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EXEMPT FROM FEES PER GOVERNMENT CODE §6103

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF SACRAMENTO**

JOHN TOS *et al*.,
Plaintiffs
vs.
CALIFORNIA HIGH SPEED RAIL AUTHORITY *et al*.,
Defendants

No. 34-2016-00204740

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER

[Code of Civil Procedure §527]

Date: April 18, 2017
Time: 9:00 PM
Department: 54
Action filed: December 13, 2016
Trial Date: Not Yet Set
Reservation: 2232493

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## INTRODUCTION

Defendants California High-Speed Rail Authority ("CHSRA") and Board of Directors of the California High-Speed Rail Authority ("Board", and the foregoing, collectively, "Defendants") have demurred against Plaintiffs' First Amended Complaint ("FAC") on basically two grounds. On the first cause of action, for declaratory relief, Defendants claim the cause of action must be dismissed as unripe. On the second cause of action, for injunctive relief under Code of Civil Procedure Section 526a, Defendants claim not only that it is unripe, but that it is improper, because it is, in reality, a challenge to Defendants' approval of two Final Funding Plans under Streets & Highways Code Section 2704.08(d), and such a challenge may only be brought by way of administrative mandamus. Defendants raised similar objections in the recently decided, and related[1], lawsuit *John Tos et al. v. California High-Speed Rail Authority et al. ("Tos I")* (Sacramento County Superior Court Case No. 34-2011-00113919, judgment entered March 22, 2016). Those objections were rejected by the trial court, as well as by the Court of Appeal, which summarily denied a petition for writ of mandate. (See, Plaintiffs' Request for Judicial Notice in Opposition to Demurrer and Motion to Strike Allegations) ["Plaintiffs' RJN"], ¶ 1 and Exhibits A and B thereto; see also, *California High-Speed Rail Authority v. Superior Court ("Calif. HSR Auth.")* (2014) 228 Cal.App.4th 676, 710.) For similar reasons, this Court should also reject Defendants' demurrer herein.

## BACKGROUND

In 1996, the Legislature created CHSRA and charged it with developing and implementing an intercity high-speed rail service integrated with the State's existing intercity rail and bus network. (Public Utilities Code § 185030; FAC ¶ 15.) In 2008, the Legislature placed on the ballot a $9.95 billion bond act, the "Safe Reliable High-Speed Passenger Train Bond Act for the

[1] See Notice of Related Case filed herein on December 13, 2016.

21st Century," to provide partial funding towards planning and constructing that high-speed rail service. (FAC ¶ 16.)

However, aware of the voters' potential hesitancy in approving that large an outlay of public funds, the Legislature placed in the measure numerous provisions to allay those concerns. They included both procedural requirements to be met before funds could be expended on construction (Streets & Highways Code § 2704.08; FAC ¶ 17), and substantive requirements on the system to be constructed with the bond funds. (Streets & Highways Code § 2704.09.) In *Calif. HSR Auth., supra,* 228 Cal.App.4th at p. 706, the Court of Appeal referred to those provisions as a "financial straitjacket" intended "to ensure the financial viability of the project." (*See also,* FAC ¶ 20; Plaintiffs' RJN, Exhibit C [Governor's Budget – May Revision 2008-9 High-Speed Rail Authority].) Among the requirements included within § 2704.08 were provisions that the basic construction unit for the system would be a "usable segment" containing at least two stations, and that when construction of a usable segment pursuant to the two Funding Plans provided for in that section was complete, it would be "suitable and ready for high-speed train operation." (FAC ¶ 22.) In November 2008, the voters approved the measure, denominated as "Proposition 1A" ("Prop. 1A"). (Streets & Highways Code, Section 9, Chapter 20, §§ 2704 – 2704.21; see also, generally, *Calif. HSR Auth., supra*, 229 Cal.App.4th at pp. 684-690.)

In November 2011, CHSRA approved a first, "Preliminary" Funding Plan for a usable segment that it termed its Initial Operating Segment ("IOS"), along with its Draft 2012 Business Plan. In April 2012, it approved a Final Revised 2012 Business Plan, which defined the IOS as a 300-mile segment extending from Merced through the Central Valley, across the Tehachapi Mountains, and into the San Fernando Valley. (*Calif. HSR Auth., supra*, 229 Cal.App.4th at pp. 690-691.) In July 2012, the Legislature, based on CHSRA's Final Revised Business Plan and Preliminary Funding Plan, approved appropriations of Prop. 1A bond funds for not only an initial 129-mile section of the IOS, but also for two "bookend" segments of the Phase I, San Francisco –

Los Angeles project: one at the northern end along the San Francisco Peninsula between San Francisco and San Jose; the other at the southern end in Los Angeles County. (*Id.* at pp. 691-692.)

While the money had been appropriated, it could not be spent on construction until CHSRA had prepared second "Final" Funding Plans for the segments involved. (Streets & Highways Code § 2704.08(d).) Perhaps because of the stringent requirements the voters had set for such Funding Plans in Prop. 1A, no such plans were prepared between 2012 and 2016.

During the 2016 legislative session, a Bill was proposed by Assembly Member Mullin, who represented part of the area in the northern "bookend" along the San Francisco Peninsula. (FAC ¶ 39.) The final enacted version of the Bill, AB 1889, provided that a corridor/usable segment would be considered suitable and ready for high-speed train operation if either, a) upon completion of the project's construction, high-speed rail trains could operate immediately, or b) they would be able to operate after additional planned investments had been made to the corridor/usable segment. (FAC ¶¶ 43-44.)

While several of the Plaintiffs herein raised objections to the Legislature, and to the Governor, that the bill was a unilateral and unconstitutional attempt to modify the terms of a voter-approved bond measure, the bill was given final approval and was signed by the Governor. (FAC ¶¶ 45-46.)

On December 13, 2016, the Board considered and approved two Final Funding Plans. (FAC ¶ 53.) One Funding Plan provided $600 million of Prop. 1A HSR construction funds towards electrifying a portion of the northern bookend segment. The electrified segment would be used by Caltrain, a local conventional rail commuter line. Eventually, after additional major future investments, it might also be usable by high-speed rail trains. (FAC ¶¶ 29-31, 52.)

The second Final Funding Plan provided $2.4 billion of Prop. 1A HSR construction funds towards construction of a "Central Valley Segment." That segment would only extend approximately 106 miles, between Madera and Shafter. While it would be electrified and would contain two stations (Kings/Tulare and Fresno), it would not be suitable and ready for high-speed

train operation (FAC ¶ 27, 51), nor would it carry any high-speed train service. (FAC ¶ 51; See Exhibit C to Plaintiff's RJN at p. 28 – second bullet point [Governor emphasizes the importance of having all funding needed to provide service on a segment before beginning its construction].) Rather, it would serve as a test track for high-speed rail cars when/if they were later purchased.[2] (FAC ¶¶ 27, 51.)

On January 3, 2017, the Chief Executive officer of CHSRA gave final approval to the two Final Finding Plans and transmitted them to the Director of the California Department of Finance ("DOF") for his approval. (FAC ¶ 53.)

According to the FAC, the DOF was expected to give his approval to one or more of the two Final Funding Plans on or before approximately March 4, 2017. (FAC ¶¶ 54, 64.) In fact, the DOF gave his final approval to the Central Valley Funding Plan on March 3, 2017. (Plaintiffs' RJN ¶ 2 and Exhibit E.) Once either of the Final Funding Plans had been given final approval by the Director of Finance, Plaintiffs alleged that Defendants would begin to encumber and expend Prop. 1A bond funds towards the construction of that project. (FAC ¶¶ 54, 64.)

## STANDARD OF REVIEW

A demurrer tests whether the complaint, or one or more of its causes of action, states facts sufficient to support a cause of action. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.) The complaint's allegations are given a reasonable interpretation, and all material facts that are properly pled are treated as admitted. (*Id.*)

> If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '*[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory.* (*Id.* [emphasis added].)

[2] The Final Funding Plan for the Central Valley Segment did not include funds for the purchase of any rolling stock to run on the segment. (Exhibit D to Plaintiffs' RJN at pp. 4-5.)

Thus, while there are classes of cases where a special proceeding in mandamus is considered the appropriate form of action, the failure to state an action as mandamus does not make it subject to demurrer.

> As against a general demurrer, however, it is unimportant that plaintiff's pleading was not in form a petition for mandamus or certiorari. All that is required is that plaintiff state facts entitling him to some type of relief, and if a cause of action for mandamus or certiorari has been stated, the general demurrer should have been overruled. [] Accordingly, an action for declaratory relief to review an administrative order should be regarded as a petition for a writ of mandate for purposes of ruling upon a general demurrer. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 546 [citations omitted].)

In considering a demurrer, the Court may consider not only the facts stated on the face of the complaint, but facts of which judicial notice may properly be taken. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

Even if a complaint is subject to demurrer, leave to amend should be granted liberally if there is any reasonable possibility that the complaint can be amended to state a viable cause of action. (*Mendoza v. JPMorgan Chase Bank, N.A.* (3rd Dist., 2016) 6 Cal.App.5th 802, 809.) Only when the complaint shows on its face that it is incapable of amendment should an initial demurrer be granted without leave to amend. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747.)

## ARGUMENT

### I. THE DEMURRER TO THE FIRST CAUSE OF ACTION SHOULD BE OVERRULED.

Defendants argue that the First Cause of Action, for declaratory relief on the claim that AB 1889 is facially unconstitutional, must be dismissed as unripe. (Defendants' Demurrer and Supporting Memorandum of Points and Authorities ("Def. P&As") at pp. 19-20.) Defendants argue that, because the DOF had not yet approved a final funding plan, the complaint stated no facts to support an actual controversy over the validity of AB 1889. (*Id.*) Defendants misunderstand both what constitutes a controversy and what defines ripeness.

Defendants appear to argue that, because a claim for declaratory relief could be raised in the context of a final, fully approved, funding plan, nothing short of that qualified as an actual ripe controversy. Nothing in the case law applying declaratory relief, and specific declaratory relief to find a statute facially unconstitutional, justifies such a narrow crabbed view of how declaratory relief may be applied.

While it may be true that, under the California Constitution, an administrative agency generally may not, on its own, declare a statute unconstitutional or unenforceable or refuse to enforce a statute, (*see, Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055), that does not prevent an adverse party from challenging, through declaratory relief, an agency's attempt to apply an unconstitutional statute. (*See, e.g.*, *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 272-273.)[3]

In *Agins*, a property owner whose land was affected by a zoning ordinance revision sued for inverse condemnation, arguing that the zoning ordinance had effectively taken his property by denying him all use. However, he had never attempted to apply for a permit to develop his property under the new zoning. The court ruled that he was entitled to seek declaratory relief to have the statute found facially unconstitutionally. *Alternatively*, he could, through administrative mandamus, seek relief against the statute as applied specifically to his property. Either type of relief was valid, but only the latter required first attempting to obtain a permit.

To take another example where declaratory relief was considered an appropriate avenue for having a statute declared unconstitutional, in *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, several local nonprofit organizations brought an action for

[3] Nor does it prevent an agency, faced with a threatened challenge to a statute's constitutionality, from itself seeking declaratory relief before attempting to enforce or implement the statute. (*Lockyer, supra,* 33 Cal.4th at pp. 1092-1093 [agency given limited judicial powers could make a preliminary administrative determination of statute's constitutionality, but in all other cases, the courts must make that determination]; *see also*, *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal.App.4th 141, 149-150 [proper method for county to determine whether measure should be kept off the ballot for failure to meet statutory standards was by filing action for declaratory relief].)

declaratory relief against the state, challenging the constitutionality of a statute exempting religious organizations, but no other type of group, from historic preservation laws. While the Supreme Court held that the statute did not violate the establishment clause, the court unquestionably accepted that declaratory relief was an appropriate method to raise a facial challenge to the statute's validity. (*See also, Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1428-1429 [claim for declaratory relief survived demurrer even in the absence of pending administrative action, where complaint alleged continuing policy dispute between the parties].)

In its quotes, Defendants' Points and Authorities imply that unless/until there is a final agency action (i.e., approval by DOF), the disagreement over the validity of AB 1889 is abstract and depends on "speculative future events." (Def. P&As at 20:19-20.) Such is not the case. Rather, and as alleged in the FAC (¶¶ 54, 64), the situation here is very much like that in *Hayward Area Planning Assn. v. Alameda County Transportation Authority ("HAPA")* (1999) 72 Cal.App.4th 95.

In *HAPA*, the defendants, the county transportation authority and Caltrans, proposed to use money from a county transportation sales tax measure to build a highway project dubbed the Hayward Bypass. Two local nonprofits sued for declaratory, injunctive, and traditional mandamus relief, claiming that the project differed significantly from the project authorized in the ballot measure. Defendants moved for summary judgment based on ripeness, because they had not yet given final approval to the project. The trial court agreed and dismissed the lawsuit, but the court of appeal reversed.

The court of appeal noted that for an issue to be ripe for adjudication:

> The legal issues posed must be framed with sufficient concreteness and immediacy so that the court can render a conclusive and definitive judgment rather than a purely advisory opinion based on hypothetical facts or speculative future events. (*Id.* at p. 102.)

Moving more directly to the issues in the case at hand, the court stated:

> We are cognizant that courts have found a case or controversy ripe for review where "the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law. (*Id.* at p. 103.)

The court went on to explain how ripeness applied to the issues in the case at hand:

> In considering whether issues are ripe for review, account should also be taken of the public interest in a prompt answer to a particular legal question and the relative hardship on the parties if a decision is deferred. [] We believe these considerations strongly militate in favor of a finding of ripeness. Appellants allege respondents are under a present duty imposed by the Act to use Measure B sales and use tax funds only for projects approved by the voters and that respondents are "improperly and illegally" expending Measure B funds to implement an unauthorized project. Absent judicial action, respondents have given every indication that they will, in effect, continue to exercise the very power that appellants claim they do not have and proceed with the putative project. Dismissing this appeal would require the parties to make the identical arguments at a later stage of these proceedings, after an expenditure of large sums of public money on a highly controversial project, the legality of which is still in question. Failure to resolve the tendered issue now will only create "lingering uncertainty" with respect to a transportation project that is the subject of widespread public interest in the Bay Area, and particularly Alameda County. (*Id.* at p. 104 [citation omitted].)

The situation here is highly analogous. The FAC adequately alleges that Defendants intend to use Prop. 1A bond funds towards construction of at least the Central Valley Segment, based on a Funding Plan that, according to the FAC, relies on AB 1889 for its validity. (FAC ¶¶ 54, 67, 69.) Defendants would ask that the current lawsuit be dismissed and the Plaintiffs file a new lawsuit in administrative mandamus based on a final approval that has now already been given. In the meantime, there will have been "an expenditure of large sums of public money on a highly controversial project, the legality of which is still in question."

The court concluded that, based on all these factors, "the issues raised in this controversy have 'sufficiently congealed' to the point of concreteness to justify review." (*Id.*) The same is true here. The issue of the facial constitutionality of AB 1889 is squarely before the Court, and waiting for additional facts to unfold[4] would only further delay resolution while doing nothing to change what is "purely a legal issue upon which the parties express fundamental disagreement." (*Id.* at p. 103.)

[4] As it turns out, those events have now unfolded almost exactly as stated in the FAC. (Compare: FAC ¶ 54 at pp. 12:27 – 13:1, to Exhibit E to Plaintiffs' RJN.)

## II. THE DEMURRER TO THE SECOND CAUSE OF ACTION SHOULD BE OVERRULED.

As with the First Cause of Action, Defendants argue that the Second Cause of Action, under Code of Civil Procedure Section 526a for illegal expenditure of Public Funds, should be dismissed as unripe. Defendants also argue that the cause of action, while claiming to seek injunctive relief against the illegal expenditure of public funds, is in reality a challenge to Defendants' approval of the two funding plans, and that challenge may only be made through administrative mandamus. (Def. P&As at p. 14.) Neither argument has merit.

### A. Plaintiffs' claim for illegal expenditure of public funds is separate from a challenge to defendants' approval of the funding plans, and need not be brought through administrative mandamus.

Defendants argue that the Second Cause of Action, while denominated as a claim for injunctive relief under C.C.P. Section 526a, is, in reality, a challenge the Defendants' approval of the two Final Funding Plans, and as such must be brought as administrative mandamus under Code of Civil Procedure Section 1094.5. While it is true that a challenge to a final administrative decision must be brought under § 1094.5, that is not the thrust of Plaintiffs' claim. Plaintiffs are not seeking here to overturn Defendants' approvals of the two funding plans.

Rather, Plaintiffs seek to block the illegal expenditure of Proposition 1A bond funds on a project that, without AB 1889, would violate the requirements of the bond measure. Plaintiffs allege that such expenditures would violate both the bond measure and the California Constitution. (FAC ¶ 3, 67; *See, Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 693 [expenditure of bond funds contrary to the provisions of the bond act constituted an illegal partial repeal of the bond's provisions].) Such an illegal expenditure of public funds is clearly subject to injunction under § 526a. (*See, e.g., Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-269 [suit properly sought to restrain expenditure of public funds to enforce unconstitutional implementation of ordinance]; *Osburn v. Stone* (1915) 170 Cal. 480 [suit challenged improper and illegal expenditure of city funds].)

From that point of view, it is irrelevant whether approval of the funding plans is final before the lawsuit is filed. What is required for a claim under § 526a is that "the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring *or will occur*." (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 749 [emphasis added].)

Here, Plaintiffs have alleged that, some time shortly after March 4, 2017, Defendants will begin to encumber and expend Prop. 1A bond funds towards construction pursuant to the two Final Funding Plans. (FAC ¶ 54.) That allegation adequately alleges an illegal expenditure of public funds. (See also, FAC at ¶ 64 [similar allegation].)

While it is true that under § 2704.08(d), Defendants may not commit and expend Prop. 1A funds on the Central Valley Project (or the Caltrain electrification project) until the DOF has given final approval to a Final Funding Plan, the FAC alleges that, as of now, such an approval would have [and in reality has] already occurred. (FAC ¶ 54; Exhibit E to Plaintiffs' RJN.) Plaintiffs have also alleged that, following the Final Funding Plans' approval, CHSRA intends to begin encumbering and expending Prop. 1A bond funds on the projects described in the Funding Plans. (FAC ¶ 64.) This is certainly a sufficient allegation of a threatened expenditure of public funds. The FAC also alleges that, but for AB 1889, the two Funding Plans cannot meet the requirements of Prop. 1A. (FAC ¶ 66.) Altogether, therefore, these allegations support a claim of threatened illegal expenditure of public funds and justify a claim for injunctive relief under § 526a to prevent those illegal expenditures. (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 449; *see also, Los Altos Property Owners Assn. v. Hutcheon* (1977) 69 Cal.App.3d 22 [demurrer overruled on claim that school district was wastefully spending public funds].)

Further, Plaintiffs also challenge past and already-occurring expenditures of public funds towards the preparation and approval of the two Funding Plans. (FAC ¶¶ 2, 47, 63, 67.) The illegality of these expenditures is independent of any final approval for the two Funding Plans and is an independent basis for seeking injunctive and remedial relief under Section 526a.

**B. Plaintiffs' claims under C.C.P. § 526a are ripe for adjudication.**

As with the First Cause of Action, Defendants also assert that any claim for injunctive relief under Code of Civil Procedure Section 526a is not ripe for adjudication. Their argument is that Plaintiffs seek:

> …to enjoin the Authority from approving future funding plans that do not yet exist, and from spending money on construction pursuant to plans that either do not exist or that the FAC alleges have not yet been approved by the Director of Finance. (Def. P&As at pp. 16:27 - 17:1.)

Defendants misapprehend and misrepresent the claims in the Second Cause of action.

Defendants claim to summarize the allegations in ¶¶ 63-69 in the FAC and ¶¶ 2-3 in the prayer for relief. If Plaintiffs were seeking a writ of administrative mandate to overturn the approval of the two funding plans in question here, Defendants might have a point. Obviously, a challenge to the final approval of an administrative action does not ripen until that approval is final.

Here, however, what is at stake is not the final approval of funding plans but the threat of illegal expenditure of public funds. That claim has already ripened with Defendants' expenditures on the preparation and approval of the two allegedly illegal funding plans. In addition, as in *HAPA, supra*, Plaintiffs have adequately alleged that while a final approval may not yet have been formally given, that approval is a foregone conclusion, as are the expenditures of Prop. 1A bond funds on construction of the two segments once that approval has been formally given.[5] (See also, *Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 400 [declaratory relief action was ripe despite no final determination having been made when agency admitted (through legal counsel) that it had already determined its course of action].)

[5] Indeed, as Defendants have admitted in Court, they intend to put the bonds to fund the Central Valley Segment up for public sale on April 20, 2016 – two days after the hearing on this demurrer.

## CONCLUSION

Obviously, Defendants would like this legal action to go away. A challenge to the validity of AB 1889 is, to say the least, inconvenient, especially when Defendants intend very shortly to begin spending Prop. 1A bond funds liberally on the two projects at issue herein. However, the constitutional provision prohibiting making a material change in the terms of a voter-approved bond measure without going back to the voters for approval of that change is fundamental to California voters' willingness to entrust their money for investment by public agencies.

Defendants here have sought to circumvent that provision, and that attempt must be addressed by the Court. For that reason, Defendants' demurrer, and the accompanying Motion to Strike, should be rejected and Defendants should be called to answer the complaint.

Dated: April 4, 2017

Michael J. Brady

Stuart M. Flashman

Attorneys for Plaintiffs

by: 

Stuart M. Flashman

**PROOF OF SERVICE BY OVERNIGHT AND ELECTRONIC MAIL**

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On April 5, 2017, I served the within PLAINTIFFS' OPPOSITION TO RESPONDENTS' DEMURRER; PLAINTIFFS' OPPOSITION TO RESPONDENTS' MOTION TO STRIKE ALLEGATIONS; and PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO RESPONDENTS' DEMURRER AND MOTION TO STRIKE ALLEGATIONS on counsel for the Defendants by placing true copies thereof enclosed in a sealed envelope with priority mail overnight postage thereon fully prepaid and submitting them to a U.S. Post Office station at Oakland, California for delivery at the address shown below:

Sharon O'Grady, Deputy Attorney General
Office of California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Sharon.OGrady@doj.ca.gov

In addition, on the above-same day, I also served the above-same documents, converted into pdf files, on the above-same party via electronic service as e-mail attachments sent to the e-mail address shown above. I received no e-mail response indicating that the e-mail had not been properly received.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on April 5, 2017.

Stuart M. Flashman