Civ. No. C076042

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*

Petitioners

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Respondent

JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS,

Real Parties in Interest

Sacramento County Superior Court Case Number 34-2011-0113919-CU-MC-GDS; Department 31, Hon. Michael P. Kenny, Judge.

PRELIMINARY OPPOSITION OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, COUNTY OF KINGS TO PETITION FOR EXTRAORDINARY WRIT OF MANDATE

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State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:
California High-Speed Rail Authority et al.
v.
Superior Court for the State of California for the County of Sacramento et al.

Court of Appeal Case Number: C0 76042

Please check here if applicable:

[X] There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information, if necessary.

Stuart M. Flashman
Signature of Attorney or Unrepresented Party

Date: March 29, 2014

Printed Name: Stuart M. Flashman
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Party Represented: Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

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INTRODUCTION AND SUMMARY OF ARGUMENT

For more than two years, ever since this case was filed in November 2011, Petitioners herein[1] have been trying to put this case into a box, slap a lid on it, and bury it. In doing so, they would also bury the right of California voters to hold public agencies accountable for how they spend bond funds. The Court should not cooperate in this burial.

As their latest ploy, Petitioners have filed this, their second petition for extraordinary writ of mandate in less than two months. Petitioners' latest argument is that the press of time until federal grant funds must be spent requires the court to insert itself into the trial court's pre-trial litigation to overturn an order denying Petitioners' Motion for Judgment on the Pleadings – the equivalent of a demurrer. (Petition at p. 9-10 (¶22).) By this argument, virtually any adverse trial court decision between now and the 2017 federal grant deadline could also receive immediate writ review.

Petitioners claim to seek relief based on their fear of facing a multitude of frivolous lawsuits whenever the Authority makes a minor

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[1] California High-Speed Rail Authority ("Authority"), Governor Edmund G. Brown, Jr. ("Governor"), Treasurer Bill Lockyer ("Treasurer"), Director of Finance Michael Cohen ("DOF"), Secretary of the State Transportation Agency Brian Kelly ("Secretary"), and Chief Executive Officer of the High-Speed Rail Authority Jeff Morales ("Morales", and the foregoing, collectively, hereinafter, "Petitioners")

change to its plans[2]. In reality, what they seek is a Court judgment immunizing the Authority's decisions on use of the voter-approved bond measure proceeds – past, present, and future – from any and all legal challenge.

Such a decision would fly in the face of long-standing and overwhelming precedent holding that the courts are entitled, and indeed required, to address challenges to the propriety of decisions, both formal and informal, on how voter-approved bond funds are used.

While there is no question that this is a very large and potentially important project, that does not relieve the courts of the jurisdiction and responsibility for considering whether the requirements of a voter-approved bond measure are being complied with, as required under Article XVI, §1 of the California Constitution. (*See, e.g., Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 692 [legislative appropriations violated provisions of bond measure that would fund the appropriations].)

The courts' ability to enforce compliance with the bond measure's requirements is all the more important given the almost ten billion dollars of taxpayer-funded bonds at stake.[3] That is the case when the action being

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[2] Although it has been more than five years since the passage of Proposition 1A, this is the only lawsuit that has been filed alleging noncompliance with that measure's requirements.

[3] The actual cost to the taxpayers would far exceed ten billion dollars, when interest on the bond debt is taken into account. (See, 11 HSR 5128-5129 [Tab 319] [explanation of costs of bond funding].)

questioned is a formal agency decision such as approval of a Funding Plan (the subject of Petitioners' other writ petition pending before this Court). It is equally true where more informal decision-making results in a threat of illegal expenditure of public funds, challengeable under Code of Civil Procedure §526a. (*See, .e.g., Hayward Area Planning Assn. v. Alameda County Transportation Authority ("HAPA")* (1999) 72 Cal.App.4th 95, 104, 110 [challenge to transportation agency's expenditure of sales tax funds under §526a proper even though the agency had not yet given formal approval to the challenged project].)

Petitioners allege that the continued trial court litigation puts $2.2 billion of federal grant funds at risk. (Petition, ¶22.) Although there is a 2017 deadline for expenditure of some of the federal grant funds (4 HSR 3321:2-6 [Tab 215]), that deadline is not sufficient reason for this Court to interject itself into the normal pretrial proceedings of the court below, especially when Petitioners have themselves stated that they will continue to spend those grant funds and expect to fully expend them prior to 2017, regardless of the continued trial court proceedings in this case. (1 HSR 252:23-28 [Tab 9]; 4 HSR 3321:15-20 [Tab 215].) And, of course, there will be no repercussions if the results of the trial indicate, as Petitioners assert, that the Authority is fully complying with the bond act. Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings (hereinafter,

"RPI") therefore respectfully request that the Extraordinary Petition for Writ of Mandate be summarily denied.

RELEVANT FACTS

I. FACTS STATED IN REAL PARTIES' FILING IN THE PREVIOUS WRIT PETITION CASE.

Most of the facts relevant to this writ petition have already been summarized in the Statement of Material Facts submitted by RPI with their Return by Answer and Supporting Memorandum of Points and Authorities in the related writ petition case *California High-Speed Rail Authority et al. v. John Tos et al.*, C075668. That statement is therefore incorporated herein by this reference.

II. EVENTS FOLLOWING THE TRIAL COURT'S DECISION ON THE FUNDING PLAN WRIT CHALLENGE.

After the trial court reached its decision on the writ issues in this case[4], it set a case management conference to discuss addressing the claims that had been made under Code of Civil Procedure §526a. (2 HSR Tabs 194-197.) At that time, Petitioners herein requested, and were allowed, to file a Motion for Judgment on the Pleadings in an attempt to avoid a trial on those claims. (2 AR 2888 [Tab 194].) The motion was fully briefed (2

[4] Those issues involved the Authority's adoption of a Funding Plan for its proposed Initial Operating Segment of its proposed high-speed rail system. In that context, RPI acknowledged that several of the writ claims in their complaint were not ripe. (1 HSR 215:16-18 and 25-28, 217:7-10.) However, they specifically reserved the issues involved under §526a for later determination. (*Id.*)

HSR 2861-2877 [Tab191]; 28 HSR 9553-9572 [Tab 449], 9578-9586 [Tab 451]) and heard on February 14, 2014. (28 HSR Tabs 453-453 [minutes], 9604-9626 [hearing transcript].) On March 4, 2014, the trial court issued its Ruling on Submitted Matter denying Petitioners' Motion. (28 HSR 9594-9597 [Tab 455].) Shortly thereafter, Petitioners notified counsel for RPI that they intended to file a writ petition in the Third District Court of Appeal contesting the trial court's decision. The parties stipulated to a stay of the trial court proceedings pending resolution of the writ petition. (28 HSR 9599-9601 [Tab 456].)

ARGUMENT

I. THE PETITION SHOULD BE SUMMARILY DENIED AS UNWARRANTED.

A. PETITIONERS WILL NOT SUFFER ANY IRREPARABLE INJURY THROUGH SUMMARY DENIAL OF THE WRIT PETITION.

Petitioners allege that they will suffer irreparable injury if the Petition is not granted. (Petition, ¶¶19-23) Their argument is that the mere continued pendency of this matter in the trial court "casts a cloud of uncertainty over the State's ability to bring the project to fruition." (Petition, ¶22.) According to Petitioners, this lawsuit, and any other legal challenge to the Authority's actions or decisions, "create a climate that puts those crucial federal funds, and thus the entire project, at risk." Petitioners do not provide any further explanation of how the mere pendency of a trial, without any injunction or other interim relief, threatens the Authority's

federal grant funds.[5] To the contrary, Petitioners have stated that they intend to continue using the federal grant funds regardless of the pendency of this action (1 HSR 252:23-28 [Tab 9]), and that even if the bond act funds prove unavailable, there are other funds, including AB 32 "cap and trade" auction proceeds, available through the Legislature with which to meet the federal grants' matching funds requirement. (See, 18 HSR 7193 [Tab 373] [discussion of funding sources for high-speed rail project]; see also Real Parties in Interest's Motion for Judicial Notice [Governor's appropriation request for $250 million in cap and trade auction funds for Authority for FY2014-2015].) In short, Petitioners can show no harm, and certainly no irreparable harm justifying extraordinary writ review, from the mere pendency of a trial on the Code of Civil Procedure §526a claims in the Second Amended Complaint ("SAC").

B. PETITIONERS HAVE AN ADEQUATE REMEDY THROUGH ALLOWING THE TRIAL COURT PROCEEDINGS TO RUN THEIR COURSE.

Petitioners assert that they have no plain, speedy, and adequate remedy at law. (Petition, ¶¶ 19-23.) As already explained, Petitioners have not incurred any irreparable harm by the mere pendency of a trial.

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[5] A permanent injunction against use of bond measure funds and a preliminary injunction against use of federal grant funds pending a trial on the §526a claims had been sought in the trial court (4 HSR 3354-3355, 3356:14.5-21.5 [Tab 217]), but the requests were denied. (1 HSR 39:11-17 [Tab 2].)

However, assuming such harm existed, Petitioners have an adequate remedy though allowing the trial court proceedings to run their course.

Petitioners argue that the Authority has acted within its proper discretion in proposing to use bond measure funds for its high-speed rail project. Perhaps, and perhaps not; but isn't that what a trial is intended to determine? Assuming the authority has acted within its proper legal discretion, the verdict from that trial will be in Petitioners' favor, and assuming Petitioners allow the trial to move forward without undue delay, no harm would be done.[6] If, on the other hand, the trial court found that the Authority was acting improperly in attempting to expend bond funds in violation of the bond measure's requirements, that violation would need to be taken seriously and an injunction against that expenditure would unquestionably be proper. In either case, there is no justification for immediate appellate review, and certainly none for short-circuiting the judicial system's duty of enforcing the Authority's compliance with its constitutional duties under the bond measure.

As Justice Mosk stated in his eloquent dissent in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 394, "for a reviewing court to inject itself before trial by the heroic means of a prerogative writ to prevent the matter from being heard," would serve as, "a cordial invitation to

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[6] Even if there *were* an appeal after a trial court verdict in Petitioners' favor, RPI, having lost at trial, would be unlikely to get an injunction blocking bond fund use while the appeal was pursued.

litigants to seek a prerogative writ in appellate courts whenever a trial court exercises its discretion contrary to their contentions." Justice Mosk's admonition applies with full force to the current case.

II. THE PETITION IS WITHOUT MERIT.

A. RPI ARE ENTITLED TO A TRIAL ON THEIR CLAIMS UNDER CODE OF CIVIL PROCEDURE §526a.

1. The Situation Here is not Appropriate for Resolution by Traditional Mandamus with an Administrative Record

Petitioners' basic argument is that the only way to challenge a public agency's actions is by way of a petition for writ of mandate under Code of Civil Procedure §1085 based on an administrative record. (Petitioners' Memorandum of Points and Authorities in Support of Petition ["Petitioners' P&As'] at p.14.) In fact, Petitioners argue that Code of Civil Procedure §526a cannot serve as a basis for a cause of action, but only as a liberalized standard for granting standing. (Petitioners' P&As at p.34.) As support, Petitioners cite to *Western States Petroleum Assn. v. Superior Court ("WSPA I")* (1998) 9 Cal.4th 559, 567 and *Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 602. Neither case supports Appellants' position.

WSPA concerned the specific question of whether extra-record evidence was allowable in a challenge under the California Environmental Quality act ("CEQA") to a quasi-legislative administrative decision. In that context, the court opined that quasi-legislative decisions are challengeable

under traditional mandamus, rather than administrative mandamus. However, later in the decision, the court specifically noted that the evidence for considering ministerial or informal actions is not limited to an administrative record. (*Id.* at 575.) *WSPA I* never took up, and certainly never decided, the appropriate proceedings for an action under Code of Civil Procedure §526a.

Brock, likewise, was limited to addressing the proper scope of administrative and traditional mandamus, and specifically the applicability of traditional mandamus to review of a quasi-legislative action of an agency. Again, it neither considered nor discussed actions under Code of Civil Procedure §526a.

Significantly, both *WSPA I* and *Brock* focused on situations where an agency was taking a formal quasi-legislative action. That, however, is not the nature of the allegations in the SAC at issue here. The SAC did, indeed, include numerous causes of action that focused on the Authority's approval of a Funding Plan for its proposed Initial Operating Segment. (9 HSR 4806 et seq. [Tab 292]; see also 11 HSR 5174 *et seq*. [adoption of Funding Plan [Tab 323].) Those claims were dealt with in the mandamus proceedings related to approval of the Funding Plan, based on an administrative record. The results of those proceeding are now before this Court for writ review in case number C075668.

However, the SAC also included claims under Code of Civil Procedure §526a for both illegal expenditure of public funds in violation of the requirements of the bond measure and for wasteful expenditure of public funds. (9 HSR 4808 (¶2), 4813 (¶12), 4815 (¶16), 4818 (¶18), and 4832-4833 (¶75) [Tab 292, SAC]; see also 28 HSR 9565-9567 [Tab 449] [explanation of causes of action under C.C.P. §526a].)

2. Claims under Code of Civil Procedure §526a are Properly Tried to Determine Contested Issues of Fact.

Petitioners try to shoehorn the claims of illegal expenditure of public funds in the SAC into a mandamus cause of action to be tried based on an administrative record. This is comparing apples and oranges. A mandamus action based on an administrative record is appropriate when an agency makes a formal determination, such as approving a project, certifying an Environmental Impact Report, or adopting an ordinance or general plan. Such was clearly the case for the claims associated with the Authority's approval of its Funding Plan, and those claims were in fact litigated in the mandamus portion of this case.

However, there can be little question that, contrary to Petitioners' claim, Code of Civil Procedure §526a can serve as the independent basis for a cause of action. (*See, e.g. Van Atta v. Scott* (1980) 27 Cal.3d 424*; Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist*. (2013) 215 Cal.App.4th 1013, 1031 [Cause of action under

§526a for improper expenditure of school bond proceeds].) More specifically on point here, the claims for illegal expenditure of public funds through violation of the requirements of the bond measure here, like those involved in *HAPA, supra,* involve an agency's determination to proceed in a particular direction (figuratively and literally) despite not having made a formal determination to that effect. (*HAPA, supra*, 72 Cal.App.4th at 103-104.) As such, there is no administrative record upon which to base a determination of disputed facts, such as the travel time between Los Angeles and San Francisco for the proposed project, because the Authority never took formal action to approve its "blended system."[7] Nevertheless, by the time the Legislature made its appropriation towards the Initial Construction Segment, the die had clearly been cast in favor of that choice. (See, e.g., 18 HSR 7253 [Authority presentation highlighting blended system] [Tab 374]; 6 HSR 4179 [joint legislative budget hearing on high-speed rail, discussion of blended system] [Tab 269].)[8] Likewise, in *Van Atta, supra*, 27 Cal.3d at 433, the plaintiffs challenged under C.C.P. §526a both the statutes providing for pretrial release of criminal defendants and San Francisco County's implementation of those statutes. A seven-day trial

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[7] The blended system was discussed in the Authority's 2012 Partially-Revised Program EIR for its Bay Area to Central Valley High-Speed Train Project. (See, 21 HSR 7930-7932 [comments of EIR] [Tab 390].)

[8] The appropriation which the Authority requested, and which the Legislature granted in SB 1029, included funds to initiate implementation of the blended system. (See, 6 HSR 4128 [Tab 269].)

was held to resolve disputed facts, leading to a judgment for the plaintiffs. (*Id*.) The California Supreme Court affirmed the judgment.

Petitioners continue to insist, as did the respondents in *HAPA, supra*, that claims about the characteristics of the proposed system are not yet ripe. (Petitioners' P&As at pp. 38-41.) That may have been true in November 2011, when the Authority approved its Funding Plan. By the time the SAC was filed, those claims had ripened. (See, 9 HSR [Tab 292 – SAC] 4814 (¶12), 4815 (¶15), 4816:19-22 ¶16a), 4818-4819 (¶¶ 18, 19).) As in *HAPA*, in the dispute between the parties, "the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*HAPA, supra*, 72 Cal.App.4th at 102.)

As to the claims of wasteful use of public funds, those claims relate solely to the federal grant funds that are being provided to the Authority by the Federal Railroad Administration. The SAC complaint asserts that, without sufficient funding to produce an actual useful segment of track, expenditure of those funds by the Authority towards construction of an unusable partial segment would be a wasteful use of public funds. . (9 HSR 4818 (SAC, ¶18).) This is not a matter of a difference of opinion as to how beneficial a working rail segment would be. Rather, it is more similar to building infrastructure that would not be usable. (*See, City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 555-556 [§526a action properly brought to enjoin city's construction of sewage system outside of

its sphere of influence].) As the trial court found, the claims in the SAC on this issue also suffice to defeat a Motion for Judgment on the Pleadings and allow the case to move forward to trial on the facts.

It should also be noted that the SAC was filed in July of 2012, more than a year and a half ago. Petitioners had ample time to challenge any claims they felt were unripe by demurrer, Motion for Judgment on the Pleadings, or even a Motion for Summary Judgment instead of sitting on their hands while the writ proceedings moved forward.

3. Under the Circumstances of the Case, Petitioners' Claimed Deferential Standard of Review is Inapplicable.

Petitioners argue that determination of whether the Authority's proposed high-speed rail project complies with the bond measure's substantive requirements must be judged by the deferential standard of abuse of discretion. (Petitioners' P&As at p.32.) Such is not the case.

Contrary to Petitioners' characterization, this case is not very different from *HAPA, supra*. In *HAPA*, the sales tax ballot measure's associated expenditure plan identified the projects to be funded by the sales tax proceeds and provided a brief description of each project. (*HAPA, supra*, 72 Cal.App.4th at 100.) The project at issue in that case, labeled at "Route 238 and Route 84," was accompanied by a brief general description of the route and a location map showing "a Foothill and Mission Boulevard alignment" for the project. (*Id.*)

Contrary to Petitioners' characterization, this did not convert constructing the project into a ministerial act. The county transportation authority retained considerable discretion in how it implemented the ballot measure's direction. Indeed, at the time the lawsuit was filed, the transportation authority was still in the midst of preparing an Environmental Impact Report/Environmental Impact Study for the project, including consideration of alternatives. (*Id*. at 102.) The court of appeal found, however, that the transportation authority did not have discretion as to whether it met the ballot measure's direction. It could not choose to use the sales tax funds to build a project that was substantially different from what the ballot measure had specified. (*Id*. at 105-106.)

Similarly here, while the bond measure gave the Authority discretion in how it met the measure's substantive requirements, as in *HAPA*, it did not provide discretion as to whether to meet them. Thus the question that would be before the court at trial, as in *HAPA*, is whether the Authority's proposed project meets the requirements of the ballot measure.

A determination of whether a statute has been complied with is judged by the "substantial compliance" standard. That standard has been described as:

> Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Western States Petroleum Assn. v. Board of Equalization ("WSPA II")* (2013) 57 Cal.4th 401, 426.)

In *WSPA II*, the court specifically noted that in questions involving statutory interpretation, the agency is entitled to no deference and the court exercises its independent judgment. (*Id.* at 415.)

Even on factual issues, the Authority, never having made a formal decision based on an administrative record, is not entitled to the deference that would be due it in a formal decision-making proceeding. (*See, California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 581 [record for an agency's informal action is not an adequate basis for judicial review, making extra-record evidence admissible].) The court may not presume there was evidence to support the decision when the decision was informal and the scope of the evidence ill-defined.

4. The Allegations in the SAC are Sufficient to Satisfy the Ripeness Doctrine at the Pleading Level.

Finally, Petitioners argue that the claims under Code of Civil Procedure §526a in the SAC are not ripe and therefore should be dismissed. Petitioners ignore the fact that their Motion for Judgment on the Pleadings only addressed the sufficiency of the complaint. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1491) As the trial court noted in denying Petitioners motion:

> Of course, at this stage, the Court reaches no conclusions regarding whether petitioners will be able to prove their claims. That is a matter to be resolved at trial. (28 HSR 9597:2-3 [Tab 450].)

It may well be that the allegations of illegal and wasteful expenditures of public funds made in the SAC will turn out not to be provable at trial. Petitioners will be entitled to argue at trial that the evidence shows those claims are not yet ripe, but that is not the issue here. The only question before the trial court was whether the allegations in the SAC sufficed to state a claim under Code of Civil Procedure §526a. The trial court, limited to considering the face of the complaint and documents subject to judicial notice, properly concluded that the claims were ripe and entitled to go forward to trial.

CONCLUSION

Understandably, Petitioners are uncomfortable about facing a trial over whether they are violating provisions of a voter-approved bond measure. The consequences of noncompliance could be severe, even to the point of the Authority not being permitted to use bond proceeds to construct its proposed project. However, close to a hundred years of consistent court decisions have made clear that the provisions of a voter-approved bond measure may not be ignored, nor may they be changed except by going back to the voters for approval of the change.

If Petitioners are properly following the requirements of Proposition 1A, they have nothing to fear from having to demonstrate their compliance at trial. If they are not, this Court should not allow them to circumvent California's constitutional requirements by using fallacious arguments

based on technicalities of writ review. The Petition should be summarily denied and the case remanded to the trial court so that RPI's claims can be tried on their merits.

Dated: March 29, 2014

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

Attorneys for Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings

By: Stuart M. Flashman

Stuart M. Flashman

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I, Stuart Flashman, certify that this Preliminary Opposition contains 3,894 words, including footnotes but excluding caption, tables, and this certification, as determined by the word count function of my word processor, Microsoft Word 2002, and is printed in a 13-point typeface.

Dated: March 29, 2014

Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC SERVICE

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 March 31, 2014, I served the within PRELIMINARY OPPOSITION OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS TO PETITION FOR EXTRAORDINARY WRIT OF MANDATE on the parties listed below by placing true copies thereof enclosed in sealed envelopes with first class mail postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as follows:

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In addition, on the above-same day, I also served electronic copies of the above-same documents converted to "pdf" format, as e-mail attachments on the parties indicated by an asterisk above at the e-mail addresses shown above, and on the California Supreme Court by submission at the Third District Court of Appeal internet website.

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 March 31, 2014.

Stuart M. Flashman