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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAII'S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAII ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI, Plaintiffs, v. FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity	Case No. 11-00307 AWT PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE [Docket Nos. 37-40]

as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu Department of Transportation. Defendants.	

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INTRODUCTION

As a general rule, the scope of judicial review on a motion for judgment on the pleadings is limited to the contents of the Complaint. Defendants have nonetheless filed a Motion for Judgment on the Pleadings ("Def. Motion" or "Motion") based entirely on documents other than Plaintiffs' Complaint. Defendants claim that their reliance on such evidence is appropriate because the evidence is subject to judicial notice. They have filed a Request for Judicial Notice ("RFJN") to that effect.

But Defendants are not really seeking judicial notice. Instead, they are asking the Court to accept their own characterizations of the evidence of Plaintiffs' participation in the Honolulu High-Capacity Transit Corridor Project (the "Project"). These characterizations hardly constitute "facts," much less ones subject to judicial notice. For these reasons and those more fully discussed below, this Court should deny Defendants' RFJN to the extent it does not comply with Rule 201 of the Federal Rules of Evidence.

ARGUMENT

A. General Objections

1. Defendants' Reliance On "Incorporation By Reference" Is Improper

Defendants claim that the Final Environmental Impact Statement (the "FEIS") for the Honolulu High-Capacity Transit Corridor Project (the "Project"), the Draft Environmental Impact Statement (the "DEIS") for the Project, and the Record of Decision ("ROD") for the Project have been "incorporated by reference" into

Plaintiffs' Complaint and therefore can be considered by the Court in their entirety. *See* Def. Motion at 18-19; RFJN at 2-4.

As an initial matter, Plaintiffs note that Defendants' RFJN does not appear to be the right place for arguments on the subject of incorporation by reference. Nevertheless, because Defendants argue incorporation by reference in their RFJN, Plaintiffs will briefly address the issue here.

Plaintiffs do not dispute that, as a general matter, material incorporated by reference into a complaint can be considered in the context of a motion for judgment on the pleadings. Nor do Plaintiffs dispute that their Complaint incorporates by reference small portions of the 5,000-plus page Draft EIS and the still-lengthier Final EIS (together, the "EISs"). *See, e.g.*, Complaint at ¶¶ 23-31, 89-93.

But Defendants' reliance on the incorporation by reference doctrine is nonetheless improper. First of all, Defendants never served their Exhibit A (the Draft EIS) or their Exhibit B (the Final EIS) on Plaintiffs. *See* Declaration of Matthew Adams ("Adams Dec.") at ¶ 2. Plaintiffs have independent access to electronic versions of both EISs. *Id*. at ¶ 3. But they have no access to the "original color hard bound version[s]" of the documents that were (apparently) provided to the Court. *Id*. Nor do Plaintiffs have access to the "accompanying DVD, and additional CD" Defendants lodged with the Court. *Id*. Therefore, Plaintiffs cannot fully evaluate Defendants' citations to those materials. For reasons of fundamental fairness, Defendants should not be allowed to rely on any portion of their Exhibit A or Exhibit B.

Second, incorporation by reference is not an appropriate means of establishing an "absence of evidence" where, as here, the parties' contentions must be resolved on the basis of an entire administrative record. Defendants contend that Plaintiffs failed to exhaust their administrative remedies. Def. Motion at 19-34. The extent to which a party has exhausted its administrative remedies — like other NEPA, NHPA, and Section 4(f) issues — is determined on the basis of the administrative record as a whole. *See, e.g., Great Basin Mine Watch v. Hankins*, 456 F. 3d 955, 968 (9th Cir. 2006) ("our review of the record indicates that Great Basin adequately raised the issue"); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092-93 (9th Cir. 2006) (relying on administrative record to evaluate waiver and exhaustion issues). But incorporation by reference only allows courts to consider specific documents; by definition, it does not permit consideration of an entire administrative record. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (describing incorporation doctrine). For this reason, too, Defendants' reliance on the incorporation by reference doctrine is improper.

2. Defendants' Reliance On Judicial Notice Is Improper.

Defendants assert that their Exhibits A through W, as well as their assertions about the documents contained in those exhibits, are "matters of public record, capable of accurate and ready determination and not subject to reasonable dispute," and therefore subject to judicial notice (RFJN at p.4). They are mistaken.

Federal Rules of Evidence Rule 201 provides that judicial notice is proper where the "adjudicative fact" is "one not subject to

reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Rule 201 only applies to "adjudicative facts," defined as "those to which the law is applied in the process of adjudication." *Valdivia v. Schwarzenegger*, 599 F.3d 984, 994 (9th Cir. 2010) (citing Fed. R. Evid. 201, Notes to Subdivision (a).) Because judicial notice "proceeds upon the theory that these considerations call for dispensing with the traditional methods of proof only in clear cases …the tradition has been one of caution." Fed. R. Evid. 201(a), Notes to Subdivision (a).

a) Judicial Notice Of The Veracity Of An Argument Or Conclusion Is Improper.

Judicial notice is an appropriate mechanism for introducing evidence of the existence of a fact or document. It cannot be used to introduce evidence of the veracity of an argument or conclusion based on a fact. As the Ninth Circuit has explained, "[a]lthough the existence of a document may be judicially noticeable, the truth of statements contained in the document and improper interpretation are not subject to judicial notice if those matters are reasonably disputable." *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 440 (9th Cir. 2010) (internal citations omitted); *see also Lee v. City of Los Angeles*, 250 F. 3d 668, 690 (9th Cir. 2001) (denying request for judicial notice and noting that when taking judicial notice, courts may do so "not for the truth of the facts recited therein, but for the existence" of the document, "which is not subject to reasonable dispute over its veracity.") Here, Defendants improperly request that

the Court consider not only the *existence* of certain documents, but also the *veracity* of propositions for which Defendants believe those documents stand.

b) Judicial Notice Of Defendants' Own Interpretation, Characterization, Or Opinion Of Matters Of Public Record Is Improper.

Defendants' RFJN should also be denied as to Defendants' interpretations or characterization of various factual and legal aspects of this case. Defendants misleadingly present those matters as "facts." But they are entirely unsuitable for judicial notice. A party's "characterization of [documents outside the pleadings] is subject to reasonable dispute and is therefore not properly noticed." *Swartz v. KPMG LLP*, 476 F.3d 756, 758, n.3 (9th Cir. 2007); *see also J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice"); *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 974 (E.D. Cal. 2004) reconsidered on other grounds 2005 US Dist LEXIS 24592 (E.D. Cal. 2005) ("A court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted."). Speculative facts are equally unsuitable for judicial notice. *See Lawrence v. Commodity Futures Trading Com.*, 759 F.2d 767, 776, n.13 (9th Cir. 1985) (denying judicial notice) ("[S]peculation is not appropriate matter for judicial notice."); *Lee v. City of Los Angeles*, 250 F. 3d 668, 690 (9th Cir. 2001). The Court should decline to take judicial notice of Defendants' interpretations and opinions.

These grounds form the basis of Plaintiffs' objection to Defendants' reliance on evidence beyond the Complaint. Plaintiffs specifically address each of Defendants' requests below.

B. Specific Objections

1. Exhibit A: The Honolulu High-Capacity Transit Corridor Project Draft Environmental Impact Statement/Section 4(f) Evaluation ("Draft EIS").

Defendants submit the Draft EIS for judicial notice on the basis that it is a public record. (RFJN, ¶ 1.) Through their Motion though, it is clear that Defendants are really seeking judicial notice not simply of the existence of this document but also of the truth of the facts (they claim are) contained therein. *See e.g.*, Motion at pp. 8-10, 25-26, 28, 31-32. Doing so is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440. Plaintiffs object to Defendants' request for judicial notice of Exhibit A in that the request seeks notice of the veracity of arguments based on the Draft EIS.

2. Exhibit B: *The Honolulu High-Capacity Transit Corridor Project Final Environmental Impact Statement/Section 4(f) Evaluation* ("Final EIS").

Defendants submit the Final EIS for judicial notice on the basis that it is a public record. (RFJN, ¶ 2.) Through their Motion though, it is clear that Defendants are really seeking judicial notice not simply of the existence of this document but also of the truth of the facts (they claim are) contained therein. *See e.g.*, Motion at pp. 8-10, 25-26, 28, 31-32. Doing so is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440. Plaintiffs object to Defendants' request for judicial notice of

Exhibit B in that the request seeks notice of the veracity of arguments based on the Final EIS.

3. Exhibit C: *Record of Decision* ("ROD").

Defendants submit the ROD for judicial notice on the basis that it is a public record. (RFJN, ¶ 2.) Through Defendants' Motion though, it is clear that Defendants are really seeking judicial notice not simply of the existence of this document but also of the truth of the facts contained therein. (*See, e.g.,* Motion at 27-28, 31-32.) Doing so is improper under Federal Rules of Evidence. *See* Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440. Plaintiffs object to Defendants' request for judicial notice of Exhibit C in that the request seeks notice of the veracity of arguments based on the ROD.

4. Exhibit D: *O'ahu Regional Transportation Plan 2030* ("ORTP 2030") and corresponding facts.

Defendants seek judicial notice of Exhibit D as well as the following "facts" concerning this document:

- "Pursuant to the Federal-Aid Highway Act of 1973, the Urban Mass Transportation Act of 1964 and Hawai'i Revised States Chapter 279E, the O'ahu Metropolitan Planning Organization ("O'ahu MPO") was established to act as an advisory urban transportation planning organization for the island of O'ahu and to coordinate continuing, comprehensive, transportation planning." (RFJN, ¶ 4) (citing Haw. Rev. Stat. §§ 279E-1, -2.)
- "The O'ahu MPO is responsible for, *inter alia*, producing the O'ahu Regional Transportation Plan ("ORTP"), which "communicates the long-range vision and transportation goals, objectives and policies

for O'ahu." (RFJN, ¶ 4) (citing http://www.oahumpo.org.programs/ortp.html.)

- "In or about April 2006, the Policy Committee of the O'ahu MPO (comprised of five members from the City Council, Three Senators, three State Representatives, the Director of the State Department of Transportation and the Director of the City Department of Transportation Services) approved the O'ahu Regional Transportation Plan 2030 ("ORTP 2030"), and then modified it through Amendment #1 in May 2007." (RFJN, ¶ 4).)

Plaintiffs first object to this Court taking judicial notice of these matters because they do not constitute "adjudicative facts" under Rule 201(a). Fed. R. Evid. 201(a) and Notes to Subdivision (a). Second, Plaintiffs object on the basis that Defendants are improperly seeking judicial notice not of the existence of certain documents, but instead of the truth of the matter asserted therein. Doing so is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

5. Exhibit E: Hawai'i State Legislature Act 247 and corresponding facts.

Defendants submit Exhibit E for judicial notice along with the following "fact": "In 2005, the Hawai'i State Legislature passed Act 247, authorizing the City to levy an excise and use tax surcharge to construct and operate a mass transit system serving O'ahu." (RFJN, ¶5.)

Plaintiffs first object to this Court taking judicial notice of this matter because it does not constitute an "adjudicative fact" under Rule 201(a). Fed. R. Evid. 201(a) and Notes to Subdivision (a). Second,

Plaintiffs object on the basis that Defendants are improperly seeking judicial notice not of the existence of Act 247, but rather of their interpretation of Act 247 (an interpretation disputed by Plaintiffs). Doing so is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440.

6. Exhibit F: Honolulu City Council Ordinance 05-027 and corresponding facts.

Defendants submit Exhibit F for judicial notice along with the fact: "On or about August 10, 2005, the Honolulu City Council adopted Ordinance 05-027 to levy a tax surcharge to fund the Project." RFJN, ¶6.

Plaintiffs first object to this Court taking judicial notice of this fact because it does not constitute an "adjudicative fact" under Rule 201(a). Fed. R. Evid. 201(a) and Notes to Subdivision (a). Second, Plaintiffs object on the basis that Defendants are improperly seeking judicial notice not of the existence of certain documents, but instead of the truth of their own interpretation of a matter of public record. Doing so is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440. Indeed, Defendants grossly misrepresent the contents of the Ordinance. Ordinance 05-027 did not state that it was adopted to fund "the Project," nor does it specifically address any such project. Ordinance 05-027 merely establishes an excise and use tax "to be used for the purposes of funding the operating and capital costs of public transportation" and mandated that the funds be used for "a mass transit project." (RFJN, Ex. F-1, F-2.) Thus, this ordinance refers to *any* new mass transit project, not specifically "the Project", as

Defendants assert and request this Court to notice. This Court cannot take judicial notice of Defendants' mischaracterization of the public record. *See Swartz* 476 F.3d at 758, n.3; *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice").

7. Exhibit G: Certificate of Results From Office of City Clerk, City and County of Honolulu.

Defendants submit Exhibit G for judicial notice. (RFJN ¶ 7.) Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

8. Exhibit H: Notice of *Preparation of an Environmental Impact Statement for the High-Capacity Transit Improvements in the Southern Corridor of Honolulu, HI* ("December 2005 NOI").

Defendants submit Exhibit H for judicial notice. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

9. Exhibit I: Comment Form of Plaintiff Dr. Michael Uechi to December 2005 NOI.

Defendants submit Exhibit I for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 9. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

10. Exhibit J: Written Comments by Plaintiff HonoluluTraffic.com through its Chair, Plaintiff Cliff Slater submitted with December 2005 NOI.

Defendants submit Exhibit J for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 10. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

11. Asserted "fact": "The public record is devoid of any comments from Plaintiffs Cliff Slater (in his individual capacity), Benjamin Cayetano, Walter Heen, Hawaii's Thousand Friends, The Small Business Hawaii Entrepreneurial Education Foundation and Randall Roth in response to the NOI and the alternatives scoping process."

Defendants request this Court take judicial notice of this "fact." RFJN, ¶ 11. Defendants cite to no legal support which advances the proposition that courts can embark on this sort of speculative deductive reasoning to judicially notice the absence of facts. Plaintiffs are also aware of no case law which deems a conclusion based on deductive reasoning is a judicially noticeable "adjudicative fact" nor any which allows a court to take judicial notice of the absence of a fact. Fed. R. Civ. Proc. 201. Moreover, Plaintiffs object that this "fact" simply represents Defendants' interpretation and speculations regarding alleged matters of public record and, as such, is wholly improper for judicial notice. *See Swartz*, 476 F.3d at 758, n.3 (A party's "characterization of [documents outside the pleadings] are subject to reasonable dispute and are therefore not properly noticed."); *see also, J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice"); *S. Cal.*

Edison Co., 300 F. Supp. 2d at 974 ("A court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted."); *Lawrence,* 759 F.2d at 776, n.13 ("[S]peculation is not appropriate matter for judicial notice."); *Lee*, 250 F. 3d at 690.

12. Exhibit K: Notice of *Intent to Prepare an Environmental Impact Statement for High-Capacity Transit Improvements in the Leeward Corridor of Honolulu, HI* ("March 2007 NOI") and corresponding facts.

Defendants submit Exhibit K for judicial notice along with the fact: "This notice informed the public that, *inter alia*, the FTA and City intended to prepare an environmental impact statement for a proposed fixed-guideway system and called for "public and interagency input on the purpose and needs to be addressed by the project, the alternatives to be considered in the EIS, and the environmental and community impacts to be evaluated" through attendance at two scoping meetings or submission of written comments." RFJN, ¶ 12.

Plaintiffs object on the basis that Defendants are improperly seeking judicial notice not of the existence of certain documents, but rather of the truth of their own interpretation of a matter of public record. Thus, this "fact" is subject to a reasonable dispute and judicial notice is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440.

13. Exhibit L: Comment Letter by Plaintiff HonoluluTraffic.com (through its Chair, Cliff Slater) regarding the March 2007 NOI.

Defendants submit Exhibit L for judicial notice on the basis that, because it is included in a matter of public record, it itself is also

a matter of public record. RFJN, ¶13. Defendants can not and do not cite to any legal support for the assertion that individual comments to the NOI's are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201. Indeed the very subject matter of such documents -- an individual's personal opinions and viewpoints concerning a certain topic -- are inherently subject to a reasonably dispute. Thus, to the extent Defendants seek judicial notice of the contents of these comments or Defendant's own legal interpretation of these comments, it is improper and should be denied.

14. Exhibit M: Written Comments by Plaintiff HonoluluTraffic.com (through its Chair, Cliff Slater) regarding the March 2007 NOI.

Defendants submit Exhibit M for judicial notice on the basis that, because it is included in a matter of public record, it is itself also a matter of public records. RFJN, ¶ 14. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

15. Asserted "fact": "The public record is devoid of any comments from Plaintiffs Cliff Slater (in his individual capacity), Benjamin Cayetano, Walter Heen, Hawaii's Thousand Friends, The Small Business Hawaii Entrepreneurial Education Foundation and Randall Roth and Dr. Michael Uechi in response to the NOI."

Defendants request this Court take judicial notice of this "fact." RFJN, ¶ 15. Defendants cite to no legal support which advances the proposition that courts can embark on this sort of speculative deductive reasoning to judicially notice the absence of facts.

Plaintiffs are also aware of no case law which deems a conclusion based on deductive reasoning is a judicially noticeable "adjudicative fact" nor any which allows a court to take judicial notice of the absence of a fact. Fed. R. Civ. Proc. 201. Moreover, Plaintiffs object that this "fact" simply represents Defendants' interpretation and characterization of alleged matters of public record and, as such, is wholly improper for judicial notice. *See Swartz*, 476 F.3d at 758, n.3 (A party's "characterization of [documents outside the pleadings] are subject to reasonable dispute and are therefore not properly noticed."); *see also, J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice"); *S. Cal. Edison Co.*, 300 F. Supp. 2d at 974 ("A court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted."); *Lawrence*, 759 F.2d at 776, n.13 ("[S]peculation is not appropriate matter for judicial notice."); *Lee*, 250 F. 3d at 690.

16. Exhibit N: November 21, 2008 *Notice of Availability* of the Draft EIS and subsequent *Amended Notices* of December 12, 2008 and December 19, 2008.

Defendants submit Exhibit N for judicial notice along with the "fact" asserting that the "*Amended Notice* informed the public that the comment period was extended to February 6, 2009." RFJN, ¶ 16. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

17. Exhibit O: Notice of public hearings published in the Honolulu Star-Bulletin newspaper on November 21, 2008 and corresponding facts.

Defendants submit Exhibit O for judicial notice along with the following "fact": "The FTA and the City conducted five noticed public hearings on the Draft EIS in December 2008." (RFJN, ¶ 17.)

Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

18. Asserted "fact": "The FTA and the City also conducted extensive public outreach program to inform the public of the Project's environmental impacts and to solicit public comments on the Draft EIS."

Defendants request this Court take judicial notice of this "fact." RFJN ¶ 18. Plaintiffs object that this "fact" simply represents Defendants' characterization (for example, note defendants' use of the term "extensive") regarding alleged matters of public record and, as such, is wholly improper for judicial notice. *See Swartz*, 476 F.3d at 758, n.3 (A party's "characterization of [documents outside the pleadings] are subject to reasonable dispute and are therefore not properly noticed."); *see also J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice"); *S. Cal. Edison Co.*, 300 F. Supp. 2d at 974 ("A court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted."); *Lawrence*, 759 F.2d at 776, n.13 ("[S]peculation is not appropriate matter for judicial notice.");

Lee, 250 F. 3d at 690. Accordingly, Plaintiffs object to this court taking judicial notice of Defendants' conclusory "fact."

19. Exhibit P: Written Comments to the Draft EIS by Plaintiff HonoluluTraffic.com (through its Chair, Cliff Slater).

Defendants submit Exhibit P for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶19. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

20. Exhibit Q: Comment Letter to the Draft EIS by Plaintiff Hawaii's Thousand Friends dated February 2, 2009.

Defendants submit Exhibit Q for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 20. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440..

21. Exhibit R: Oral Comments (transcribed by court reporter) by Plaintiff Dr. Michael Uechi regarding the Draft EIS.

Defendants submit Exhibit R for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 21. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

22. Exhibit S: Comment Letter to the Draft EIS by Plaintiff Dr. Michael Uechi dated February 6, 2009.

Defendants submit Exhibit S for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 22. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

23. Asserted "fact": "The public record is devoid of any comments from Plaintiffs Cliff Slater (in his individual capacity), Benjamin Cayetano, Walter Heen, the Small Business Hawaii Entrepreneurial Education Foundation, and Randall on the Draft EIS."

Defendants request this Court take judicial notice of this "fact." RFJN ¶ 23. Defendants cite to no legal support which advances the proposition that courts can embark on this sort of speculative deductive reasoning to judicially notice the absence of facts. Plaintiffs are also aware of no case law which deems a conclusion based on deductive reasoning is a judicially noticeable "adjudicative fact" nor any which allows a court to take judicial notice of the absence of a fact. Fed. R. Civ. Proc. 201. Moreover, Plaintiffs object that this "fact" simply represents Defendants' interpretation and characterization of alleged matters of public record and, as such, is wholly improper for judicial notice. *See Swartz*, 476 F.3d at 758, n.3 (A party's "characterization of [documents outside the pleadings] are subject to reasonable dispute and are therefore not properly noticed."); *see also J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice"); *S. Cal. Edison Co.*, 300 F. Supp. 2d at 974 ("A court may not take judicial

notice of one party's opinion of how a matter of public record should be interpreted."); *Lawrence,* 759 F.2d at 776, n.13 ("[S]peculation is not appropriate matter for judicial notice."); *Lee,* 250 F. 3d at 690.

24. Exhibit T: *Notice of Availability* of Final EIS and subsequent *Amended Notice* of July 23, 2010 and corresponding facts.

Defendants submit Exhibit T for judicial notice along with the following "fact": "This notice informed the public of the 30-day comment period (ending July 26, 2010) for the Final EIS." (RFJN, ¶ 24.)

Plaintiffs object on the basis that Defendants are improperly seeking judicial notice not of the existence of certain documents, but rather of their characterization of a matter of public record. Thus, this "fact" is subject to a reasonable dispute and judicial notice is improper under Federal Rules of Evidence. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440. This Court may not take judicial notice of the *truth* of whether the notice did inform the public of a comment period. *See* Fed. R. Evid. 201(b); *J. W. v. Fresno Unified Sch. Dist.,* 626 F.3d at 440; *Lee,* 250 F. 3d at 690. Doing so would be a factual determination beyond the scope of judicial notice. *Id.*

25. Exhibit U: Oral testimony of Plaintiff Cliff Slater regarding the Final EIS.

Defendants submit Exhibit U for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 25. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the

document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

26. Exhibit V: Written Comments to the Final EIS by Plaintiff HonoluluTraffic.com (through its Chair, Cliff Slater) dated August 16, 2010.

Defendants submit Exhibit V for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 26. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

27. Exhibit W: Written Comments to the Final EIS by Plaintiff Hawaii's Thousand Friends (through is Executive Director, Donna Wong).

Defendants submit Exhibit W for judicial notice on the basis that, because it is included in a matter of public record, it itself is also a matter of public record. RFJN, ¶ 27. Plaintiffs do not object to the request, so long as judicial notice extends only to the existence of the document and not to Defendants' interpretation of the document. Fed. R. Evid. 201 (b); *J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440.

28. Asserted "fact": "The public record is devoid of any comments from Plaintiffs Benjamin Cayetano, Walter Heen, the Small Business Hawaii Entrepreneurial Education Foundation, Randall Roth, and Dr. Michael Uechi on the Final EIS."

Defendants request this Court take judicial notice of this "fact." RFJN ¶ 28. Defendants cite to no legal support which advances the proposition that courts can embark on this sort of speculative deductive reasoning to judicially notice the absence of facts. Plaintiffs are also aware of no case law which deems a conclusion

based on deductive reasoning is a judicially noticeable "adjudicative fact" nor any which allows a court to take judicial notice of the absence of a fact. Fed. R. Civ. Proc. 201. Moreover, Plaintiffs object that this "fact" simply represents Defendants' interpretation and characterization of alleged matters of public record and, as such, is wholly improper for judicial notice. *See Swartz*, 476 F.3d at 758, n.3 (A party's "characterization of [documents outside the pleadings] are subject to reasonable dispute and are therefore not properly noticed."); *see also J. W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 440 (party's "improper interpretation [is] not subject to judicial notice"); *S. Cal. Edison Co.*, 300 F. Supp. 2d at 974 ("A court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted."); *Lawrence*, 759 F.2d at 776, n.13 ("[S]peculation is not appropriate matter for judicial notice."); *Lee*, 250 F. 3d at 690.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendants' Request For Judicial Notice to the extent it does not comply with Federal Rules of Evidence Rule 201.

Dated: September 26, 2011

Respectfully submitted,

/s/ Michael J. Green

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CERTIFICATE OF SERVICE

I certify that on September 26, 2011, I electronically filed the above document with the Clerk of the District Court using its CM/ECF system, which will send notice of electronic filing to the following:

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