CIV-130

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FOR COURT USE ONLY

FILED/ENDORSED
JUL 30 2020
By: E. Gutierrez Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Sacramento
STREET ADDRESS: 813 6th Street
MAILING ADDRESS: 813 6th Street
CITY AND ZIP CODE: Sacramento 95814
BRANCH NAME: Hall of Justice

PLAINTIFF/PETITIONER: Mark E. Graham, et al.

DEFENDANT/RESPONDENT: Sacramento Municipal Utility District

CASE NUMBER:
34-2019-00267423-CU-MC-GDS

NOTICE OF ENTRY OF JUDGMENT OR ORDER

(Check one): ☒ **UNLIMITED CASE** (Amount demanded exceeded $25,000) ☐ **LIMITED CASE** (Amount demanded was $25,000 or less)

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: July 29, 2020

2. A copy of the judgment, decree, or order is attached to this notice.

Date: July 30, 2020

Ryan Thomas Dunn ▶ Ryan Thomas Dunn
(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY) (SIGNATURE)

BY FAX

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CIV-130 [New January 1, 2010]
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NOTICE OF ENTRY OF JUDGMENT OR ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/29/2020 TIME: 01:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2019-00267423-CU-MC-GDS** CASE INIT.DATE: 10/22/2019
CASE TITLE: **Graham vs. Sacramento Municipal Utility District**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion for Protective Order - Civil Law and Motion

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APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Motion for Protective Order) taken under submission on 07/23/2020

TENTATIVE RULING

Effective June 16, 2020 hearings for Department 53 will be held at 1:30 p.m.

Until further notice, NO IN-PERSON APPEARANCES WILL BE PERMITTED. All Civil Law and Motion hearings will be conducted remotely via CourtCall or Zoom [which includes telephonic and teleconferencing options]. This will also apply to "Appearance Required" matters. The Department 53 Zoom ID is: 841 204 6267.

Consistent with Local Rule 1.06(B), any party requesting oral argument on any matter on this calendar must comply with the following procedure.

To request oral argument, you must call the Department 53 clerk at (916) 874-7858 and opposing party by 4:00 p.m. the court day before the hearing. At the time of requesting oral argument, the requesting party shall leave a voice message to advise the clerk that it has notified the opposing party of the following: a) its intention to appear and b) that opposing party may appear via Zoom using the Zoom ID indicated above or by CourtCall. If no request for oral argument is made, the tentative ruling becomes the final order of the Court.

The hearings will also be live-streamed on the Court's YouTube page for the benefit of the public. Although the hearings will be live-streamed on the Court's YouTube page, the broadcast will not be saved/preserved. Thus, if any party wishes to preserve the hearing for future use, a court reporter will be required. During the COVID-19 emergency, the Court will supply a court reporter upon request. Any party desiring a court reporter shall so advise the clerk upon request for oral argument. Unless a fee waiver has been granted, the reporter's fee must be paid to the Court prior to the hearing. Local Rule 1.12 and Government Code § 68086.

Defendant Sacramento Utility District's ("SMUD") motion for protective order to preclude discovery and

extra-record evidence is ruled upon as follows.

In this reverse validation action [see, *Kaatz v. City of Seaside, (*2006) 143 Cal. App. 4th 13, 30, " If the public agency does not bring a validation action, "any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter." (§ 863.) A validation action by an interested person is called a " 'reverse validation action.'], self-represented Plaintiffs Mark Graham and Jan Summers assert challenges to SMUD's electric rates on the grounds that they are too high and violate the California Constitution. Plaintiffs rely on Proposition 26 (Cal. Const. art. XIII C, § 1, sub. (e)) which provides that public agency revenue measures are taxes unless they fall under certain exceptions, for example, charges "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).) SMUD adopted the challenged rates by Resolution No. 19-06-03 on June 24, 2019. Plaintiff were required to file this action as a reverse validation action under CCP § 860. (Pub. Util. Code § 14402.)

Plaintiffs raised the issue of depositions with SMUD and SMUD's counsel informed Plaintiffs that no discovery was permissible in a reverse validation action as the evidence was limited to the administrative record. Plaintiffs then propounded written discovery which SMUD objected to on the basis that discovery was not permissible. SMUD now moves for a protective order.

SMUD moves for a protective order pursuant to CCP §§ 2017.020 and CCP § 2019.030. CCP § 2017.020(a) allows the Court to limit discovery "if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." The Court may make the determination on a motion for protective order. (Id.) CCP § 2019.030 is similar. SMUD argues that electricity rate making is a legislative act and that challenges to legislative acts are limited to the administrative record for that act and thus evidence at trial is limited to the administrative record. It further argues that validation actions and reverse validation actions are similarly limited to the administrative record and thus discovery serves no purpose. The Court agrees with SMUD that a protective order precluding discovery in this reverse validation action is appropriate. First, electricity ratemaking is a legislative act. (*American Microsystems, Inc. v. City of Santa Clara* (1982) 137 Cal.App.3d 1037, 1042-1043.) Judicial review of a legislative act is limited to the administrative record. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576; *Consejo de Desarrollo Economico de Mexicali v. United States,* 438 F. Sup. 2d 1207 (2007 (D. Nev.).) The rule articulated in *Western States* limiting evidence to the administrative record has been applied to a wide variety of legislative acts, including Proposition 26 challenges. (*Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1450.) Extra-record evidence is generally not admissible to contradict evidence upon which the administrative agency relied in making a legislative or quasi-legislative decision. (*Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency*, (2016) 1 Cal. App. 5th 1084, 1103.) The rationale for the rule is that if extra-record evidence were permitted in challenges to legislative acts, the "issue would often become not whether the administrative record was a prejudicial abuse of discretion, but whether the decision was wise or scientifically sound in light of the extra-record evidence," which questions "are not for the courts to answer." (*Western States*, *supra*, 9 Cal.4th at 577.) "Discovery is intended to produce or lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.010.) Since extra-record evidence is generally not admissible in an action or proceeding to challenge a" legislative decision, "discovery is usually not necessary." (*San Joaquin County Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 167 [issuing peremptory writ of mandate directing trial court to vacate order partially granting public agency's motion for protective order while also allowing certain discovery and directing it to enter order granting public agency's motion for protective order precluding discovery].)

With respect to this specific reverse validation action, the principles are the same. Again, this action was

required to be brought pursuant to the validation statutes in CCP § 860 et seq. The validation statutes permit agencies to validate certain actions through in rem validation actions and allow others to challenge the actions through reverse validation actions using the same in rem procedures. (*McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1166.) Evidence in validation and reverse validation actions are limited to the administrative record. (*Poway Royal Mobilehome Owners Ass'n v. City of Poway* (2007) 149 Cal.App.4th 1460, 1479. "The scope of judicial review of a legislative type of activity is limited to an examination of the record before the authorized decision makers to test for sufficiency with legal requirements...The trial court reviews the decision-making process of the administrative agency and does not conduct its own evidentiary hearing..." (*Morgan v. Community Redevelopment Agency* (1991) 231 Cal.App.3d 243, 258.) In *Morgan*, it was found that the trial court properly limited discovery by prohibiting the party challenging a redevelopment agency's approval of a redevelopment project action from subpoenaing individuals, noticing depositions and seeking documents.

Given the above, the Court agrees with SMUD that a protective order precluding discovery is appropriate here.

Plaintiffs' lengthy opposition does not compel any different conclusion. Plaintiffs' opposition focuses mainly on the fact that Proposition 26 was approved in 2010 which was 15 years after *Western States*, *supra*, 9 Cal.4th 559. Plaintiffs appear to believe that Proposition 26 somehow changed the scope of what evidence is permissible in a reverse validation action. It did not. As noted above, Proposition 26 (Cal. Const. art. XIII C, § 1, sub. (e)) provides that public agency revenue measures are taxes unless they fall under certain exceptions, for example, charges "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." (Cal. Const., art. XIII C, § 1, subd. (e)(2).) The public agency bears the burden to show by a preponderance of the evidence that the charge is not a tax. (Id.) This change in no way allows the use of extra-record evidence in a validation or reverse validation action. To that end, Proposition 26 was an amendment to the Constitution enacted to "**reinforce** the voter approval requirements set forth in Propositions 13 and 218." (*Jacks v. City of Santa Barbara* (2017 3 Cal.5th 248, 263 [emphasis in original].) Courts interpret constitutional initiatives such as Proposition 26 so as not to repeal other laws voters did not intend to change. For example, where owners of property annexed by a city demanded an election on the city's taxes under Proposition 218, it was held that if Proposition 218 were intended to require elections upon annexations, the intent would have been in the measure's language. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com.* (2012) 209 Cal.App.4th 1182, 1191.) "Just as the silence of a dog trained to bark at intruders suggests the absence of intruders," the absence of Proposition 218 provisions requiring elections upon annexation "is indicative of a lack of voter intent to affect annexation law." (*Id.*) The same is true here. There is nothing that suggests in any way that Proposition 26 in any way changed the type of evidence that is available in challenges to legislative acts. Indeed, even in cases involving Proposition 26, the general rule laid out in *Western States, viz.* that courts may not consider evidence not contained in the administrative record has been applied. (*Newhall County Water Dist.*, *supra*, 243 Cal.App.4th at 1450.) Proposition 26 therefore did not, as Plaintiffs argue at length, supersede any of the cases cited by SMUD and no authority is cited for such a proposition. While there may be a different burden of proof in Proposition 26 cases ("preponderance of evidence") as opposed to the substantial evidence burden in other actions challenging legislative acts, the fact remains that whatever burden applies, extra-record evidence is not permitted.

Plaintiffs spend a great deal of time attempting to distinguish the cases cited by SMUD on the basis that the cases do not involve electricity rate challenges, precede Proposition 26, or do not use the word "discovery." These are distinctions without a difference. The cases discussed above stand for the general principles that validation and reverse validation actions are limited to the administrative record, regardless of whether the case specifically discussed discovery. In addition, as noted above, some of

the cases did discuss discovery and specifically declined to allow the discovery. (*San Joaquin County Local Agency Formation Commission, supra,* 162 Cal.App.4th at 167; *Morgan, supra,* 231 Cal.App.3d at 258.) Again, that these cases preceded Proposition 26 is not relevant. Moreover, as already mentioned, these principles have been applied in Proposition 26 cases. (*Newhall County Water Dist., supra*, 243 Cal.App.4th at 1450.) While Plaintiffs may believe *Newhall* was "overly broad and not accurate" this Court is bound by that case. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) Further, while Plaintiffs suggest that the *Western States* rule only applies in CEQA cases, they are incorrect. Numerous cases cited above and in SMUD's papers applied the rule limiting review to the administrative record in non-CEQA cases. (E.g. *SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 191.) In fact, the rule has been applied to tax challenges under Proposition 26. (*San Diego Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1152-1153.) Tellingly, Plaintiffs cite no case allowing discovery in a reverse validation action. Indeed, courts will limit themselves to record evidence even when confronted with challenges that an agency "acting in its quasi-legislative capacity has exceeded its authority." *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal. App. 4th 218, 233.

Plaintiffs make other attempts to distinguish the cases cited by SMUD by arguing for example, that *Western States* was limited to "quasi-legislative administrative decisions" or State administrative agencies. But no such limitation exists in the cases.

In short, the Court finds that SMUD has shown that it is entitled to a protective order precluding Plaintiffs from propounding discovery in this matter.

The Court notes that throughout the opposition Plaintiffs complain that SMUD will somehow be the ultimate arbiter of what is included in administrative record. Plaintiffs ask that the Court not approve the record at this time as it has not even been prepared and/or ask that certain evidence be included. These issues are not before the Court. The Court is not asked to approve the content of an administrative record on this motion. To the extent that there are issues with the administrative record when it is prepared, Plaintiffs may raise those concerns at the appropriate time. As noted by SMUD in reply, it will meet and confer with Plaintiffs regarding the content of the administrative record and Plaintiffs may move to augment the record if the parties cannot resolve any disagreements regarding the record. The court rejects the plaintiffs perceived role of SMUD as the fox guarding the hen-house, in preparing the content of the record.

SMUD also requested that the protective order limit the evidence at trial to the administrative record which SMUD will certify and serve. The Court declines to issue such an order. This is a matter that should be raised to the trial judge at the appropriate time by way of a pre-trial motion in limine or other appropriate motion. What evidence will be admitted at trial is not a Law and Motion matter.

As a result, SMUD's motion for a protective order is granted to the extent that Plaintiffs are precluded from propounding additional discovery. The motion is denied to the extent SMUD requested a protective order limiting the evidence at trial.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

Having taken the matter under submission on 07/23/2020, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirmed the tentative ruling.

MARK E. GRAHAM
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PROOF OF SERVICE

Mark E. Graham, et al. v. Sacramento Municipal Utility District
Sacramento County Superior Court Case No. 34-2019-00267423-CU-MC-GDS

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: ALloyd@chwlaw.us. On July 30, 2020, I served the document(s) described as **NOTICE OF ENTRY OF ORDER** on the interested parties in this action addressed as follows:

Mark E. Graham — *Plaintiff, In Pro Per*
P.O. Box 1823
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☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on July 30, 2020, from e-mail address: ALloyd@chwlaw.us. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 30, 2020, at Grass Valley, California.

Ashley A. Lloyd