allegations and on that basis deny said allegations.

19 10. Responding to paragraph 10, Defendant-Intervenors admit that Pub. L.
20 109-59, title 1, § 1101(b) of SAFETEA-LU is entitled “Disadvantaged Business Enterprises” and
21 otherwise deny the remaining allegations contained therein.

22 11. Responding to paragraph 11, Defendant-Intervenors admit to the language
23 of the quoted statutes and regulations as set forth in those statutes and regulations and otherwise
24 deny the allegations contained therein.

25 12. Responding to paragraph 12, Defendant-Intervenors admit to the language
26 of the quoted statutes and regulations as set forth in Section 1101(b)(2) of SAFETEA-LU.

27 13. Responding to paragraph 13, Defendant-Intervenors deny the allegations
28 contained therein.

1 14. Responding to paragraph 14, the allegations of this paragraph constitute
2 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
3 Defendant-Intervenors deny the allegations of said paragraph.

4 **RESPONSE TO TITLE 49 CODE OF FEDERAL REGULATIONS PART 26**

5 15. Responding to paragraph 15, Defendant-Intervenors admit that federal
6 regulations governing disadvantaged business enterprise programs are found at 49 CFR Part 26
7 and otherwise deny the allegations contained therein.

8 16. Responding to paragraph 16, the allegations of this paragraph constitute
9 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
10 Defendant-Intervenors admit that the referenced regulations contain the language set forth in the
11 regulations and otherwise deny the allegations contained in said paragraph.

12 17. Responding to paragraph 17, the allegations of this paragraph constitute
13 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
14 Defendant-Intervenors admit the referenced regulations contain the language set forth in the
15 regulations and otherwise deny the allegations contained in said paragraph.

16 18. Responding to paragraph 18, the allegations of this paragraph constitute
17 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
18 Defendant-Intervenors admit the referenced regulations contain the language set forth in the
19 regulations and otherwise deny the allegations contained in said paragraph.

20 19. Responding to paragraph 19, the allegations of this paragraph constitute
21 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
22 Defendant-Intervenors admit the referenced regulations contain the language set forth in the
23 regulations and otherwise deny the allegations contained in said paragraph.

24 20. Responding to paragraph 20, the allegations of this paragraph constitute
25 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
26 Defendant-Intervenors admit the referenced regulations contain the language set forth in the
27 regulations and otherwise deny the allegations contained in said paragraph.

28 21. Responding to paragraph 21, the allegations of this paragraph constitute

1 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
2 Defendant-Intervenors admit the referenced regulations contain the language set forth in the
3 regulations and otherwise deny the allegations contained in said paragraph.

4 22. Responding to paragraph 22, the allegations of this paragraph constitute
5 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
6 Defendant-Intervenors admit the referenced Appendix A to 49 CFR Part 26 contains the
7 language set forth in Appendix A to 49 CFR Part 26 and deny the remaining allegations of said
8 paragraph.

9 23. Responding to paragraph 23, the allegations of this paragraph constitute
10 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
11 Defendant-Intervenors deny the allegations of said paragraph.

12 **RESPONSE TO ARTICLE I, SECTION 31, OF THE CALIFORNIA CONSTITUTION**

13 24. Responding to paragraph 24, Defendant-Intervenors admit the people of
14 California amended the Constitution by adopting Proposition 209 and admit the California
15 Constitution contains the language set forth in Art. I, § 31(a), but deny it is “the relevant
16 provision” of Proposition 209.

17 25. Responding to paragraph 25, the allegations of this paragraph constitute
18 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
19 Defendant-Intervenors admit the California Constitution contains the language set forth in Art. I,
20 § 31(f) and deny the remaining allegations contained therein.

21 26. Responding to paragraph 26, the allegations of this paragraph constitute
22 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
23 Defendant-Intervenors deny the allegations contained therein.

24 27. Responding to paragraph 27, the allegations of this paragraph constitute
25 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
26 Defendant-Intervenors deny the allegations contained therein.

27 28. Responding to paragraph 28, the allegations of this paragraph constitute
28 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.

1 Defendant-Intervenors admit the California Constitution contains the language set forth in Art. I,
2 § 31(e) and otherwise deny the remaining allegations of said paragraph.

3 29. Responding to paragraph 29, Defendant-Intervenors deny the allegations
4 contained therein.

5 **RESPONSE TO ALLEGATIONS OF CALTRANS' DISCRIMINATORY 2009 DBE**
6 **GOALS AND METHODOLOGY**

7 30. Responding to paragraph 30, Defendant-Intervenors deny that Defendants
8 were not in danger of losing federal funding and otherwise lack sufficient knowledge to admit or
9 deny the allegations of said paragraph, and on that basis deny them.

10 31. Responding to paragraph 31, Defendant-Intervenors admit that Defendants
11 conducted a disparity study and that Defendants have allowed public access to that study.
12 Defendant-Intervenors otherwise lack sufficient information to either admit or deny allegations
13 contained therein and on that basis deny the allegations contained therein.

14 32. Responding to paragraph 32, Defendant-Intervenors lack sufficient
15 information to either admit or deny allegations contained therein and on that basis deny said
16 allegations.

17 33. Responding to paragraph 33, Defendant-Intervenors lack sufficient
18 information to either admit or deny allegations contained therein and on that basis deny said
19 allegations.

20 34. Responding to paragraph 34, Defendant-Intervenors lack sufficient
21 information to either admit or deny allegations contained therein and on that basis deny said
22 allegations.

23 35. Responding to paragraph 35, Defendant-Intervenors admit that the Overall
24 2009 G&M includes the language quoted in this paragraph and otherwise deny the allegations
25 contained therein.

26 36. Responding to paragraph 36, the Overall 2009 G&M speaks for itself, and
27 Defendant-Intervenors deny Plaintiff's characterization of it. Defendant-Intervenors otherwise
28 lack sufficient information to either admit or deny the remaining allegations contained therein

1 and on that basis deny them.

2 37. Responding to paragraph 37, Defendant-Intervenors lack sufficient
3 knowledge to either admit or deny the allegations contained therein, and on that basis deny them.

4 38. Responding to paragraph 38, Defendant-Intervenors admit that the
5 referenced documents contain the language set forth in the referenced documents and otherwise
6 lack sufficient knowledge to either admit or deny the allegations contained therein, and on that
7 basis deny them.

8 39. Responding to paragraph 39, Defendant-Intervenors deny the allegations
9 contained therein.

10 40. Responding to paragraph 40, Defendant-Intervenors lack sufficient
11 information to either admit or deny the remaining allegations contained therein and on that basis
12 deny them.

13 **RESPONSE TO INJUNCTIVE RELIEF ALLEGATIONS**

14 41. Responding to paragraph 41, Defendant-Intervenors incorporate by
15 reference their responses to each of the incorporated allegations as set forth above.

16 42. Responding to paragraph 42, Defendant-Intervenors admit that the 2009
17 DBE Report contains the language set forth in the 2009 DBE Report and otherwise deny the
18 remaining allegations of this paragraph.

19 43. Responding to paragraph 43, Defendant-Intervenors deny the allegations
20 of said paragraph.

21 44. Responding to paragraph 44, Defendant-Intervenors deny the allegations
22 of said paragraph.

23 45. Responding to paragraph 45, Defendant-Intervenors deny the allegations
24 of said paragraph.

25 46. Responding to paragraph 46, Defendant-Intervenors deny the allegations
26 of said paragraph.

27 **RESPONSE TO DECLARATORY RELIEF ALLEGATIONS**

28 47. Responding to paragraph 47, Defendant-Intervenors incorporate by

1 reference its responses to each of the incorporated allegations as set forth above.

2 48. Responding to paragraph 48, Defendant-Intervenors admit that Defendants
3 “dispute that its race-conscious requirements are unconstitutional” and otherwise deny the
4 remaining allegations of this paragraph.

5 49. Responding to paragraph 49, Defendant-Intervenors deny the allegations
6 of said paragraph.

7 **RESPONSE TO FIRST CLAIM FOR RELIEF**

8 50. Responding to paragraph 50, Defendant-Intervenors incorporate by
9 reference their responses to each of the incorporated allegations as set forth above.

10 51. Responding to paragraph 51, Defendant-Intervenors admit that the U.S.
11 Constitution contains the language set forth in the Fourteenth Amendment (U.S. Const. amend.
12 XIV, section 1). The remaining allegations of this paragraph constitute arguments or
13 conclusions of law which Defendant-Intervenors are not required to admit or deny.

14 52. Responding to paragraph 52, Defendant-Intervenors lack sufficient
15 information to either admit or deny allegations contained therein and on that basis deny them.

16 53. Responding to paragraph 53, the allegations of this paragraph constitute
17 arguments or conclusions of law which Defendant-Intervenors are not required to admit or deny.
18 Defendant-Intervenors deny the allegations contained therein.

19 54. Responding to paragraph 54, Defendant-Intervenors deny the allegations
20 contained therein.

21 **RESPONSE TO SECOND CLAIM FOR RELIEF**

22 55. Responding to paragraph 55, Defendant-Intervenors incorporate by
23 reference their responses to each of the incorporated allegations as set forth above.

24 56. Responding to paragraph 56, Defendant-Intervenors deny the allegations
25 contained therein.

26 57. Responding to paragraph 57, Defendant-Intervenors admit that Defendants
27 have set “a participation goal of 13.5%, of which 6.75% is to be achieved through race-conscious
28 measures” but deny the remaining allegations of said paragraph.

1 58. Responding to paragraph 58, Defendant-Intervenors lack sufficient
2 knowledge to admit or deny the allegations regarding Plaintiff's desires, and on that basis deny
3 them. Defendant-Intervenors deny the remaining allegations of said paragraph.

4 **RESPONSE TO THIRD CLAIM FOR RELIEF**

5 59. Responding to paragraph 59, Defendant-Intervenors incorporate by
6 reference their responses to each of the incorporated allegations as set forth above.

7 60. Responding to paragraph 60, Defendant-Intervenors deny the allegations
8 contained therein.

9 61. Responding to paragraph 61, Defendant-Intervenors deny the allegations
10 contained therein.

11 62. Responding to paragraph 62, Defendant-Intervenors lack sufficient
12 information to either admit or deny the allegations contained therein and on that basis deny them.

13 63. Responding to paragraph 63, Defendant-Intervenors deny the allegations
14 contained therein.

15 **RESPONSE TO FOURTH CLAIM FOR RELIEF**

16 64. Responding to paragraph 64, Defendant-Intervenors incorporate by
17 reference their responses to each of the incorporated allegations as set forth above.

18 65. Responding to paragraph 65, Defendant-Intervenors deny the allegations
19 contained therein.

20 66. Responding to paragraph 66, Defendant-Intervenors admit the language of
21 42 U.S.C. § 2000d as set forth in the referenced statute and otherwise deny the allegations of this
22 paragraph.

23 67. Responding to paragraph 67, Defendant-Intervenors deny the allegations
24 of this paragraph.

25 68. Responding to paragraph 68, Defendant-Intervenors admit that Defendants
26 award federally funded contracts. Defendant-Intervenors otherwise deny the allegations
27 contained therein.

28

1 asserted herein.

2 **SIXTH AFFIRMATIVE DEFENSE**

3 Plaintiff's claims are barred because Defendants are required by law to implement
4 a Disadvantaged Business Program in accord with the requirements of 49 Code of Federal
5 Regulations, Part 26.

6 **SEVENTH AFFIRMATIVE DEFENSE**

7 Plaintiff's claims are barred because Defendants are implementing the challenged
8 program in order to establish and maintain eligibility for federal funds.

9 **EIGHTH AFFIRMATIVE DEFENSE**

10 Plaintiff's claims are barred because the U.S. Constitution requires Defendants to
11 implement the challenged program.

12 **NINTH AFFIRMATIVE DEFENSE**

13 Plaintiff's claims are barred because the Federal Highway Administration has
14 made it a condition of receipt of federal funds that Defendants implement the challenged
15 Disadvantaged Business Program as approved by them and in accord with the requirements of 49
16 Code of Federal Regulations, Part 26.

17 **TENTH AFFIRMATIVE DEFENSE**

18 Plaintiff is not a "person" who may assert the claims stated herein.

19 **ELEVENTH AFFIRMATIVE DEFENSE**

20 Plaintiff has failed to state a claim upon which relief can be granted.

21 **TWELFTH AFFIRMATIVE DEFENSE**

22 Plaintiff's claims are barred because the relief requested would require
23 Defendants to violate the Fourteenth Amendment to the U.S. Constitution (U.S. Const. amend.
24 XIV, section 1).

25 **THIRTEENTH AFFIRMATIVE DEFENSE**

26 Plaintiff's claims are barred because the relief requested would require
27 Defendants to violate 42 U.S.C. § 1981.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the relief requested would require Defendants to violate 42 U.S.C. § 1983.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because the relief requested would require Defendants to violate 42 U.S.C. § 2000d.

PRAYER

WHEREFORE, these Defendant-Intervenors pray judgment against the Plaintiff as follows:

1. That this court dismiss Plaintiff's Complaint with prejudice and enter judgment in favor of Defendants and Defendant-Intervenors and deny Plaintiff's entire prayer for relief.
2. That this court declare that the race-conscious remedial measures in Defendants' 2009 DBE Program Goal and Methodology ("2009 Goal and Methodology") are constitutional, valid and enforceable and further that said 2009 Goal and Methodology does not violate the Fourteenth Amendment of the United States Constitution, 42 U.S.C. §§ 1981, 1983, 2000d or Article I, section 31, of the California Constitution.
3. That this court declare that, under the facts presented, the race-conscious remedial measures in Defendants' 2009 DBE Program are required by the Fourteenth Amendment of the United States Constitution as well as 42 U.S.C. §§ 1981, 1983, and/or 2000d.
4. That this court declare Defendants are required by law to comply with regulations set forth in 49 CFR Part 26.
5. That no injunction issue to enjoin the Defendants from implementing the 2009 DBE Program, including its Goal and Methodology.
6. For legal costs, expenses and attorneys' fees.
7. For such other relief as the Court deems just and proper.

1 DATED: September 14, 2009

BINGHAM McCUTCHEN LLP

2

3

4

By: /s/ Michael I. Begert

5

BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)

6

michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)

7

sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)

8

erin.conroy@bingham.com
CARLOS P. MINO (SBN 247022)

9

carlos.mino@bingham.com
Three Embarcadero Center
San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
Facsimile: 415.393.2286

10

11

12

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN 161074)

13

KENDRA FOX-DAVIS (SBN 248757)
131 Steuart Street, Suite 400

14

San Francisco, CA 94105
Telephone: (415) 543-9697

15

Facsimile: (415) 543-0296
Email: osellstrom@lccr.com

16

EQUAL JUSTICE SOCIETY
EVA JEFFERSON PATERSON (SBN 67081)

17

260 California Street, Suite 700
San Francisco, CA 94111

18

Telephone: (415) 288-8700
Facsimile: (415) 288-8787

19

Email: epaterson@equaljusticesociety.org

20

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

21

ALAN L. SCHLOSSER (SBN 49957)
JORY C. STEELE (SBN 206944)

22

39 Drumm Street
San Francisco, CA 94111

23

Telephone: (415) 621-2493
Facsimile: (415) 255-8437

24

Email: aschlosser@aclunc.org

25

26

Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National
Association for the Advancement of Colored People,
San Diego Chapter

27

28

1 BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MINO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association
9 for the Advancement of Colored People,
San Diego Chapter

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12 SACRAMENTO DIVISION

13 ASSOCIATED GENERAL CONTRACTORS
14 OF AMERICA, SAN DIEGO CHAPTER, INC.,
a nonprofit California corporation,

15 Plaintiff,
16 v.

17 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

18 Defendants,

19 COALITION FOR ECONOMIC EQUITY and
20 NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
21 SAN DIEGO CHAPTER,

22 Defendant-Intervenors.
23
24
25
26

No. 2:09-cv-01622-JAM-GGH

**DECLARATION OF CARLOS P.
MINO IN SUPPORT OF
DEFENDANT-INTERVENORS
MOTION FOR LEAVE TO
INTERVENE UNDER FEDERAL
RULE OF CIVIL PROCEDURE 24**

Judge: Hon. John A. Mendez

A/73141875.1/0999997-0000929484

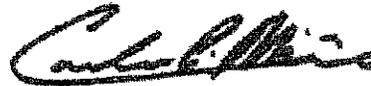
1 I, Carlos P. Mino, declare:

2 1. I am a member of the State Bar of California and a lawyer with the law
3 firm of Bingham McCutchen LLP, counsel for Defendant-Intervenors Coalition for Economic
4 Equity and National Association for the Advancement of Colored People, San Diego Chapter.

5 2. I have personal knowledge of the following facts and, if called as a
6 witness, I could and would testify to them.

7 3. Attached hereto as Exhibit A is a true and correct copy of a December 19,
8 2008 letter from Mr. Gene K. Fong, Division Administrator of the United States Department of
9 Transportation, to Mr. Will Kempton, Director of the California Department of Transportation.

10 I declare under penalty of perjury under the laws of the United States and the
11 State of California that the foregoing is true and correct. Executed in East Palo Alto, California
12 on September 14, 2009.

13
14 

15 _____
16 CARLOS P. MINO
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA. 95814
December 19, 2008

IN REPLY REFER TO
HDA-CA
File #: 901
Document #: S52320

Mr. Will Kempton, Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

Attention: Federal Resources Office, Room 3500
For Olivia Fonseca

Dear Mr. Kempton:

SUBJECT: Disadvantaged Business Enterprise Program Compliance

It appears to us that the California Department of Transportation (Caltrans) is not carrying out its Disadvantaged Business Enterprise (DBE) program in good faith in compliance with the DBE program requirements. Further, immediately we need the information requested in our letter to you on October 7, 2008, regarding your FY 2009 overall DBE goal methodology.

On August 7, 2008, you received a letter from the U.S. Department of Transportation approving your DBE program waiver request for, and giving you the authority to, use contract goals for African American-, Asian American-, Native American-, and women-owned DBE firms. Further, on October 7, 2008, we acknowledged receipt of your FY 2009 overall DBE goal of 13.5%. In that letter we stated that we expected you to implement the goal you have established.

To date you have not implemented your DBE program waiver and utilized contract goals for the four groups cited above. Your latest Award Tracker report for your construction contracts indicates that for FY 2009 through November 30, 2008, you have achieved only 2.7% DBE participation. The last two complete years that Caltrans used contract goals in FY 2004 and 2005 you set goals on nearly every Federal-aid contract with subcontracting opportunities. By November FY 2004, you had achieved 12.8% DBE participation and by November 2005 you had achieved 7.9% DBE participation on your construction contracts. During these years you achieved 10.4% and 10.5% DBE participation for your entire program for FY 2004 and 2005, respectively. In FY 2008 you achieved 4.56% DBE participation for your entire program without setting contract goals. These figures are summarized below:

MOVING THE
AMERICAN
ECONOMY



FY	DBE participation by Nov. 30	DBE participation for entire fiscal year on all Federal-aid contracts	% awarded construction contracts with goals (through Nov. 30)	% awarded construction contracts with goals (for entire fiscal year)
2009	2.7%	13.5% (goal)	0%	
2008 (no goals)		4.56%		
2005 (w/ goals)	7.9%	10.5%	100%	96%
2004 (w/ goals)	12.8%	10.4%	90%	92%

We know that it will take a minimum of three months from your decision to use contract goals to award contracts with goals. This means that at best it will be March 2009 before you can rely on race-conscious measures to meet your FY 2009 overall DBE goal.

When it becomes apparent that the recipient will fall short of their overall goal, they must make appropriate modifications in their use of race-neutral means and/or make upward adjustments to contract goals to allow them to meet the overall goal. See 49 C.F.R. § 26.51(f)(2). Recent data from your program shows that use of contract goals (for all DBE groups) on over 90% of your construction contracts for the entire year (and similarly high rates of contract goal usage for consultant and subrecipient contracts) in FY 2004 and 2005 did not yield DBE participation that will meet your current 13.5% goal. You have not used contract goals and will not be able to award contracts with goals until at least March 2009. Therefore, it appears to us that by not using contract goals you are not carrying out your DBE program in good faith in compliance with the DBE program requirements.

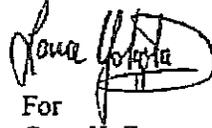
Please show us why you believe you are carrying out your program in good faith by January 12, 2009. Please tell us what appropriate measures will be taken and when they will occur to ensure that you are making proper use of contract goals in compliance with the DBE program requirements.

If a recipient fails to comply with any requirement of 49 C.F.R. part 26, they may be subject to formal enforcement action under 49 C.F.R. § 26.103 or § 26.105 or appropriate program sanctions by the Federal Highway Administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include actions provided for under 23 C.F.R. § 1.36. See 49 C.F.R. § 26.101.

Additionally, by January 12, 2009, please provide the information about your FY 2009 overall DBE goal methodology that we requested in our letter to you on October 7, 2008.

If you have any questions about this request call Lance Yokota at (916) 498-5012. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Lance Yokota", written over a circular stamp or seal.

For
Gene K. Fong
Division Administrator

Cc: Fardad Falakfarsa, Federal Resources Office

1 BINGHAM McCUTCHEM LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MINO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association
9 for the Advancement of Colored People,
San Diego Chapter

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12 SACRAMENTO DIVISION

13 ASSOCIATED GENERAL CONTRACTORS
14 OF AMERICA, SAN DIEGO CHAPTER, INC.,
a nonprofit California corporation,

15 Plaintiff,

16 v.

17 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

18 Defendants,

19 COALITION FOR ECONOMIC EQUITY and
20 NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
21 SAN DIEGO CHAPTER,

22 Defendant-Intervenors.

No. 2:09-cv-01622-JAM-GGH

**DECLARATION OF LEI-CHALA
WILSON IN SUPPORT OF
DEFENDANT-INTERVENORS
MOTION FOR LEAVE TO
INTERVENE UNDER FEDERAL
RULE OF CIVIL PROCEDURE 24**

Judge: Hon. John A. Mendez

23
24
25
26

A/73138666.2/0999997-0000929484

1 I, Lei-Chala Wilson, declare:

2 1. I have personal knowledge of the facts set forth in this declaration and, if
3 called as a witness, I could and would testify competently to these facts under oath.

4 2. I am the President of the San Diego Branch of the National Association
5 for the Advancement of Colored People (NAACP). The San Diego Branch NAACP was
6 founded in 1919 to ensure the political, educational, social and economic equality of rights of all
7 persons and to eliminate racial hatred and racial discrimination.

8 3. Our organization's members include individuals and businesses who seek
9 to do business with the California Department of Transportation (Caltrans) on federally-funded
10 contracts and who are certified as Disadvantaged Business Enterprises (DBEs) with Caltrans.

11 4. The San Diego Branch NAACP has long been concerned about ongoing
12 discrimination in local and statewide construction contracts involving US Department of
13 Transportation funds. As a consequence of this discrimination, Black-owned firms have often
14 been unable to secure contracts with public agencies, and the communities that the Branch
15 represents have been locked out of the business and employment opportunities derived from such
16 contracts.

17 5. Although not a complete remedy for the discrimination faced by Black
18 contractors, the federal DBE program goes a long way in helping to ameliorate the disparities
19 faced by our members. Indeed, since the passage of Proposition 209, the federal DBE program
20 has been one of the few avenues by which Black-owned contracting firms can compete for
21 government contracts on something approaching a level playing field. In the absence of such
22 programs, firms that are largely owned by white males dominate the contracting process, often
23 based on their participation in insular, and often informal, networks.

24 6. The federal DBE program is a particular priority for the Branch given the
25 increase in federal infrastructure spending that will result from the passage of the stimulus
26 package. Indeed, state and local entities will fund large projects and developments that can, and
27 should, benefit distressed communities that often bear the brunt of the pain in economic
28 downturns. In our estimation, the best way to achieve this goal is through a contracting program

A/73138666.1/0999997-0000929484

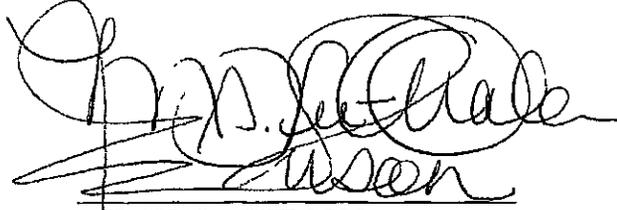
DECLARATION OF LEI-CHALA WILSON IN SUPPORT OF DEFENDANT-INTERVENORS'
MOTION FOR LEAVE TO INTERVENE UNDER FED. R. CIV. PROC. 24

1 that provides equal opportunity for all. As federal dollars begin to jumpstart local and state
2 infrastructure projects, it is our belief that a robust federal DBE program that includes race-
3 conscious elements where shown to be necessary is the most effective way of achieving such
4 equal opportunity.

5 7. The San Diego Branch NAACP first learned of this legal challenge to
6 Caltrans' DBE program in June 2009 through our vice president, who works on policy matters
7 regarding contracting equity. The San Diego Branch NAACP wishes to intervene in this case to
8 advocate for the interests of our members to help ensure that these interests are represented as the
9 litigation proceeds.

10 I declare under penalty of perjury under the laws of the United States and the
11 State of California that the foregoing is true and correct. Executed in San Diego, California on
12 September 11, 2009.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



LEI-CHALA WILSON

1 BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MIÑO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association
9 for the Advancement of Colored People,
San Diego Chapter

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12 SACRAMENTO DIVISION

13 ASSOCIATED GENERAL CONTRACTORS
14 OF AMERICA, SAN DIEGO CHAPTER, INC.,
a nonprofit California corporation,

15 Plaintiff,

16 v.

17 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

18 Defendants,

19 COALITION FOR ECONOMIC EQUITY and
20 NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
21 SAN DIEGO CHAPTER,

22 Defendant-Intervenors.
23
24
25
26

No. 2:09-cv-01622-JAM-GGH

**DECLARATION OF AILEEN C.
HERNANDEZ IN SUPPORT OF
DEFENDANT-INTERVENORS
MOTION FOR LEAVE TO
INTERVENE UNDER FEDERAL
RULE OF CIVIL PROCEDURE 24**

Judge: Hon. John A. Mendez

A/73138675.1/0999997-0000929484

1 I, Aileen C. Hernandez, declare:

2 1. I have personal knowledge of the facts set forth in this declaration and, if
3 called as a witness, I could and would testify competently to these facts under oath.

4 2. I am the Chair of the Coalition for Economic Equity, an umbrella
5 organization of numerous different minority- and women-owned business groups based in the
6 San Francisco Bay Area, whose mission is to promote fairness and equity in public contracting.
7 We are a broadly diverse coalition; our affiliates include such organizations as the Council of
8 Asian American Business Associations; San Francisco African-American Chamber of
9 Commerce; the California Hispanic Contractors Association; and the Asian Indian Association
10 of America.

11 3. The Coalition was first organized in 1982 to address the problem of low
12 participation of minority- and women-owned businesses (MBEs and WBEs) in contracting in the
13 City and County of San Francisco. Since that time, the Coalition has worked legislatively and
14 administratively to strengthen efforts to combat discrimination in public contracting at the local,
15 state, and federal levels.

16 4. Our affiliates' members include numerous individuals and businesses who
17 are certified as Disadvantaged Business Enterprises (DBEs) with the California Department of
18 Transportation (Caltrans), who have submitted bids as contractors or subcontractors on Caltrans
19 projects receiving federal funds, and who are willing and able to submit bids for future such
20 projects.

21 5. The federal DBE program is critical for our affiliates for a number of
22 reasons. Millions of dollars are spent each year by Caltrans on federally-funded projects, and the
23 federal DBE program helps to promote fair and equitable competition for these lucrative
24 contracts. Moreover, Proposition 209, California's anti-affirmative action initiative that was
25 passed in 1996, resulted in the elimination of many race- and gender-conscious programs at the
26 State and local levels. As a result, the "old boys network" that exists in many places and in
27 many industries was once again allowed to flourish unchecked. Many minority- and women-
28 owned businesses simply went bankrupt when they were no longer given equal opportunity to

A/73138675.1/0999997-0000929484

1 compete for contracts and subcontracts. The federal DBE program has remained one of the key
2 areas where minority- and women-owned businesses can still have a shot at securing contracting
3 opportunities – although much work remains to be done there as well.

4 6. The federal DBE program is of particular importance to our affiliates right
5 now, since federal stimulus package monies are beginning to flow into California for
6 infrastructure projects. This unprecedented influx of federal dollars into the State must be
7 accompanied by a strong DBE program, or minority- and women-owned businesses risk losing
8 out entirely.

9 7. The Coalition has long advocated for Caltrans to strengthen its DBE
10 program, since the program is a critical means of ensuring that DBEs are afforded equal
11 opportunity to compete for federally-funded contracts. Thus, in particular, our affiliates and their
12 members urged Caltrans not to suspend the race- and gender-conscious elements of its DBE
13 program in 2006 and later, when Caltrans did so, urged the agency to conduct an expeditious and
14 thorough disparity study in order to reinstate race-conscious elements into the DBE program.

15 8. Earlier this year, we became increasingly frustrated by the failure of
16 Caltrans to lift the suspension on race- and gender-conscious goals, since it was plain that the
17 disparity study more than demonstrated why such goals are necessary. In February 2009, we
18 wrote to Senator Dianne Feinstein about our concerns, copying both Caltrans and Federal
19 Highway Administration (FHWA) officials. *See* Exhibit A. In that letter, we outlined what our
20 affiliates and members had been told by Caltrans about federal officials having failed to give all
21 necessary approvals to allow reinstatement of race- and gender-conscious goals. Almost
22 immediately, we received a reply from FHWA, informing us that such approval had in fact
23 already been given and that Caltrans could act at any time. *See* Exhibit B. In a letter to Caltrans
24 later that month, FHWA noted “steadily decreas[ing]” DBE participation on federal contracts in
25 California, to a low of 2.2 percent, and noted that the passage of the federal stimulus act “has
26 heightened the urgency for Caltrans to reconsider implementing the DBE program
27 requirements.” *See id.* The letter went on to state that “Caltrans must immediately use contract
28 goals to administer its program in good faith.” *Id.* The following week, Caltrans announced that

A/73138675.1/0999997-0000929484

DECLARATION OF AILEEN C. HERNANDEZ IN SUPPORT OF DEFENDANT-INTERVENORS'
MOTION FOR LEAVE TO INTERVENE UNDER FED. R. CIV. PROC. 24

1 it was reinstating race-conscious elements into the DBE program. See Exhibit C.

2 9. Since then, we have continued our advocacy on this issue with Caltrans.
3 For example, on March 11, 2009, we sent a letter to then-Director Will Kempton, noting that “we
4 remain deeply troubled by how long it took for Caltrans to reinstate race-conscious goals in its
5 DBE program” and asking that a) Caltrans move forward expeditiously to add back in groups
6 that were not included in the reinstated goals; b) require local agencies to begin implementing
7 the goals immediately, rather than in 90 days; and c) adjust the goals upwards. See Exhibit D.
8 We remain concerned that Caltrans’ own actions (and inaction) exacerbate the underlying
9 problems of discrimination and exclusion and contribute to the low DBE participation rates cited
10 by federal officials, which harm the businesses we represent.

11 10. The Coalition has participated as either a party or as amicus in numerous
12 different cases involving efforts by government entities to create more fair contracting systems.
13 See, e.g., *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th
14 Cir. 1991); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922
15 (9th Cir. 1987); *Coral Construction, Inc. v. City and County of San Francisco* (review granted
16 8/22/07, CA Supreme Court No. S152934); *C&C Construction v. Sacramento Municipal Utility*
17 *District*, 122 Cal.App.4th 284 (2004). As we hope to do in this case, in those cases we helped
18 bring a crucial perspective to the proceedings, by showing the real-life effects of discrimination
19 and exclusion in public contracting and the necessity for programs to remedy this problem.

20 11. The Coalition first learned of this challenge to Caltrans’ DBE program
21 through media reports after it was filed in late June 2009. The Coalition wishes to intervene in
22 this case to advocate for the interests of our affiliates and their members and other similarly
23 situated DBEs, to help ensure that these interests are represented as the litigation proceeds.

24 I declare under penalty of perjury under the laws of the United States and the
25 State of California that the foregoing is true and correct. Executed in San Francisco, California
26 on September 10, 2009.

27 
AILEEN C. HERNANDEZ

28 A/73138675.1/0999997-0000929484

DECLARATION OF AILEEN C. HERNANDEZ IN SUPPORT OF DEFENDANT-INTERVENORS’
MOTION FOR LEAVE TO INTERVENE UNDER FED. R. CIV. PROC. 24

EXHIBIT A



COALITION FOR ECONOMIC EQUITY
818 - 47th Avenue • San Francisco, CA 94121
Phone: (415) 752-4506 • FAX: (415) 752-4509

February 3, 2009

Chair
Aileen C. Hernández

Secretary-Treasurer
Samuel Kwong

Legal Counsel
Oren Sellstrom

The Honorable Dianne Feinstein
One Post Street, Suite 2450
San Francisco, CA 94104

(415) 393-0710

Re: Disadvantaged Business Enterprise (DBE) Participation in Economic Stimulus Package Projects

Dear Senator Feinstein:

Congress is in the process of voting on the Economic Stimulus Package that has been proposed by President Obama, and a new Transportation Secretary will soon come before the Senate for confirmation. The Economic Stimulus plan, as introduced in the House, is projected to cost \$825 billion, with a significant portion of that amount being proposed for infrastructure projects. As a coalition of organizations committed to the advancement of minority- and women-owned businesses, we are extremely concerned that this extraordinary disbursement of taxpayer funds be spent equitably, and that all segments of the community benefit. We therefore respectfully request the following action:

I. Disadvantaged Business Enterprise (DBE) Provisions Must Be Maintained In The Legislation

Congress has repeatedly documented that discrimination persists in federally-funded contracting projects, and that minority- and women-owned businesses continue to face obstacles that stand in the way of equal contracting opportunity. For this reason, Congress enacted and has on a number of occasions re-authorized the federal Disadvantaged Business Enterprise (DBE) program, to guard against funneling taxpayer dollars into a discriminatory contracting system. The DBE program is modest: it simply requires recipients of federal financial assistance to establish goals for DBE participation and to take certain defined steps to meet those goals. *See generally* 49 C.F.R., Part 26.

It is our understanding that DBE requirements are a part of the current draft of the Stimulus Package. Given the enormity of taxpayer funds involved, we wholeheartedly support this inclusion. It is incumbent upon Congress to ensure that these DBE requirements are maintained in the final version of the law, so that all segments of the community can participate equally in these contracting opportunities.

II. California's DBE Program Must Be Approved Immediately.

Because of inaction by the federal Department of Transportation under the prior Administration, California has been unable to use all the tools provided by Congress to break down barriers to DBE participation, as explained below. In order for all Californians to benefit equally from the Economic Stimulus package, this situation must be rectified immediately.

Prior to 2006, the California Department of Transportation (Caltrans) had long found that both race-conscious and race-neutral means, as set forth in the DBE law, were necessary to meet its obligations under the federal DBE program. In 2006, however, Caltrans was forced to suspend its implementation of the race-conscious elements of the federal DBE program in light of a federal appellate court decision in the *Western States Paving* case. In short, that case held that states covered by the Ninth Circuit Court of Appeals are required to demonstrate discrimination in their state's contracting in order to implement race-conscious elements of a DBE program. Previously, it had always been considered sufficient that Congress found discrimination to exist nationwide.

California responded by commissioning an extensive "disparity study" that thoroughly documented such discrimination, specifically within the State. The study was completed in June 2007. Based on that study, California submitted a plan to the federal Department of Transportation for approval, in order to allow reinstatement of race-conscious remedial measures for those groups found to suffer from continuing discrimination in California.

Unfortunately, the U.S. Department of Transportation, and more specifically its Federal Highway Administration (FHWA), never took the necessary steps to approve that 2007 request. Again in 2008, California submitted a request for approval to be allowed to reinstate race-conscious DBE elements, but FHWA again failed to issue the requisite approvals.

The result of this inaction is that inequities in federally-funded contracting in California – which have now been documented not only by Congress but by the State – continue to go un-remedied. This has been nothing short of disastrous for minority- and women-owned businesses in California. Recent studies and anecdotal evidence point to precipitous declines in participation in public contracting by minority- and women-owned businesses in California when only race-neutral means are employed. *See, e.g., Free to Compete?* (Discrimination Research Center) at 2-3 (documenting 50% reduction in contracting awards to minority- and women-owned businesses in state-funded contracts after race-conscious measures were abandoned); Caltrans Availability and Disparity Study (June 2007) at 2-3 (comparing DBE participation in California under race-neutral and race-conscious programs).

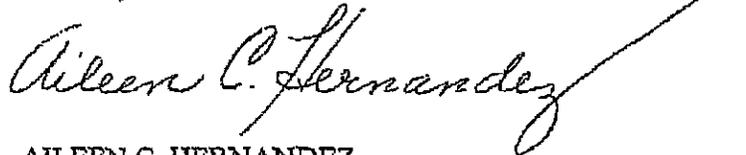
Given the enormity of the Economic Stimulus package, it is imperative that California be allowed to use all available tools to rectify the discrimination that both it and the Congress have identified. While we believe that Caltrans' goals could be more aggressive, and that its proposed race-conscious measures could be applied more broadly,

Caltrans' proposed program is undoubtedly preferable to the current race-neutral *status quo*. It would be unconscionable if the Economic Stimulus package went forward without action by the federal Department of Transportation to approve California's request to reinstate modest race-conscious measures into its contracting program.

Representative Ray LaHood will soon come before the Senate for confirmation as Transportation Secretary. We ask that you question Rep. LaHood about these issues and urge him to act immediately to rectify this situation, should he be confirmed, and that you take all other possible steps to ensure that this issue is addressed before the multi-billion dollar funding stream begins to flow.

We would be happy to answer any questions that you have about this issue or about our concerns. Thank you for your attention to this issue of critical importance to minority- and women-owned businesses in California, and congratulations on the history-making inaugural ceremonies.

Sincerely,

A handwritten signature in cursive script that reads "Aileen C. Hernandez". The signature is written in black ink and extends across the width of the page.

AILEEN C. HERNANDEZ
Chair

cc: Will Kempton, Director, California Department of Transportation
Walter Waidehlich, Jr., Division Administrator, Federal Highway Administration
Coalition Affiliates

EXHIBIT B



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA. 95814
February 13, 2009

IN REPLY REFER TO
HDA-CA
File # 901
Document # S52461

Aileen C. Hernandez, Chair
Coalition for Economic Equity
818 47th Avenue
San Francisco, CA 94121

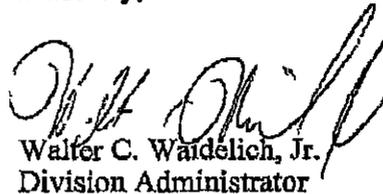
Dear Ms. Hernandez:

We received your February 3, 2009 letter to Senator Dianne Feinstein regarding Disadvantaged Business Enterprise (DBE) Participation in Economic Stimulus Package Projects. We would like to set the record straight regarding several statements in your letter.

The letter states that the California Department of Transportation's (Caltrans) DBE program has not been approved by the Federal Highway Administration and this is preventing Caltrans from reinstating race-conscious measures. Caltrans has an approved DBE program that along with its disparity study and approved waiver request allows it to use race-conscious measures (contract goals). The study identified statistically significant disparities for African American-, Asian American, Native American-, and women-owned firms. On August 7, 2008, the U.S. Department of Transportation approved Caltrans' waiver request that permits it to use contract goals for these four groups of DBEs. Caltrans does not need any additional approvals to use contract goals.

Thank you for sending us a copy of your letter to Senator Feinstein. It has given us the opportunity to provide clarifying information regarding your this issue.

Sincerely,


Walter C. Waidelich, Jr.
Division Administrator

cc: The Honorable Senator Dianne Feinstein
Will Kempton, Director, California Department of Transportation
Randy Iwasaki, Chief Deputy Director, California Department of Transportation

Lance Yokota/LY





U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
CALIFORNIA DIVISION
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814
February 25, 2009

IN REPLY REFER TO
HDA-CA
File #: 901
Document #: S52489

Mr. Will Kempton, Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

Dear Mr. Kempton:

SUBJECT: Implementation of the FY 2009 Disadvantaged Business Enterprise (DBE) Program

The recent enactment of the American Recovery and Reinvestment Act (ARRA) of 2009, Pub. L. 111-5, 123 Stat. 115 (February 17, 2009) and the increase in transportation contracting opportunities it will bring has heightened the urgency for Caltrans to reconsider implementing the DBE program requirements. DBE participation on federal contracts in California has steadily decreased over the past 4 federal fiscal years from 10.9 percent in 2005 to its most recent level of 4.6 percent in 2008 (without contract goals). For this fiscal year, Caltrans has only achieved 2.2 percent DBE participation on its construction contracts through December 31, 2008. We cannot afford any further delay by Caltrans in implementing DBE contract goals, as authorized by its DBE program waiver approved on August 7, 2008.

As outlined in our December 19, 2008 letter, Caltrans must immediately use contract goals to administer its DBE program in good faith. We are conditionally approving Caltrans' goal methodology and its projection of the portion of the overall goal it expects to meet through race neutral and race conscious means until we receive a written response to our October 7, 2008 and December 19, 2008 information requests. Thus, Caltrans is expected to implement its 13.5% overall goal immediately. In addition, Caltrans and its subrecipients are directed to immediately begin setting DBE contract goals, as authorized by its DBE program waiver approved on August 7, 2008 and in accordance with DBE program requirements, on Federal-aid highway contracts with subcontracting opportunities.

Although we have discussed our earlier requests with your staff, we have not received the additional information in writing requested to support Caltrans' decision to make no upward adjustment to its FY 2009 goal. We expect Caltrans to provide this information no later than March 31, 2009 and to additionally submit monthly status reports on its use of contract goals as described above beginning March 31, 2009.

**AMERICAN
ECONOMY**

2

Failure to implement this overall goal and contract goals set out in this letter could result in the imposition of sanctions authorized at 23 CFR § 1.36, which may include withholding federal funds, withholding approval of projects, or such other action FHWA deems appropriate under the circumstances.

Thank you for your immediate attention to this matter. Caltrans' implementation of these measures will ensure that DBEs are afforded equal opportunity to participate in the tremendous transportation contracting opportunities created by the ARRA statute.

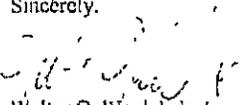
Sincerely,

Walter C. Wardelich, Jr.
Division Administrator

EXHIBIT C

DEPARTMENT OF TRANSPORTATION

DIRECTOR'S OFFICE
1120 N STREET
P.O. BOX 942873
SACRAMENTO, CA 94273-0001
PHONE (916) 654-5266
FAX (916) 654-6608
TTY 711



*Flex your power!
Be energy efficient!*

March 4, 2009

Dear Transportation Construction Community:

The California Department of Transportation (Caltrans) has just received conditional approval from the Federal Highway Administration (FHWA) to immediately implement its Federal Fiscal Year (FFY) 2009 Disadvantaged Business Enterprise (DBE) Goal and Methodology. The 2009 Goal and Methodology provides for a 6.75 percent race-conscious goal and a 6.75 percent race-neutral goal for an overall 13.5 percent program goal.

With the recent enactment of the American Recovery and Reinvestment Act (ARRA) of 2009 and the increase in transportation contracting opportunities it will bring, the urgency for Caltrans to implement contract goals has heightened. The conditional approval requires Caltrans to submit to FHWA the additional requested information to support its decision to make no upward adjustment to the FFY 2009 goal. The conditional approval also requires Caltrans to submit monthly status reports on its use of contract goals beginning March 31, 2009.

FHWA has indicated that failure to implement the overall goal and contract goals could result in the imposition of sanctions authorized by 23 Code of Federal Regulation (CFR) section 1.36. Those sanctions may include withholding federal funds, withholding approval of projects, or other action FHWA deems appropriate under the circumstances.

By March 30, 2009, the Division of Engineering Services and the Division of Procurement and Contracts will begin including an appropriate DBE race-conscious goal to include African American, Asian-Pacific American, Women, and Native American businesses, in the advertised contracts for federally funded projects. These four groups together will be referred to as Underutilized Disadvantaged Business Enterprises (UDBEs). The race-conscious goal established for each contract will be based on the subcontracting opportunities it provides and the availability of UDBEs. At this time, Hispanic American and Subcontinent Asian American businesses are not included in the race-conscious portion of the program. However, use of these businesses does count toward meeting the race-neutral portion of the goal and the overall goal. I encourage continued use of these groups at current levels in order to avoid the necessity of adjusting the goals as time goes on.

Implementation of the race-conscious component of the DBE program applies to Local Agencies as subrecipients. Caltrans will advise regional and local partners to begin implementing DBE race-conscious goals on federally funded projects within 90 days.

Transportation Construction Community

March 4, 2009

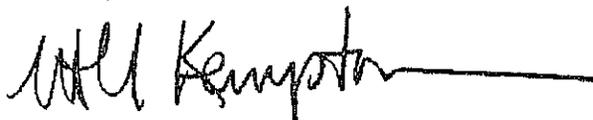
Page 2

Caltrans will continue its commitment to the application of race-neutral measures as before. They include, but are not limited to, providing technical assistance, one-on-one counseling, training, and direct referral of DBEs to prime contractors through the California Construction Contracting Program and the memorandum of understanding with the California Community Colleges Chancellor's Office. More information can be found on the Web site at <http://www.buildcalifornia.org>.

Caltrans will also implement its Communication Plan to advise the DBE firms, community organizations, industry/trade associations, and California Legislators that Caltrans has conditional approval to implement the race-conscious component of the overall DBE goal. To broaden business communication and outreach, the Caltrans' Office of Business and Economic Opportunity will have information and the schedule of public forums on its Web site at <http://www.dot.ca.gov/hq/bep>. In addition, Caltrans staff will work with business groups such as the City-County-State-Federal Cooperative Committee, Caltrans Statewide Small Business Council, Associated General Contractors of California, Engineering and Utility Contractors Associations, Southern California Contractors Association, and American Council of Engineering Companies on the implementation of their program revision.

I thank you for your patience and understanding during the last year while Caltrans operated under race-neutral measures. If you have any questions regarding this announced change in the DBE program, please contact Robert Padilla, Disparity Study Project Manager, at (916) 324-0552, or by e-mail at robert_padilla@dot.ca.gov.

Sincerely,



WILL KEMPTON
Director

c: Walter Waidelich, Division Administrator, Federal Highway Administration
Rick Land, Chief Engineer, California Department of Transportation
Robert Padilla, Disparity Study Project Manager, California Department
of Transportation

DEPARTMENT OF TRANSPORTATION
DIVISION OF LOCAL ASSISTANCE – M.S. 1
1120 N STREET
P. O. BOX 942874
SACRAMENTO, CA 94274-0001
PHONE (916) 653-1776
FAX (916) 654-2409
TTY 711



*Flex your power!
Be energy efficient!*

March 4, 2009

TO: ALL CITIES AND COUNTIES IN CALIFORNIA
METROPOLITAN PLANNING ORGANIZATIONS
REGIONAL TRANSPORTATION PLANNING AGENCIES

Dear Directors:

Re: Mandatory Race Conscious DBE Program

The Federal Highway Administration (FHWA) has approved the California Department of Transportation's 2009 Disadvantaged Business Enterprise (DBE) Annual Overall Goal. FHWA's approval requires the immediate implementation of the new DBE Program that includes a Race Conscious component (RC DBE Program). Effective immediately the California Department of Transportation (Caltrans) and local agencies receiving federal-aid funds must begin transitioning to the new RC DBE Program.

Transition Period

Local agencies may have until June 2, 2009 to transition to the newly approved RC DBE Program. This allows local agencies until June 2, 2009, to adopt and execute the new RC DBE Program and allows projects authorized to proceed under the old Race Neutral (RN) DBE program to proceed to contract award. As soon as possible but before June 2, 2009, local agencies must adopt and execute a new *California Department of Transportation DBE Program Implementation Agreement* (DBE Implementation Agreement). Upon execution of the new DBE Implementation Agreement, local agencies shall proceed under the new RC DBE Program. Under the new RC DBE Program, local agencies must incorporate the new race conscious contract specifications into all federal-aid consultant and construction contracts. These specifications are incorporated in the new contract boilerplate language referenced below.

Impacts to Federal-Aid Projects

- **ALL CONTRACTS AWARDED AFTER June 2, 2009 SHALL INCLUDE RC DBE REQUIREMENTS (i.e. contract goals, good faith efforts).**
- **Any project that receives Authorization to Proceed under the old RN DBE requirements must award the contract by June 2, 2009.**
- **Any Authorization to Proceed received under the old RN DBE requirements that does not meet the June 2, 2009 contract award deadline, shall be re-evaluated.**

Cities & Counties in California
MPOs
RTPAs
March 4, 2009
Page 2

Local agencies must resubmit their projects to Caltrans for approval to ensure compliance with the new RC DBE requirements prior to bid opening. Authorizations to Proceed will be withdrawn if projects do not comply with the new RC DBE requirements.

- **Contracts awarded after June 2, 2009, without meeting the new RC DBE requirements will be ineligible for federal funding.**
- **Local agencies' Requests for Authorization to Proceed for projects under the old RN DBE Program will continue to be received and processed subject to the preceding conditions.**
- **In submitting Requests for Authorization to Proceed for projects under the old RN DBE Program, the project sponsors need to be mindful of the minimum advertising period of three weeks, and the time it takes for bid opening and contract approval by their governing bodies.**
- **Requests for Authorization to Proceed with the new RC DBE requirements may be submitted for processing and have funds obligated/authorized before the District Local Assistance Engineer (DLAE) receives the new DBE Implementation Agreements; however, projects shall not be awarded prior to the approval of the new DBE Implementation Agreement by the DLAE.**
- **Existing federal-aid project contracts awarded with race neutral requirements shall continue under the old RN DBE Program.**

Contract Goals Limited to Underutilized Disadvantaged Business Enterprises (UDBEs)

Contract goals and the Good Faith Effort requirement are reinstated; however, they are limited to Underutilized DBEs (UDBEs). The findings from the Caltrans Availability and Disparity Study revealed statistically significant underutilization in four of the six groups presumed to be disadvantaged as defined by the Code of Federal Regulations, 49 CFR Part 26. The four groups are African American, Asian Pacific American, Native American and Women. Contract goals will be limited to these four groups of UDBEs. Use of the UDBEs above the contract goal and/or use of DBEs owned and controlled by Hispanic Males or Subcontinent Asian Males shall be reported and counted toward the Race Neutral portion of the local agencies' overall Anticipated Annual DBE Percentage Levels (AADPLs).

Old RN and New RC DBE Forms, Boilerplate Specifications

For contracts that will be advertised and awarded under the old RN DBE Program, the appropriate DBE forms will be available on the Local Assistance Website:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC.html

You may download the new DBE Implementation Agreement and consultant and construction contract boilerplate language from the Local Assistance website at:

<http://www.dot.ca.gov/hq/LocalPrograms/>

Cities & Counties in California
MPOs
RTPAs
March 4, 2009
Page 3

For specific guidance on federal-aid consultant and construction contracts and access to the new DBE forms, please refer to the enclosures addressing consultant contracts and construction contracts.

Local Assistance Procedures Manual (LAPM)

The Division of Local Assistance will be issuing the changes to the LAPM. Until the LAPM changes are issued, the updated forms, guidance, and Frequently Asked Questions are available on the Caltrans, Division of Local Assistance (DLA) website:

<http://www.dot.ca.gov/hq/LocalPrograms/>

Annual Anticipated DBE Percentage Levels (AADPL)

Local agencies are not required to resubmit previously approved 2008/2009 AADPLs to include segregated Race Conscious (RC) and Race Neutral (RN) components; **however, contract goals shall be calculated and placed on all contracts after the local agency has executed the new DBE Implementation Agreement.** The 2009/2010 AADPLs shall report segregated RC and RN anticipated percentage level components. Guidance for AADPL calculation under the new RC DBE Program is available at the Caltrans DLA website under "Announcements."

If you have questions, please refer to the Frequently Asked Questions posted on the Caltrans, DLA website: <http://www.dot.ca.gov/hq/LocalPrograms/> before contacting your DLAE.

Sincerely,



DENIX D. ANBIAH, Chief
Division of Local Assistance

Enclosures

c: Local Agency DBE Liaison Officers



Enclosure 1

Consultant Contracts: Contracts awarded prior to June 2, 2009, whose authorizations were granted prior to the adoption of the Race Conscious DBE Implementation Agreement may follow the Race Neutral DBE Program. All contracts awarded after June 2, 2009 must follow the Race Conscious DBE Program and use the following new Race Conscious LAPM Exhibits currently located on the Caltrans Local Assistance website under "Announcements."

- Exhibits 3-A, 3-B, or 3-C: Request to Proceed with Preliminary Engineering, Right-of-Way, or Utility Relocation
- Exhibit 3-E: Request for Authorization to Proceed Data Sheet(s)
- Exhibit 10-C: Consultant Agreement Reviewers Checklist
- Exhibit 10-D: Consultant Agreement Outline
- Exhibit 10-I: Notice to Bidders/Proposers DBE Requirements and Instructions
- Exhibit 10-J: Standard Agreement for Subcontractor/DBE Participation
- Exhibit 10-O(1): Local Agency Bidder/Proposer UDBE Commitment (Consultant Contracts)
- Exhibit 10-O(2): Local Agency Bidder/Proposer DBE Commitment (Consultant Contract)
- Exhibit 17-F: Final Report Utilization of DBE, First-Tier Subcontractors



Enclosure 2

Construction Contracts: Contracts to be advertised and awarded before the execution of the new DBE Implementation Agreement and before June 2, 2009, may proceed to advertise and award using Race Neutral boilerplate specifications and Race Neutral LAPM Exhibits 12-D, 15-A, 15-B, 15-G, 15-I, 15-L and 17-F. All other contracts shall use the new Race Conscious boilerplate specifications and the following new Race Conscious LAPM Exhibits currently located on the Caltrans Local Assistance website under "Announcements:"

- Exhibit 3-D: Request for Authorization to Proceed with Construction
- Exhibit 3-E: Request for Authorization to Proceed Data Sheet(s)
- Exhibit 12-D: PS&E Checklist
- Exhibit 15-A: Local Agency Construction Contract Administration Checklist
- Exhibit 15-B: Resident Engineer's Construction Contract Administration Checklist
- Exhibit 15-G(1): Local Agency Bidder/Proposer UDBE Commitment (Construction Contracts)
- Exhibit 15-G(2): Local Agency Bidder/Proposer DBE Commitment (Construction Contracts)
- Exhibit 15-H: Good Faith Efforts Submittal
- Exhibit 15-I: Local Agency Bid Opening Checklist
- Exhibit 15-L: Local Agency Contract Award Checklist
- Exhibit 17-F: Final Report Utilization of DBE, First-Tier Subcontractors

EXHIBIT D



COALITION FOR ECONOMIC EQUITY

818 - 47th Avenue • San Francisco, CA 94121

Phone: (415) 752-4506 • FAX: (415) 752-4509

Chair
Aileen C. Hernández

Secretary-Treasurer
Samuel Kwong

Legal Counsel
Oren M. Sellstrom

March 11, 2009

Mr. Will Kempton, Director
California Department of Transportation
1120 N Street
Sacramento, CA 95814

Re: California's Disadvantaged Business Enterprise (DBE) Program

Dear Director Kempton:

We are in receipt of your March 4, 2009 letter to the Transportation Construction Community concerning California's Disadvantaged Business Enterprise (DBE) program. While we remain deeply troubled by how long it took for Caltrans to reinstate race-conscious goals in its DBE program, we are pleased that now at least it will be happening.

However, as we stated in our February 3, 2009 letter to Senator Dianne Feinstein on this issue, we view this reinstatement as but the first of a number of steps that must be taken to ensure equal participation by all California businesses in the Economic Stimulus package. We therefore now call upon Caltrans to do the following:

I. Request Approval From FHWA To Add Back In The Groups Excluded From The Initial Waiver Request

As you know, Hispanic American and Subcontinent Asian American businesses will not be included in the race-conscious portion of Caltrans' DBE program when it is reinstated, because Caltrans did not make that request of the Federal Highway Administration (FHWA). We view this as a significant omission that must be rectified immediately. We share many of the concerns that have been previously outlined by the California Hispanic Chambers of Commerce and others concerning the original disparity study findings on this issue.

Regardless of that initial finding, however, it is our understanding that Caltrans now has additional evidence that would support the inclusion of the excluded groups. We ask that you forward this information to FHWA and ask for immediate approval to reinstate the excluded

• African American Agenda Council • African American Contractors of San Francisco • Alliance for Equity • ASIAN, Inc. • Asian American Contractors Association • Asian Indian Association of America • California Hispanic Contractors Association • Council of Asian American Business Associations • Filipino Architects, Contractors & Engineers • San Francisco African-American Chamber of Commerce • San Francisco Women Contractors Association • Society of Hispanic Architects, Planners & Engineers •

groups. Time is of the essence if these groups are going to benefit from the millions in construction contracting that will be funded by the Economic Stimulus package.

II. Require Local Agencies To Move Quickly To Implement DBE Race-Conscious Goals on Federally-Funded Projects

In your March 4, 2009 letter, you stated that Caltrans will advise its regional and local partners to begin implementing DBE race-conscious goals on federally-funded projects within 90 days. Three months is too long. Particularly in light of the unreasonable and unexplainable delay in re-instating these goals in the first place, Caltrans should take all available steps to ensure immediate implementation by regional and local partners.

Indeed, in the February 25, 2009 letter to you from FHWA Division Administrator Waidehich, FHWA stated that "Caltrans *and its subrecipients* are directed to *immediately* begin setting DBE contract goals . . . on Federal-aid highway contracts with subcontracting opportunities." (emphasis added). The FHWA repeatedly highlighted the "urgency" of the situation, in light of upcoming Economic Stimulus projects, and stated that "[w]e cannot afford any further delay." We agree. We know of no compelling reason why local agencies cannot implement within 30 days, as Caltrans is doing. At a minimum, if particular agencies claim that they cannot implement within 30 days, then Economic Stimulus funds should be withheld for those projects until the new program is in place.

III. Respond To FHWA's Information Requests As To Why Caltrans' Goal Should Not Be Adjusted Upward

In his February 25, 2009 letter, Mr. Waidehich further requests information from Caltrans as to why there should be no upward adjustment to its FY 2009 goal. As we stated in our original letter on this issue to Senator Feinstein, we agree that Caltrans' overall goal is too low and should be adjusted upwards. While we have advocated for at least conditional approval of the lower goal, in order not to lose the opportunity to return to race-conscious contract goals, we now believe there must be an overall goal that more accurately reflects the ability and capacities of DBEs in California to participate in Caltrans projects.

Thank you for your attention to these matters of critical importance to minority- and women-owned businesses in California.

Sincerely,



AILEEN C. HERNANDEZ
Chair



OREN SELLSTROM
Legal Counsel

cc: Hon. Dianne Feinstein
Hon. Nancy Pelosi
Walter C. Waidehich, Jr., Division Administrator, FHWA
Coalition Affiliates

1 BINGHAM McCUTCHEN LLP
MICHAEL I. BEGERT (SBN 141969)
2 michael.begert@bingham.com
SUJAL J. SHAH (SBN 215230)
3 sujal.shah@bingham.com
ERIN S. CONROY (SBN 241042)
4 erin.conroy@bingham.com
CARLOS P. MINO (SBN 247022)
5 carlos.mino@bingham.com
Three Embarcadero Center
6 San Francisco, CA 94111-4067, U.S.A.
Telephone: 415.393.2000
7 Facsimile: 415.393.2286

8 LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OREN SELLSTROM (SBN 161074)
9 KENDRA FOX-DAVIS (SBN 248757)
131 Steuart Street, Suite 400
San Francisco, CA 94105
10 Telephone: (415) 543-9697
Facsimile: (415) 543-0296
11 Email: osellstrom@lccr.com

12 Attorneys for Defendant-Intervenors
Coalition for Economic Equity and National Association for
13 the Advancement of Colored People, San Diego Chapter

14 UNITED STATES DISTRICT COURT
15 EASTERN DISTRICT OF CALIFORNIA
16 SACRAMENTO DIVISION

18 ASSOCIATED GENERAL CONTRACTORS
OF AMERICA, SAN DIEGO CHAPTER, INC.,
19 a nonprofit California corporation,

20 Plaintiff,

21 v.

22 CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

23 Defendants,

24 COALITION FOR ECONOMIC EQUITY and
NATIONAL ASSOCIATION FOR THE
25 ADVANCEMENT OF COLORED PEOPLE,
SAN DIEGO CHAPTER,
26

27 Defendant-Intervenors.

No. 2:09-cv-01622-JAM-GGH

**[PROPOSED] ORDER ON MOTION
OF APPLICANTS IN
INTERVENTION COALITION FOR
ECONOMIC EQUITY AND
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE, SAN DIEGO
CHAPTER TO INTERVENE UNDER
FEDERAL RULE OF CIVIL
PROCEDURE 24**

Date: November 4, 2009
Time: 9:00 a.m.
Place: Courtroom 6
Judge: Hon. John A. Mendez

1 The Court, having read all the pleadings and heard argument, and finding good
2 cause, hereby orders that the motion of Applicants Coalition for Economic Equity and National
3 Association for the Advancement of Colored People, San Diego Chapter to intervene in the
4 above-captioned matter is hereby GRANTED.

5 IT IS SO ORDERED.

6
7 Dated: _____, 2009

HON. JOHN A. MENDEZ
UNITED STATES DISTRICT COURT JUDGE

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28