

FILED
ENDORSED

13 OCT 29 PM 3:42

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*

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SACRAMENTO

13
14
15 **JOHN TOS, AARON FUKUDA; AND
16 COUNTY OF KINGS, A POLITICAL
17 SUBDIVISION OF THE STATE OF
CALIFORNIA,**

18 Plaintiffs,

19 v.

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

27 Defendants.
28

Case No. 34-2011-00113919

**DEFENDANTS/RESPONDENTS'
SPECIAL APPLICATION TO STRIKE
OR DISREGARD NEW ARGUMENT IN
THE REPLY BRIEF ON REMEDIES, OR
IN THE ALTERNATIVE, REQUEST
FOR PERMISSION TO FILE A SUR-
REPLY**

Date: November 8, 2013

Time: 9:00 a.m.

Dept: 31

Hon. Michael P. Kenny

Trial Date: May 31, 2013

Action Filed: November 14, 2011

1 terms of the federal grants and the higher amount known to Tos and cited in his opening brief,
2 Tos now argues that: (1) the Authority cannot use the ARRA grant funds to pay for *any* contract
3 costs, leaving only state bond funds to pay contract costs (*id.*, p. 3:11-18; Warren Decl., ¶ 10); (2)
4 the ARRA grant requires the Authority to begin paying the full contract costs by April 2014 (*id.*,
5 p. 5:13-18; Warren Decl., ¶¶ 7-9); and (3) both grants (the ARRA and 2010 grant) commit state
6 funds in violation of debt limit provisions set forth in article XVI, section 1 of the California
7 Constitution (*id.*, pp. 4:15-16, 6:3-11 & 18-19).

8 ARGUMENT

9 The Authority asks the Court to strike or disregard the new argument and declarations
10 because they are based on contracts and federal grants known to Tos and cited in his opening
11 brief. All these sources were matters of public record known to Tos long before the filing of the
12 opening brief.³ Tos was required to present all points in the opening brief and could have done so
13 easily based on his understanding of the underlying documents.

14 It is improper to raise arguments for the first time in a reply brief. (*Balboa Ins. Co. v.*
15 *Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) A petitioner cannot cure deficiencies in an opening
16 brief by loading the reply brief with the evidence missing from the opening brief. (*Opdyk v.*
17 *California Horse Racing Board* (1995) 34 Cal.App.4th 1826, 1830.) To allow this to occur
18 would be particularly unfair to the Authority in a case as important as this case. (See *Tyler v.*
19 *Children's Home Society* (1994) 29 Cal.App.4th 511, 526, fn. 8.)

20 Further, the new arguments are meritless and the declarants are not competent to testify.
21 By raising them on reply, Tos either deprives the Authority of any meaningful opportunity to
22 respond, or requires that the Authority be put to the additional effort and delay of filing an
23 additional brief by permission. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362
24 [inclusion of additional evidentiary matter with reply should only be allowed in exceptional case];
25 *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765 [inclusion of new matter requires

26
27 ³ Contemporaneously with his opening brief Tos asked the Court to take judicial notice of
28 the two contracts (see Tos' Request for Judicial Notice, filed September 16, 2013, Exhibits A and
B thereto), and he referred to the ARRA grant agreement in footnote 11 of the opening brief.

1 additional delay]; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [points
2 raised for the first time in a reply brief will ordinarily not be considered because this would
3 deprive the respondent of an opportunity to counter the argument]; accord, *Save the Sunset Strip*
4 *Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181, fn. 3; see also Ruling,
5 filed August 16, 2013, pp. 13:16-14:2 [arguments raised for the first time in a reply brief on the
6 merits will not be considered].)

7 For these reasons, the Authority requests that the new evidence and argument be stricken or
8 disregarded, or in the alternative, that the Authority be permitted to file a sur-reply by November
9 4, 2013.

10 Dated: October 29, 2013

Respectfully Submitted,

11 KAMALA D. HARRIS
12 Attorney General of California
13 TAMAR PACHTER
14 Supervising Deputy Attorney General

15 

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

26 SA2011103275

DECLARATION OF SERVICE BY 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 October 29, 2013, I served the attached **DEFENDANTS/RESPONDENTS' SPECIAL APPLICATION TO STRIKE OR DISREGARD NEW ARGUMENT IN THE REPLY BRIEF ON REMEDIES, OR IN THE ALTERNATIVE, REQUEST FOR PERMISSION TO FILE A SUR-REPLY** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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

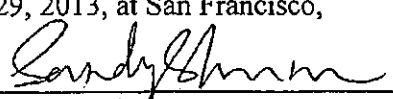
Stuart M. Flashman
Law Offices of Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
Attorneys for Plaintiffs

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

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 October 29, 2013, at San Francisco, California.

Sandy Shum

Declarant



Signature