

FILED
ENDORSED

13 NOV -4 PH 3:57

LEGAL PROCESS #3

1 KAMALA D. HARRIS
 Attorney General of California
 2 TAMAR PACHTER
 Supervising Deputy Attorney General
 3 S. MICHELE INAN
 Deputy Attorney General
 4 State Bar No. 119205
 455 Golden Gate Avenue, Suite 11000
 5 San Francisco, CA 94102-7004
 Telephone: (415) 703-5474
 6 Fax: (415) 703-5480
 E-mail: Michele.Inan@doj.ca.gov
 7 *Attorneys for Defendants/Respondents California*
High-Speed Rail Authority, Chief Executive Officer
 8 *Jeff Morales, Governor Edmund G. Brown Jr., State*
Treasurer Bill Lockyer, Director of Finance Ana
 9 *Matasantos, Secretary of California State*
Transportation Agency Brian P. Kelly and State
 10 *Controller John Chiang*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

16 **JOHN TOS, AARON FUKUDA; AND**
 17 **COUNTY OF KINGS, A POLITICAL**
 18 **SUBDIVISION OF THE STATE OF**
 19 **CALIFORNIA,**

Plaintiffs,

v.

21 **CALIFORNIA HIGH SPEED RAIL**
 22 **AUTHORITY; JEFF MORALES, CEO OF**
 23 **THE CHSRA; GOVERNOR JERRY**
 24 **BROWN; STATE TREASURER, BILL**
 25 **LOCKYER; DIRECTOR OF FINANCE,**
 26 **ANA MATASANTOS; SECRETARY**
 27 **(ACTING) OF BUSINESS,**
 28 **TRANSPORTATION AND HOUSING,**
BRIAN KELLY; STATE CONTROLLER,
JOHN CHIANG; AND DOES I-V,
INCLUSIVE,

Defendants.

Case No. 34-2011-00113919

DEFENDANT/RESPONDENTS'
OBJECTIONS TO ARGUMENT AND
EVIDENCE FILED IN CONJUNCTION
WITH PLAINTIFFS/PETITIONERS'
REPLY BRIEF ON THE REMEDY
ISSUES

Date: November 8, 2013
 Time: 9:00 a.m.
 Dept: 31
 Judge: Hon. Michael P. Kenny
 Trial Date: May 31, 2013
 Action Filed: November 14, 2011

Filed by fax

1 Defendants/Respondent California High-Speed Rail Authority and the other
2 defendants/respondents (collectively Authority) object to the new argument and/or declarations of
3 Rita Wespi, William Warren and Stuart Flashman filed in conjunction with Plaintiffs/Petitioners'
4 (hereinafter Tos) reply brief addressing his request for remedies. The new argument and evidence
5 are objectionable in that they deprive the Authority of a meaningful opportunity to respond
6 requiring their exclusion. The new declarations are further objectionable in that they are
7 insufficient to prove the facts for which they are offered or are irrelevant.

8 GENERAL OBJECTION TO NEW MATERIAL

9 The Authority generally objects to all of the new argument and declarations presented in
10 Tos' reply brief for failure to raise the arguments and evidence in his opening brief. All of the
11 new argument and declarations are based on contracts (Tutor-Perini and Caltrans) and federal
12 grant agreements (ARRA and 2010 grants) referred to in Tos' opening brief and thus known to
13 Tos when he filed the opening brief.¹

14 It is improper to raise new arguments in a reply brief. (*Balboa Ins. Co. v. Aguirre* (1983)
15 149 Cal.App.3d 1002, 1010.) A petitioner cannot cure deficiencies in an opening brief by loading
16 the reply brief with the evidence missing from the opening brief. (*Opdyk v. California Horse*
17 *Racing Board* (1995) 34 Cal.App.4th 1826, 1830.) To allow this to occur would be unfair to the
18 Authority in a case as important as this case. (See *Tyler v. Children's Home Society* (1994) 29
19 Cal.App.4th 511, 526, fn. 8.) By raising them first on reply, Tos deprives the Authority of a
20 meaningful opportunity to respond, or requires it be put to the additional effort and delay of filing
21 an additional brief by permission. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362
22 [inclusion of new evidentiary matter with reply should be allowed only in exceptional case];
23 *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765 [inclusion of new matter requires
24 additional delay]; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [points
25 raised for the first time in reply will ordinarily not be considered]; accord, *Save the Sunset Strip*

26
27 ¹ The opening brief discusses both the Tutor-Perini and Caltrans contracts and the ARRA
28 grant agreement. (Opening Brief, filed September 16, 2013, pp 8-9, fn. 11; Request for Judicial
Notice, filed same day.)

1 *Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181, fn. 3.) The Authority
 2 asked the Court for permission to file a sur-reply but received no permission.

3 The following parts of reply brief contain new material that should be disallowed for failure
 4 to raise the material in the opening brief:

MATERIAL OBJECTED TO	NEW ARGUMENT
Reply, pp. 4:1-9 [discussing ancillary commitments], 5:19-6:2 [discussing necessary commitments]; Warren Decl., ¶ 12 [discussing needed commitments]; Wespi Decl., ¶ 6 [discussing imminent commitments]	The Authority has committed or is expected to commit \$2.118 billion (up from \$470 million in the opening brief) to construct the rail project including land acquisition and other costs
Reply, p. 6:8-11; Warren Decl., ¶¶ 11-12; see Wespi Dec., ¶ 6	Based on new revised amount of actual/expected commitments of \$2.118 billion, the Authority cannot build the segment of rail encompassed by the Tutor-Perini contract using all federal funding
Reply, p. 3:11-18; Warren Decl., ¶ 10	The Authority cannot use the ARRA federal funds to share in <i>any</i> contract costs (the opening brief asserted federal funds paid 50 percent of contract costs) because of a geographic restriction in the ARRA grant, leaving Proposition 1A bond funds to pay for full cost of the Tutor-Perini and Caltrans contracts
Reply, p. 5:13-18; Warren Decl., ¶¶ 7-9	The terms of the ARRA grant require the Authority to begin paying the full contract costs by April 2014 obligating bond funds to pay contract costs at that time (the opening brief asserted bond funds were committed because there were no other identified funding sources)
Reply, pp. 4:15-16, 6:3-11 & 18-19	To the extent that the ARRA and 2010 grants commit state funds that are not appropriated to match federal spending, the grants violate debt limit restrictions article XVI, section 1 of the California Constitution

24
 25 **OBJECTIONS TO SUFFICIENCY OF NEW EVIDENCE**

26 In addition to the general objection set forth above, the Authority specifically objects to the
 27 declarations of Warren, Wespi and Flashman, and any associated writings attached to those
 28 declarations, for lack of sufficiency as set forth below:

DECLARATION OF WILLIAM WARREN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MATERIAL OBJECTED TO	GROUND FOR OBJECTION
Warren Decl., ¶¶ 5-10 and Exhibits A-G	Opinions interpreting language of contracts and grant agreements to conclude that financial commitments have been made to spend Proposition 1A bond funds are: (1) not sufficiently beyond the scope of common experience to be of assistance to the trier of fact (<i>People v. McDonald</i> (1984) 37 Cal.3d 351, 367); and (2) prohibited in that the proper interpretation of a contract or statute is a issue of law for the court to determine (<i>Summers v. A.L. Gilbert Co.</i> (1999) 69 Cal.App.4th 1155, 1178) [whether duty exists]; <i>Howard Jarvis Taxpayers Ass'n v. City of Riverside</i> (1999) 73 Cal.App.4th 679, 689 [whether tax assessment exempt from Prop. 218]).
Warren Decl., ¶ 11 and Exhibits A-D	Opinion concluding there is insufficient amount of federal funds to cover the <i>full</i> cost of Tutor-Perini and Caltrans contracts and other costs in Fiscal Year 2014-2015 is: (1) an improper interpretation of grant agreement language to require full funding using state funds to pay for contracts (see objection above); and (2) an unreliable conclusion to the extent that it is based on data in a funding contribution plan dated December 2012 that estimates amounts of future funding sources and is updated quarterly to assess funding needs based on actual project development costs (Evid. Code, § 801) [opinion must be based on reliable matter]).
Warren Decl., ¶ 12 and Exhibits B-C & E-F	Opinion concluding that the total amount of expenditures needed to complete the project encompassed by the Tutor-Perini/Caltrans contracts is \$2.118 billion, including full contract, land acquisition costs and other costs: (1) is prohibited expert testimony interpreting grant agreement language to require full contract costs to be paid with state funds (see objection above); and (2) lacks foundation and is irrelevant in it conflates assessments of estimated costs with "commitments" (contract approvals) in place to pay costs prohibited by Streets and Highway Code section 2704.08, subdivision (d); and (3) is irrelevant in that all

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	construction-related costs are being paid with federal funds.
Warren Decl., Exhibit G	Letter from federal government to the Authority stating that Authority cannot use federal funds up-front to postpone use of the state matching funds to interpret provisions of the ARRA grant, Amendment 5 that allows advance use of federal funds: (1) is inadmissible parol evidence; (2) lacks foundation; and (3) is irrelevant. The letter was executed before the legislative appropriation of bond funds for construction in July 2012; whereas Amendment 5 was executed in December 2012 after the appropriation of federal and bond funds to document the parties' tapered match funding strategy allowing advance funding using federal funds.

DECLARATION OF RITA WESPI

MATERIAL OBJECTED TO	GROUND FOR OBJECTION
Wespi Decl., ¶ 5 and Exhibit B	Evidence that the Authority "expended and encumbered" \$4 million of bond funds for construction costs in Fiscal Year 2012-13: (a) lacks foundation; (2) is speculative; and (3) is irrelevant. All construction-related costs for the two contracts are being paid with federal funds. Documentation underlying the report shows that the bond funds were incorrectly encumbered as a source of project funding and they have not been spent. Because no bond funds can be committed for expenditure until there is compliance with subdivision (d) of Streets and Highways Code section 2704.08, the encumbrance has been reversed.
Wespi Decl., ¶ 6, beginning on line 10 and Exhibit C	Evidence that on September 10, 2013, the Authority authorized its CEO to enter into contracts that will "imminently commit additional construction-related expenditures (relocation of utilities)" in the amount of \$15,425, 913 to AT&T and \$42,785,783 to PG&E lacks foundation, is speculative and is irrelevant in it: (1) conflates or assumes that future estimated costs are "commitments" (executed contract approvals) to pay costs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

prohibited by Streets and Highway Code section 2704.08, subdivision (d); and (2) all constructed-related costs are being paid with federal funds.

DECLARATION OF STUART FLASHMAN

MATERIAL OBJECTED TO	GROUND FOR OBJECTION
Flashman Decl., ¶¶ 1-5	Declaration providing comments of a state legislator made at a legislative hearing held the day Senate Bill 1029 was enacted on July 18, 2012, is irrelevant. The statement indicating that the federal and state governments are "moving forward with voter approved bond monies matched by federal dollars" to create jobs, is irrelevant to prove that the Authority has, since approval of the funding plan, expended or committed bond funds for expenditure outside of subdivision (d) or (g) of Streets and Highways Code section 2704.08.

Dated: November 4, 2013

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

S. Michele Inan
S. MICHELE INAN
Deputy Attorney General
*Attorneys for Defendants/Respondents
California High-Speed Rail Authority, Chief
Executive Officer Jeff Morales, Governor
Edmund G. Brown Jr., State Treasurer Bill
Lockyer, Director of Finance Ana
Matosantos, Secretary of California State
Transportation Agency Brian P. Kelly and
State Controller John Chiang*

SA2011103275

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Tos, et al. v. California High Speed Rail Authority, et al.**
No.: **34-2011-00113919**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 4, 2013, I served the attached **DEFENDANT/RESPONDENTS' OBJECTIONS TO ARGUMENT AND EVIDENCE FILED IN CONJUNCTION WITH PLAINTIFFS/PETITIONERS' REPLY BRIEF ON THE REMEDY ISSUES** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Michael J. Brady
Ropers Majeski Kohn & Bentley
1001 Marshall St, Suite 500
Redwood City, CA 94063

E-mail Address: mbrady@rmkb.com

Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
Attorneys for Plaintiffs

E-mail Address: Stu@stufash.com

Raymond L. Carlson
Griswold, LaSalle, Cobb, Dowd & Gin, L.L.P.
111 E 7th STREET
HANFORD, CA 93230
Attorneys for Kings County Water District

E-mail Address: carlson@griswoldlasalle.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 4, 2013, at San Francisco, California.

Sandy Shum
Declarant


Signature