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December 2, 2013

The Honorable Vance W. Raye, Presiding Justice
Honorable Associate Justices
Third DistrictCourt of Appeal
Stanley Mosk Library and Courts Building
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

RE: Appellants' Joint Supplemental Letter Brief - Town of Atherton et al. v. California High-Speed Rail Authority, Case No. C070877.

Dear Presiding Justice Raye:

Attached please find, pursuant to the Court's order of November 18, 1013, Appellant's joint supplemental letter brief responding to new points raised in Respondent's answers to the briefs of Amici Curiae. The Supplemental Brief demonstrates that Respondent's attempt to distinguish its situation from those covered by the market participant exception to federal preemption are unavailing. The points are the following:

1) The California Environmental Quality Act ("CEQA", Public Resources Code §21000 et seq.) is not a regulatory mandate placed on Respondent by an outside party. It is, instead an internal pre-approval review requirement that the State of California has chosen to place upon itself and its component agencies.

2). Standing to raise the market participant exception as a defense to preemption is not limited to the defendant agency. Where neither a defendant state agency nor the Attorney General is willing to raise the market participant exception, California citizens and organizations who are benefited by the law being challenged may raise the market participant exception to defend the law.

3) While there is, as yet, no published case law where the market participant exception has been used to defend the actions of a public rail operator aganst prepmption by the ICCTA, the market participant exception has been successfully invoked to defend actions of a public entity involved in the trucking industry, which is also regulated by the ICCTA, and there is no indication that Congress intended to prevent application of the market participant exception.

Most sincerely,

Stuart M. Flashman
Attorney for Appellants Town of Atherton et al.
State Bar Number 148396

Case Number C070877

CALIFORNIA COURT OF APPEAL

THIRD APPELLATE DISTRICT

TOWN OF ATHERTON *et al.*,

Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,

Defendant/Respondent

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

APPELLANTS' JOINT SUPPLEMENTAL LETTER BRIEF RESPONDING TO NEW POINTS RAISED IN RESPONDENT'S ANSWERS TO BRIEFS OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

CALIFORNIA STATUTES

FEDERAL STATUTES

FEDERAL CASES

CASES FROM OTHER STATES

INTRODUCTION

This joint supplemental letter brief is submitted pursuant to the Court's order of November 18, 2013 allowing Appellants to submit supplemental briefing on new points raised by Respondent in its answers to two amicus briefs previously filed with the Court. The brief will address three new points raised by Respondent:

- that the market participant exception does not apply to Respondent's compliance with CEQA because compliance is required by the State of California as an external state regulator;
- that "private third parties"[1] may not invoke the market participant exception; only the market participant itself may invoke the doctrine; and
- that the market participant exception does not apply to the Interstate Commerce Commission Termination Act ("ICCTA").

As will be shown, none of these three claims justify rejecting the market participant exception under the current circumstances. This case presents a classic example of the State of California acting as a market participant in attempting to establish itself as a high-speed passenger rail service provider. Consequently, its decision to require application of CEQA to its own project is not preempted by the ICCTA.

ARGUMENT

I. CEQA IS BEING APPLIED BY THE STATE OF CALIFORNIA TO ITS OWN PROPRIETARY RAIL PROJECT.

Respondent argues that because it did not itself enact CEQA as its own environmental review process, the market participant exception does not apply. (Respondent's Answer to Letter Brief of Amicus Curiae Citizens for California High-Speed Rail Accountability ["Answer to

[1] Respondent points to Citizens for California High-Speed Rail Accountability ("CCHSRA"), a nonprofit mutual benefit corporation, as invoking the market participant exception. Numerous other organizations, as well as public entities and a former California Attorney General, joined in that amicus brief. Appellants, who also include multiple public entities, also ask the Court to apply the market participant exception.

CCHSRA Brief"] at pp.17, 20-21; Respondent's Answer to Letter Brief of Amicus Curiae Preserve Our Heritage ["Answer to POH Brief"] at p.10.) Instead, according to Respondent, its application of CEQA to its project is an external regulatory mandate imposed upon it by the State of California; a mandate that is preempted by the ICCTA.

Respondent's depiction of its status is inaccurate. Much as Respondent might wish to be an independent public agency, it is not. Rather, as Respondent admits (Answer to POH Brief at p.4), it is a part of the Executive Branch of California's state government, more specifically a component of the State of California's Transportation Agency. (See, Exhibit A to Appellants' Joint Motion for Judicial Notice in Support of Appellants' Joint Answer to Brief of Amicus Curiae Union Pacific Railroad Company.) Indeed, Respondent was created by the Legislature specifically to plan and implement the State of California's own high-speed rail system. (Public Utility Code §185030.)

As explained in much greater detail in the Supplemental Brief of Amicus Curiae Preserve Our Heritage ("POH Brief") at pp. 4-7, the relationship between the State of California and Respondent is not that of regulator and regulated entity. Rather, it is that of a sovereign state, part of the federal union, and a subsidiary entity within that state's own government structure. As the POH Brief makes clear, preemption will not override the control a state has over its own political subdivisions absent a clear and unequivocal statement by Congress of that intent. (*See, Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 141.) No such statement is contained within the ICCTA.

The relationship between the State of California and Respondent can also be analyzed under the market participant exception to preemption. By that analysis, the State of California is the overall proprietor of the proposed high-speed passenger rail system. It has delegated responsibility for establishing and implementing its enterprise to Respondent, which it created for that express purpose. Thus, the relationship between the State of California and Respondent is analogous to that of a private enterprise and a subdivision of that enterprise. The subdivision remains under the control of the enterprise, and the federal government has no more right to

preempt the interplay between the two than it would to interfere with the relationship between a private enterprise such as the Union Pacific Railroad Company ("UP") and a subsidiary rail operation (e.g., the Roseville, California Service Unit) owned and controlled by UP.

Respondent erroneously attempts to analogize its situation to that involved in *DHL Express (USA), Inc. v. State of Florida ex rel. Grupp ("Grupp")* (Fla. 2011) 60 So.3d 426, reh'g den. (Apr. 26, 2011), rev. den. (Fla. 2012) 81 So.3d 415, cert. den. (U.S. 2012) 132 S.Ct. 2753. That case involved an attempt by private individuals to assert Florida's false claims statute against a private shipping company's rate surcharges.

As *Grupp* explained, Florida's purpose in enacting its false claims statute went far beyond merely enforcing proper conduct in contracts with the state, a type of action that would be permissible under the market participant exception. (*See, e.g*., *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 [plaintiffs' objections to retroactive change in terms of contract made with airline, while within the scope of matters subject to preemption, was not preempted because it merely involved enforcing contract terms entered into between the company and the individuals involved].) If the action in *Grupp* had similarly been limited to enforcing the contract between the state and DHL, it would not have been preempted, because Florida would have been acting as a market participant. (*Grupp, supra*, 60 So.3d at 429.) The court concluded, however, that the false claims statute, by invoking the potential for treble damages, went far beyond a market participant's interest in contract enforcement and attempted to use Florida's regulatory power to influence DHL's (and other potential defendants') future behavior in the market. (*Id.*) Under the test established in *Cardinal Towing & Auto Repair, Inc. v City of Bedford, Tex. ("Cardinal Towing")* (5th Cir 1999) 180 F3d 686, 693, Florida's law was therefore subject to preemption.[2]

[2] The same result was reached for the same reasons in *State of New York ex rel Grupp v. DHL Express (USA), Inc. ("Grupp II")* (N.Y. 2012) 970 N.E.2d 391, 397.

Here, by contrast, Respondent's application of CEQA to its own conduct and its own project would have no effect on the rail transportation market. Respondent's reliance on *Grupp* is therefore misplaced.

II. APPELLANTS MUST BE ALLOWED TO ASSERT THE MARKET PARTICIPANT EXCEPTION TO PROTECT CEQA'S APPLICATION WHEN BOTH RESPONDENT AND THE ATTORNEY GENERAL HAVE STOOD ASIDE FROM ITS DEFENSE.

Respondent's second argument in favor of preemption is that only Respondent, and not any third party, has the right to assert the market participant exception to avoid preempting CEQA compliance. (Answer to CCHSRA Brief at pp. 22-23.) Respondent, however, can cite no case law to support its assertion. That is not particularly surprising, because there is none.

It is to be expected that a public entity whose actions are being curtailed would actively oppose federal preemption. After all, why would a market participant invite federal meddling in its internal affairs? This case, however, is the uncommon exception where Respondent seeks to have the Court invalidate statutory mandates enacted by its own master and creator, the California Legislature.[3] Perhaps Respondent will next seek to have the Court relieve it of other annoying state statutory mandates such as Bagley-Keene Open Meeting Law and the California Public Records Act?

A. THIRD PARTIES ARE ENTITLED TO SEEK TO PROTECT THE APPLICATION OF CALIFORNIA LAW WHEN BOTH THE STATE AGENCY AND THE ATTORNEY GENERAL REFUSE TO DO SO.

CEQA, as well as California's open meeting and public records laws, was enacted by the Legislature to benefit not only the state itself, but

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[3] Ordinarily, one would expect the California Attorney General to intervene on behalf of the state to protect the state's interest in defending its own laws against preemption. (*See, e.g.*, Application of John Van de Kamp *et al.* for leave to file Joinder *etc.* and Joinder to Portions of Supplemental Letter Brief of *Amicus Curiae* on Federal Preemption at p.3.) Here, however, the Attorney General has already committed itself in favor of preemption. (*See, Perry v. Brown* (2011) 52 Cal.4th 1116 [initiative proponent must be allowed to defend enacted measure when state Attorney General refuses to do so].)

also its citizens. (*See, e.g.*, Public Resources Code §§21000(e) [citizens have a responsibility to contribute to the preservation and enhancement of the environment], 21005(a) [violations of CEQA that preclude relevant information from being presented to the public may constitute prejudicial abuse of discretion even if the resulting decision is unaffected].) As the California Supreme Court stated in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392:

> If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [] The EIR process protects not only the environment but also informed self-government. [citations omitted]

Thus Appellants, as California citizens or as organizations (both public and private) made up of California citizens, have a direct and beneficial interest in seeing that CEQA is properly applied by the state to its own projects[4], and more importantly here, protecting the applicability of CEQA.

The situation is in many ways analogous to that which occurred in *Perry v. Brown* (2011) 52 Cal.4th 1116. In that case, opponents of Proposition 8, an initiative measure approved by California's voters, raised a constitutional challenge to the measure in federal court. In contrast to the usual situation, however, neither California's Governor nor its Attorney General, both named as defendants in the action, was willing to step forward to defend the statute. Indeed, the Attorney General actively asserted the measure's invalidity. (*Id.* at 1129.) The trial court, as a consequence, allowed the measure's official ballot proponents to intervene in the action to defend the measure's validity. (*Id*. at 1130.)

On appeal from the trial court's decision invalidating the measure, the Ninth Circuit Court of Appeal queried the California Supreme Court

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[4] It is significant that California law generally provides for citizen enforcement of CEQA and other statutes' citizen-protective provisions. (*See, e.g., Serrano v. Priest* (1977) 20 Cal.3d 25, 44-46 [endorsing private attorney general doctrine, grounded in recognition that public enforcement, e.g., by Attorney General, is often infeasible due to limited nature of resources available for public enforcement].)

about whether, under California law, the ballot measure proponents had standing to defend a ballot measure in the trial court or to pursue an appeal of a trial court decision when state official charged with defending the measure refused to do so. (*Id.* at 1124.) The California Supreme Court concluded that they did. (*Id.* at 1127.)[5]

Just as the proponents of Proposition 8 were entitled to defend that measure against challenge when the state Attorney General refused to do so, likewise here, Appellants, who have actively sought to enforce the California Legislature's mandate to a California state agency, should be allowed to protect CEQA when the Attorney General has refused to do so.

The situation is also analogous to one that occasionally occurs in a private corporation – the derivative suit. In a derivative suit, shareholders in a private corporation are allowed to bring suit to enforce the corporation's rights or redress its injuries when the corporation's own board of directors fails or refuses to do so.[6] (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) While Appellants are not technically "shareholders" in the State of California, they are either citizens or groups of citizens of the State of California. Because Appellants are acting to protect the State of California's interest in enforcing its own laws when Respondent and the California Attorney General have refused to do so, Appellants must be allowed to raise the market participant exception as a basis for rejecting preemption.

B. RESPONDENT MAY NOT PICK AND CHOOSE WHEN THE MARKET PARTICIPANT EXCEPTION APPLIES.

Respondent also asserts that it retains the prerogative to invoke federal preemption here, but oppose it later, when the occasion suits it, based on the market participant exception. (Answer to CCHSRA Brief at

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[5] The U.S. Supreme Court later rejected the applicability of *Perry* to the federal courts, based on lack of Article III standing under the U.S. Constitution. (*Hollingsworth et al. v. Perry et al.* (2013) 570 U.S. __ [slip opinion at 2, 10-13].)

[6] Normally, the corporation, while named as a defendant, is neutral in the derivative action, as it will be benefited if the suit is successful. (*Shen v. Miller* (2012) 212 Cal.App.4th 48, 58.) Here, however, Respondent, and the Attorney General, are actively opposing Appellants and seeking federal preemption.

p. 23.) Respondent's overreach should be rejected.

The market participant exception was established by the U.S. Supreme Court in *Hughes v. Alexandria Scrap* (1976) 426 U.S. 794. Since then, the federal courts have generally recognized that the actions of state and local government agencies, when acting as market participants rather than as governmental regulators, are not subject to federal preemption. However, nowhere in federal jurisprudence is there authority to support Respondent's assertion that it, rather than Congress or the courts, can decide when the market participant exception applies and when, conversely, its authority to act is preempted by a federal statute.

Assuming, based on congressional intent expressed in the ICCTA, that it preempts state regulatory action, Respondent is, in any specific instance, either acting as a market participant or as part of a regulatory scheme. When the former, its actions are <u>never</u> preempted; when the latter, they <u>always</u> are. Respondent may not pick and choose when the market participant exception applies to it.

If the Court were to decide that a particular type of action, such as making decisions about its high-speed rail project, was preempted by the ICCTA, that would be *res judicata* in regard to any future attempt by Respondent to make such decisions. Conversely, if the Court were to decide that such actions were exempt from preemption under the market participant exception, any similar future actions would likewise be exempt. Respondent may not turn the market participant exception off and on as if it were a light switch.

III. UNDER THE PRESENT CIRCUMSTANCES, THE MARKET PARTICIPANT EXCEPTION PROPERLY APPLIES TO THE ICCTA.

Respondent's third new argument in favor of preemption and against application of the market participant exception is that the market participant exception has not been applied under §10501 of the ICCTA [49 U.S.C. §10501]. (Answer to CCHSRA Brief at p. 24.)

While it may be true that there are no published cases addressing the market participant exception as specifically applied to §10501 and government-operated railroad enterprises making decisions about their own

projects[7], the market participant exception has been applied repeatedly to federal regulation of trucks, a subject also addressed in the ICCTA. (*See, e.g, Cardinal Towing, supra; Tocher v. City of Sana Ana* (9th Cir. 1999) 219 F.3d 1040[8].)

As explained in *Building & Constr. Trades Council v. Assoc. Builders & Contractors ("Boston Harbor Cases")* (1993) 507 U.S. 218, 231:

> In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

The *Boston Harbor Cases* decision issued in March 1993. The ICCTA was passed by Congress in December 1995, almost three years later.

Congress is presumed to be aware of the decisions of the U.S. Supreme Court and to take those decisions into account in formulating legislation. For example, in 1986, in *Exxon Corp. v. Hunt* (1986) 475 U.S. 355, the Supreme Court determined that §114(c) of the Comprehensive Environmental Response, Compensation, and Liability act of 1980 (42 U.S.C.. §9614(c)) preempted state taxes to fund clean-up of superfund sites. That same year, Congress repealed §9614(c). (*See, Manor Care, Inc. v. Yaskin* (3rd Cir. 1991) 950 F.2d 122, 125-126.)

If Congress had intended, in light of the *Boston Harbor Cases*, to prevent application of the market participant exception under the ICCTA, it would have been a simple matter for it to have added language to §10501 to do so. While §10501 of the ICCTA expressly preempts any state or local

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[7] Respondent cites to *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal. Jan 14, 2002) 2002 WL 34681621 as showing that §10501 preempted environmental review of a publicly-owned rail line. (Answer to CCHSRA Brief at 12.) Respondent fails to note that in *City of Encinitas*, it was the City, a *separate* public entity, that sought to require a coastal permit and associated CEQA review of the Transit Development Board's project. That is quite different from the situation here, where Respondent carried out CEQA review before approving its own project.

[8] *Tocher* recognized that the city's rotational tow list provision was exempt from preemption under the market participant exception, but that the city's attempts to regulate towing more generally were preempted.

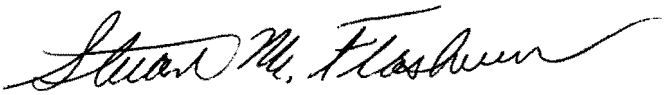
remedies with respect to the regulation of rail transportation, it is silent about a state's ability to manage its own property or direct the actions of its own subsidiary units when it pursues its purely proprietary interests. Further, the ICCTA certainly does not preempt private parties from using any particular criteria, including environmental concerns, in making internal decisions about their projects. In short, Congress, in writing the ICCTA, did not show the intent to prohibit or limit application of the market participant exception under the circumstances presented by this case. The court should therefore not infer that the ICCTA would prohibit the state of California, acting through the agency of Respondent, from using CEQA to guide its decisions about its own project.

CONCLUSION

Respondent may find applying CEQA frustrating. That is not an uncommon feeling among agencies repeatedly brought to task by the courts for doing a slipshod job of environmental review. Undoubtedly, Respondent would prefer to kick over the traces of CEQA and design its high-speed rail system without CEQA's constraints. However, as part of California's executive branch, it is obliged to follow the dictates of the state Legislature, including applying CEQA to the state's high-speed rail project.[9] If it feels the need to rid itself of those constraints, it needs to talk to the Legislature, not to the courts. Because the market participant exception applies, the ICCTA does not preempt Respondent's application of CEQA to the state's high-speed rail project.

Dated: December 2, 2013

Respectfully submitted,



Stuart M. Flashman
Attorney for Appellants

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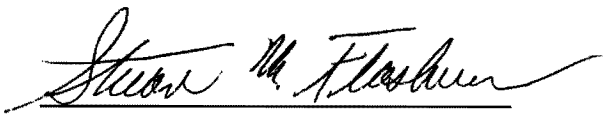
[9] *See, In re Rosenkrantz* (2002) 29 Cal.4th 616, 664 [Governor lacks discretion to disregard constitutionally mandated standards for granting or denying parole].

CERTIFICATION

I, Stuart M. Flashman, as the attorney for the appellants herein, hereby certify that the above brief, exclusive of caption, tables, exhibits, and this certification, contains 3,093 words, as determined by the word-counting function of my word processor, Microsoft Word for Windows 2002.

Dated: December 2, 2013



Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am an attorney licensed to practice in the State of California and am not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

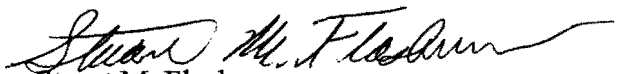
On December 3, 2013, I served the within APPELLANTS' JOINT SUPPLEMENTAL BRIEF RESPONDING TO NEW POINTS RAISED IN RESPONDENT'S ANSWERS TO AMICUS BRIEF on the parties listed on the attached service list by placing true copies thereof enclosed in sealed envelopes with first class postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as shown on the attached service list.:

In addition, on the above-same day, I served electronic copies of the above-same document, converted to "pdf" format, as an e-mail attachment, to the parties on the service list at the e-mail addresses shown.

In addition, on the above-same day, I served a copy of the above-same document, converted to "pdf" format, on the California Supreme Court through the Court of Appeal's website electronic filing address.

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

Executed at Oakland, California on December 3, 2013.



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