

**Civ. No. C070877**

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**CALIFORNIA COURT OF APPEAL  
THIRD APPELLATE DISTRICT**

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TOWN OF ATHERTON *et al.*,

Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL

AUTHORITY, a public entity,

Defendant/Respondent

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On Appeal from the Judgment and Post-Judgment

Order of the Sacramento County Superior Court

Honorable Michael P. Kenny, Judge

Cases No. 34-2008-80000022CUWMGDS

and 34-2010-80000679CUWMGDS

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**APPELLANTS' JOINT MOTION FOR JUDICIAL NOTICE IN  
SUPPORT OF ANSWER TO BRIEF OF AMICUS CURIAE UNION  
PACIFIC RAILROAD COMPANY**

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Attorney for Plaintiffs/Appellants

Plaintiffs/Appellants Town of Atherton *et al.* hereby move the Court to grant judicial notice under Evidence Code §§ 452(c) and 459 of the fact that the California High-Speed Rail Authority is a public agency within the State Transportation Agency of the Executive Branch of the government of the State of California.

In support of this fact, attached hereto as Exhibit A is a true and correct copy of the organizational chart for the Executive Branch of the State of California (as of July 1, 2013), as downloaded from the official State of California website at the URL:

<http://www.ca.gov/about/government/state/executive.html>

(See also, <http://www.gov.ca.gov/news.php?id=17617> [official notice and explanation of enactment of the Governor's Reorganization Plan No. 2 of 2012].)

## **SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. JUDICIAL NOTICE OF THE REQUESTED FACT IS APPROPRIATE.**

#### **A. NOTICE OF THE REQUESTED FACTS IS PROPER UNDER EVIDENCE CODE §§ 452 AND 459.**

In order for the court to take judicial notice of a fact, several conditions must be satisfied under Evidence Code §§451 or 452 and 459. First, the court must be authorized to take judicial notice of the fact under either §451 [mandatory judicial notice] or §452 [discretionary judicial notice]. Second, under §459, a reviewing court is required to take judicial notice of any fact or document that the trial court had noticed. Beyond that, the reviewing court is authorized to take judicial notice of any fact or document that the trial court could have taken judicial notice.

Ordinarily, a reviewing court will not take judicial notice of a fact for which judicial notice had not been requested in the trial court. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207-1208 & fn. 4.) Here, however, the preemption issue was first raised on appeal. Thus judicial notice of facts relevant to that issue could not have been requested in the trial court, as the issue to which the facts are relevant had not yet been raised. The current

situation represents an exception where judicial notice of facts or documents relevant to an issue may be requested for the first time in the reviewing court. (*See, e.g., Johanson v. City Council* (1963) 222 Cal.App.2d 68, 72 [judicial notice first requested on appeal appropriate where it was relevant to question of court's jurisdiction].)

The fact that the California High-Speed Rail Authority is a public agency located within the State Transportation Agency of the Executive Branch of California state government is subject to judicial notice under §452(c) as an official act of the executive and legislative branches of the State of California (Governor's Reorganization Plan No. 2 of 2012). (*See, e.g., Estate of Yule* (1943) 57 Cal.App.2d 652, 654 [court took judicial notice that the University of Washington was established under the laws of the State of Washington and is included within the government of the State of Washington].)

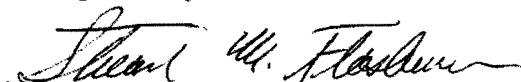
**B. THE DOCUMENTS AND FACTS ARE RELEVANT TO THE ISSUE OF FEDERAL PREEMPTION OF CEQA.**

In addition to being subject to judicial notice, judicial notice also requires that the document or fact at issue have relevance to an issue before the court. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1326.) As explained in Appellants' Joint Answer to the Brief of Amicus Curia Union Pacific Railroad Company, the requested fact has relevance to the scope of federal preemption under the ICCTA and the applicability of the market participant exception to Respondent California High-Speed Rail Authority. These, issues in turn affect the Court's jurisdiction to hear the appeal.

For the above reasons, Appellants' motion for judicial notice of the requested fact should be granted.

Dated: November 11, 2013

Respectfully submitted,



Stuart M. Flashman  
Attorney for Appellants