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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF SACRAMENTO**

JOHN TOS, AARON FUKUDA, and COUNTY OF KINGS,
Plaintiffs
v.
CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*,
Defendants

No. 34-2011-00113919 filed 11/14/2011
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31 (to be handled as writ)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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| Date: | February 14, 2014 |
| Time: | 9:00 A.M. |
| Dept.: | 31 |
| Judge: | Hon. Michael P. Kenny |
| Trial Date: | Not yet set |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CALIFORNIA STATUTES**



**TREATISES**

## INTRODUCTION

Defendants California High-Speed Rail Authority *et al.* (hereinafter, "Defendants") have filed this Motion for Judgment on the Pleadings seeking to cut short the continuation of this case. Yet this case has been, from the beginning, a two-part case. The first part, challenging the California High-Speed Rail Authority's ("CHSRA") approval of its funding plan, was based on violations of Proposition 1A's procedural mandates. It was litigated as a mandamus challenge to what Defendants characterize as a quasi-legislative act. The second half addresses Defendants' substantive violations of Proposition 1A pursuant to Code of Civil Procedure §526a, and remains to be litigated.

Defendants make two basic types of arguments: The first is that no claims may be tried under Code of Civil Procedure §526a. According to Defendants, §526a does not create a cause of action – only a basis for asserting standing, and any action must proceed as a Code of Civil Procedure §1085 mandamus challenge to a legislative act or not at all. (Defendants' Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings [hereinafter, "Defendants' P&As"] at pp.3-6.) The second argument is that Plaintiffs' remaining claims cannot be litigated, either because: 1) they were already litigated and decided in the writ proceedings, 2) they were not pleaded in Plaintiffs' Second Amended Complaint (hereinafter, "SAC"), or 3) they do not constitute a cognizable cause of action. As will be shown, all these arguments fail.

## BACKGROUND

The first phase of the high-speed rail system that CHSRA proposes to build would connect the Transbay Terminal in San Francisco to Union Station in Los Angeles, with service to Anaheim as well. The second phase would add in service to Sacramento and San Diego. Major initial funding was to be provided by a $9.9 billion bond measure approved by California voters in November 2008 as Proposition 1A. Nine billion dollars of that bond are specifically dedicated to help construct the high-speed rail system, with an expectation of matching federal, local, and private funds.

The bond measure placed a number of procedural and substantive requirements on the use of the bond proceeds. The procedural requirements are contained primarily in Streets & Highways Code §2704.08, while the substantive requirements are found, for the most part, at §2704.09.

Procedurally, the measure requires that CHSRA approve two successive funding plans for any high-speed rail corridor or usable segment thereof that it intends to build. The first funding plan must be prepared prior to seeking an appropriation of bond funds (Streets & Highways Code §2704.08(c)(1)), and the second, more detailed, of these funding plans also requires review and approval by the California Director of Finance before bond funds can be spent on actual construction activities (Streets & Highways Code §2704.08(d). The funding plans must include several specified elements. The initial funding plan for any corridor or usable segment must include a series of certifications by the CHSRA that requirements for the corridor or usable segment have been met, including that it will not require any local, state, or federal operating subsidy (Streets & Highways Code §2704.08(c)(2)(J)).

Substantive requirements for the high-speed rail system that are set forth in Streets & Highways Code §2704.09 include: 1) that the trains to be operated be capable of sustained revenue operations at a speed of at least 200 mph (subsection (a)); 2) that the train, during nonstop passenger service, meet certain time requirements, most notably being able to make the trip between Los Angeles and San Francisco terminals in no more that 2 hours and 40 minutes (subsection (b)(1)); and 3) that the high-speed rail system and its alignment shall be financially viable (subsection (g)). In addition, Streets & Highways Code §2704.04(a) requires that the train system be consistent with the plans laid out in the Environmental Impact Reports certified in 2005 and 2008.

In November 2011, the CHSRA approved an initial funding plan for an initial operating segment including an area of the Central Valley between Merced and Bakersfield and extending either northward to San Jose (IOS-North) or southward into the San Fernando Valley (IOS-South). Shortly thereafter, Plaintiffs filed this action, challenging that funding plan as well as

more general aspects of the proposed system for failure to comply with the requirements of Proposition 1A. A month later, Plaintiffs filed a First Amended Complaint, and in July of 2012, following the granting of a demurrer with leave to amend, Plaintiffs filed their Second Amended Complaint, which remains the operative complaint for this action.

On May 31, 2013, pursuant to the stipulation of the parties and the Court's order, Plaintiffs claims challenging the initial funding plan were heard in a mandamus proceeding. On August 16th, the Court issued its ruling finding that the funding plan violated provisions of the ballot measure. After additional briefing and an additional hearing, on November 26, 2013 the Court issued a supplemental ruling, concluding that a writ of mandate was warranted ordering rescission of the initial funding plan. An order was signed and the writ issued on January 3, 2014.

**STANDARD OF REVIEW**

As Defendants note, a motion for judgment on the pleadings is decided on much the same basis as a general demurrer. (Defendants' P&As at p. 3; Code of Civil Procedure §438(c)(1)(B); Weil & Brown, Civil Procedure Before Trial (2006) §7:275; *Civic Partners Stockton, LLC v. Youssefi* (2013) 218 Cal.App.4th 1005, 1012-1013.) As with a demurrer, the court must assume the truth of all facts properly alleged in the complaint, (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166), regardless of any difficulty there might be in actually proving their truth at trial (see *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1120 [stating that the standard applies in considering a demurrer]).

As California is a fact-pleading state, a motion for judgment on the pleadings must be denied if the facts alleged in the complaint state a viable cause of action under any legal theory. (Cf. *Castaneda v. Department of Corrections & Rehabilitation* (2013) 212 Cal.App.4th 1051, 1060; *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 [stating the same standard for a demurrer].)

If a motion for judgment on the pleadings is granted, it should generally be granted with leave to amend, so long as there is a reasonable possibility that the deficiencies identified by the

court can be cured by amendment. In such cases it is error for the court to refuse to grant leave to amend. (*Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1006; *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 655.)

## ARGUMENT

### I. PLAINTIFFS MAY PROSECUTE CAUSES OF ACTION UNDER CODE OF CIVIL PROCEDURE §526a OTHER THAN BY MANDAMUS CHALLENGING A FORMAL LEGISLATIVE ACTION.

Defendants argue that Code of Civil Procedure §526a does not define a cause of action, but only a basis for standing. (Defendants' P&As at pp.4-5.) Defendants go on to claim that Plaintiffs' claims are all based on Defendants' formal quasi-legislative action in adopting its funding plan, and must be pursued, if at all, by a challenge to that approval through traditional mandamus based on the administrative record for that approval[1]. (*Ibid.*) However a writ of mandate, like declaratory or injunctive relief, is as much a remedy as a cause of action. If Plaintiffs have alleged facts constituting a valid cause of action, they are entitled to pursue the appropriate remedy or remedies.

Further, not all of Plaintiffs' claims arose out of Defendants' (and specifically CHSRA's) adoption of its funding plan for an initial high-speed rail segment. In particular, the claims on which the §526a actions are premised arise out of CHSRA's more informal, but still well-defined, determination of the nature of its high-speed-rail system, as well as from the past, present, and threatened future actions of other defendants. Defendants certainly can (and do) argue that those claims either were not stated in the SAC or do not constitute causes of action, but they cannot reasonably assert that those claims arose out of CHSRA's adoption of its funding plan and had to be litigated in the writ proceedings addressing that action.

[1] Defendants also argue that a court trial with expert witnesses is singularly inappropriate because of the process, including a peer review committee, that Proposition 1A set up to advise the Legislature about the suitability of the funding plan. (Defendants' P&As at p.6.) While that may have informed the Legislature, the Court is not reviewing the propriety of the Legislature's decisionmaking process. (See, Ruling on Submitted Matter, August 16 2013, at p.13.)

A. THE CLAIMS PLAINTIFFS INTEND TO PURSUE UNDER C.C.P. §526a DID NOT ARISE OUT OF THE ADOPTION OF THE FUNDING PLAN.

The crux of Defendants' argument is the assertion that all of Plaintiffs' claims arose out of CHSRA's adoption of its funding plan in November 2011. A reading of the SAC shows otherwise. Certainly, it is true that some of the claims in the SAC arose out of CHSRA's November 2011 action. In particular, the claims relating to violation of CHSRA's procedural duties under Streets & Highways Code §2704.08(c), and more specifically as to the statements and certifications required under subsection(c)(2), unquestionable ripened into actionable claims when CHSRA violated those duties in adopting its funding plan.

However, adoption of the funding plan did not, in itself, raise justiciable issues regarding CHSRA's compliance with the substantive requirements of §2704.09 (e.g., SAC ¶¶ 12, 45; 55, 56) nor did it raise other broader issues, including (1) adoption of the "blended system" as a potential final configuration for the high-speed rail system[2] (e.g., SAC at ¶ 16a), (2) whether it was lawful for the legislature to appropriate bond funds for a project not in compliance with the bond measure, and (3) the appropriateness of continuing to expend public funds[3] on partial costruction of a system without sufficient funding to produce a useful project (SAC at ¶18). All of these claims arose separately from and after the adoption of the funding plan. Plaintiffs cannot, therefore, be forced to litigate them in the context of the funding plan's adoption.

B. THREATENED ILLEGAL OR WASTEFUL EXPENDITURE OF PUBLIC FUNDS IS A CAUSE OF ACTION SEPARATE FROM A MANDAMUS CHALLENGE TO FORMAL APPROVAL OF A LEGISLATIVE ACT.

Defendants not only assert that all Plaintiffs' section 526a claims arose from adoption of the funding plan, they further argue such claims may only be brought through a mandamus action challenging the ostensibly quasi-legislative act of adopting the funding plan, which challenge must be based on an administrative record. (Defendants' P&As at p.4.) Plaintiffs

[2] The "blended system" (which is merely a shorthand name for CHSRA's currently proposed system) was not even identified as a possible end-point for the high-speed rail system until CHSRA's issuance of it Revised 2012 Business Plan in April 2012.

[3] Such funds include the federal grant funds, which have been granted to the State of California and upon application to the project, become the property of the state.

agree that a challenge to a formal quasi-legislative decision must be brought in mandamus, but even where a formal decision has been made, if that decision is indicative of a controversy involving a broader policy or course of conduct, that broader claim can, in addition, be maintained through an action for declaratory and/or injunctive relief. (*Venice Town Council, Inc. v. City of Los Angeles ("Venice")* (1996) 47 Cal.App.4th 1547, 1556; *Californians for Native Salmon etc. Assn. v. Department of Forestry ("CNSA")* (1990) 221 Cal.App.3d 1419)

Further, there is no support for the notion that the only way an illegal or wasteful expenditure of public funds may occur is through a formal legislative or quasi-legislative action. Examples of successful §526a claims not involving a formal legislative or quasi-legislative action abound. A few examples will suffice to illustrate this. In *White v. Davis* (2003) 30 Cal.4th 528, a taxpayer sued challenging the state controller's continued payment of salaries to state employees in the absence of an approved budget. In *Howard Jarvis Taxpayers Assn. v. City of La Habra ("HJTA")*(2001) 25 Cal.4th 809,a taxpayer suit successfully challenged the continued collection of a tax that violated provisions of Proposition 62. In the seminal case *Van Atta v. Scott* (1980) 27 Cal.3d 424, a §526a action, with a court trial, was used to challenge San Francisco's implementation of state statutes governing setting bail for pretrial detention. Finally, in *Hayward Area Planning Assn. v. Alameda County Transportation Authority ("HAPA")* (1999) 72 Cal.App.4th 95, 102-104, an action with many similarities to the current case, the court held that the plaintiffs could maintain an action under §526a where the defendants, the County Transportation Authority and the Department of Transportation, were moving forward and expending public funds on a project that was contrary to the requirements of the voter-approved ballot measure that provided the funding for the project, even though the defendants had <u>not</u> taken any final legislative action to approve that project.

Finally, it must be recognized that in California:

> …a cause of action is comprised of a primary right of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The gravamen, or essential nature, of a cause of action is determined by the primary right alleged to have been violated, not by the remedy sought. The nature of the relief sought does not determine the nature of the cause of action because the violation of one primary

> right may entitle the injured party to many different forms of relief. Injunctive relief is a remedy and not, in itself, a cause of action .... Nevertheless, the phrase "cause of action" is also commonly used in pleading as applying only to the relief sought, even though the separately pleaded claims have origin in the same right or obligation. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 159-160 [citations and internal quotation marks omitted].)

Under California's liberal "fact pleading" approach to pleading, the plaintiff need not accurately identify the legal theory giving rise to his or her cause of action. He or she need only allege sufficient ultimate facts to constitute a cause of action, that is, to put the defendant on notice of the factual basis of the claim. (*Lim v. The.TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 689-690; see also *McBride v. Boughton* (2004) 124 Cal.App.4th 179, 387-388[explaining that a court should ignore labels in a challenged pleading and look to the substantive nature of what is alleged to determine whether the pleading states a cause of action].)

Here, Plaintiffs have alleged a duty (to avoid making an illegal or wasteful expenditure of public funds) a corresponding taxpayer's right to enforce that duty, and instances where, according to the allegations of the SAC, Defendants have violated their duty by illegally and/or wastefully either expending or intending to expend public funds in connection with CHSRA's high-speed rail project. Each set of allegations suffices to state a cause of action under §526a. The fact that they might also suffice to maintain an action under Code of Civil Procedure §1085 "to compel the performance of an act which the law specially enjoins" is immaterial. (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130 [availability of mandamus relief under California Public Records Act did not, in general, preclude seeking relief under §526a].) It is the pleading of ultimate facts constituting a cause of action, not the name placed on that action, that matters. (*McBride, supra*.)

Plaintiffs have pleaded sufficient facts to constitute causes of action for illegal or wasteful expenditure of public funds.[4] Those facts also suffice to support a variety of remedies,

[4] The allegations also sufficiently allege actual controversies to support claims for declaratory relief. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 848 [declaratory relief operates prospectively to address future expected or intended actions].)

including declaratory and/or injunctive relief, as well as a writ of mandate ordering Defendants to follow the dictates of Proposition 1A; not their current illegal and wasteful course.

## II. PLAINTIFFS' §526a CLAIMS WERE NEITHER LITIGATED NOR RESOLVED THROUGH THE MANDAMUS PROCEEDINGS.

Defendants assert that Plaintiffs' claims under §526a have already been resolved through the concluded mandamus litigation over CHSRA's approval of its funding plan. CHSRA is mistaken, because none of the claims for which relief is being sought under §526a were addressed in, or even mentioned during, the litigation over the propriety of CHSRA's approval of its funding plan.

### A. PLAINTIFFS' CLAIM THAT CHSRA'S PROPOSED "BLENDED SYSTEM" PLAN CANNOT MEET THE TRAVEL TIME REQUIREMENT OF STREETS & HIGHWAYS CODE §2704.09(b)(1) WAS NOT MOOTED BY THIS CASE'S MANDAMUS PROCEEDINGS.

The SAC alleges that CHSRA's current "blended system" project cannot, at build-out, comply with the requirement of Streets & Highways Code §2704.09(b)(1) that the trip from Los Angeles (Union Station) to San Francisco (Transbay Terminal) take no longer than 2 hours and 40 minutes. This is alleged in several places, but perhaps most clearly in ¶12:

> Plaintiffs allege, however, that documents from defendant Authority (recently produced pursuant to a public records request) indicate that the trip will take a minimum of three hours (express) and longer with local stops.

Defendants make the following assertion:

> This essentially duplicates the allegations contained in the Complaint's fourth cause of action for mandamus, paragraph 42.2, which alleges that section 2704.09, subdivision (a) requires the system be designed to run electric trains "capable of sustained maximum revenue operating speeds of no less than 200 miles per hour," and that the funding plan is not complaint [*sic*] with Streets and Highway Code section 2704.08(c). (Defendants' P&As at p.8:18-22.)

The assertion is surprising because the requirements of §2704.09, including those of subsections (a), (b), and (g), pertain to the entire system, not to the usable segment proposed in the funding plan adopted under §2704.08(c). While the Fourth Cause of Action addresses elements of §2704.09 in the context of the funding plan's proposed construction of the Initial

Construction Segment ("ICS")[5], it is the allegation in ¶12, rather than allegations in the Fourth Cause of Action concerning the ICS, that Plaintiffs seek to pursue in their §526a trial.

While the Court's November 26th ruling may have disposed of all of the claims arising out of CHSRA's November 2011 adoption of its funding plan, it neither addressed nor disposed of Plaintiffs' claims regarding the propriety of using Proposition 1A bond funds to build out CHSRA's currently-proposed "blended" high-speed rail system, including specifically the claim that the system, when completed, will not meet the travel time requirement of §2704.09(b)(1).

B. PLAINTIFFS' CLAIM THAT THE SYSTEM IS NOT FINANCIALLY VIABLE WAS NOT ADDRESSED IN THE MANDAMUS PROCEEDINGS.

Defendants also argue that Plaintiffs' second claim, that the system will fail to meet the financial viability requirement of §2704.09(g) and that its various usable segments will not be able to operate without a public subsidy (SAC ¶ 16), was litigated in the writ action. Yet again here, the writ action only challenged the approval of the funding plan for the IOS. That funding plan did not address the financial viability of the full built-out system, or of other future usable segments. Again, the court's writ ordering CHSRA to rescind its approval of its funding plan did not require any change in the physical or financial structure of CHSRA's plans for its overall system, which in fact remain stubbornly unchanged and noncompliant with Proposition 1A.[6]

C. PLAINTIFFS' ALLEGATION THAT THE APPROPRIATION OF BOND PROCEEDS TO HELP FUND CHSRA'S CURRENT PROJECT IS AN UNCONSTITUTIONAL ATTEMPT TO MODIFY THE BOND MEASURE WAS NOT ADDRESSED IN THE MANDAMUS PROCEEDINGS

Plaintiffs' third claim under §526a is that the Legislature, by appropriating funds for CHSRA's noncompliant high-speed rail system, unconstitutionally attempted to modify the bond measure. This claim, stated most clearly in ¶2 of the SAC, and elaborated upon in other portions

[5] Some of these claims were waived; others were dismissed as unripe *in the context of the mandamus proceedings on approval of the funding plan*.

[6] It would certainly be possible for CHSRA to reverse course and revise its system such that it would actually comply with Proposition 1A's requirements. Such a change of course would satisfy most if not all of Plaintiffs' objections and might indeed moot Plaintiffs' claims. CHSRA has, however, shown absolutely no indication of even considering such a change.

of the SAC, obviously could not have been litigated or resolved by the writ proceedings on adoption of the funding plan, because as of the date the funding plan was approved, the Legislature had not made, or even considered, any appropriation of bond funds for construction of CHSRA's proposed system. It was only when the legislature made its appropriation (SAC, ¶75) that this claim ripened to the point of being justiciable. At this point, however, the legislative die has been cast, and this claim should be addressed by the Court.

D. THE WASTEFUL USE OF FUNDS GRANTED TO CHSRA WAS NOT AT ISSUE IN THE MANDAMUS PROCEEDINGS.

Given that the mandamus proceedings involved only the propriety of CHSRA's approval of a funding plan required for the use of state bond funds, it is hard to understand Defendants' argument about how anything in that proceeding could have addressed Plaintiffs' claim on the wasteful use of public funds on a project that cannot be completed. (SAC, ¶18.) That claim asserts that if CHSRA's current proposed system is found legally ineligible for the use of Proposition 1A bond funds, all of the public funds spent towards that construction, including the federal grant funds, will have been wasted. While it is true that Plaintiffs did seek to have CHSRA's use of federal grant funds on construction activities enjoined (See Defendants' P&As at p.11 fn.6), that was only a request for a temporary restraining order to block the use of those funds until these §526a claims could be addressed by the Court. The injunction in these §526a proceedings is sought on an entirely different basis – that without state bond funds available for construction, the expenditure of the funds from the two federal grants on construction of a half-finished project would not provide any useful benefit, and would therefore constitute waste of public funds, which can be enjoined under §526a.

E. WHILE ADMINISTRATIVE MANDAMUS MAY PRECLUDE A TRIAL DE NOVO, A §526a ACTION, IN THE ABSENCE OF A FORMAL LEGISLATIVE OR ADMINISTRATIVE DETERMINATION, MAY BE TRIED ON ITS MERITS.

Defendants make much of the fact that a mandamus action challenging an administrative or legislative action must be heard on an administrative record, rather than through a trial de

novo. (Defendants' P&A at pp. 3-7, 10.) Defendants ignore the fact that the claims sought to be addressed through §526a did not arise from formal administrative or legislative determinations.

As noted earlier, there are many cases under §526a that, like this one, did not arise from a formal quasi-judicial or quasi-legislative proceedings. It is only when there has been a formal proceeding that an administrative record exists for the court to review. (*See, Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575 [distinguishing review of formal quasi-legislative actions, where an administrative record exists, from review of informal or ministerial actions, where "there is often little or no administrative record"]; *see also, People v. Picklesimer* (2010) 48 Cal.4th 330, 340 [§1085 writ action based on ministerial act may, if necessary, resolve legal or factual issues via an evidentiary hearing].)

The claims for which §526a relief is sought here, unlike those involving CHSRA's approval of its funding plan, did not arise from a formal quasi-legislative action[7]. Rather, as in *HAPA, supra*, they arose from informal agency actions for which no administrative record exists. In *HAPA*, it was alleged that the defendant agencies had informally but definitively determined a routing for a roadway project even though environmental review of the routing decision was not yet complete and no formal decision had been made. Despite the lack of a formal decision, the court concluded that the case, as pleaded, was ripe for judicial review (*HAPA, supra*, 72 Cal.App.4th. at p.104), but that factual disputes remained to be resolved in the trial court. (*Id.* at p.110.)[8]

[7] Defendants may point to CHSRA's April 2012 approval of its Revised 2012 Business Plan as a formal legislative act. It was not. While a business plan is required under the Public Utilities Code (§185033), that plan, unlike the funding plan or a general plan, has no binding effect on CHSRA's future actions. If it did, it would have required CEQA compliance.

[8] Those disputes were eventually decided by a court trial on the factual issues. (Plaintiffs' Request for Judicial Notice in Support of Opposition to Motion for Judgment on the Pleadings (Plaintiffs' RJN"), ¶1 and Exhibit A.)

## III. ALL OF PLAINTIFFS' CLAIMS ARE PROPERLY STATED IN THE SECOND AMENDED COMPLAINT.

Defendants' final arguments are that the SAC fails to properly allege either a violation of Article XVI, Section I of the California Constitution or the wasteful use of federal funds. Defendants ignore that in California, it is the facts alleged in the complaint that create a cause of action, not the titles. The SAC adequately pleads the ultimate facts necessary to state a constitutional violation and the state's wasteful use of the funds obtained from the federal grants.

### A. THE COMPLAINT ALLEGES SUFFICIENT FACTS TO STATE A CLAIM FOR VIOLATION OF ARTICLE XVI, SECTION I OF THE CALIFORNIA CONSTITUTION.

Article XVI, Section I of the California Constitution requires that any state debt in excess of $300,000.00 must be authorized by a specific procedure, including approval by California voters. As the case law governing this provision has long made clear, once a bond measure has been approved by the voters, it may not be materially altered without going back to the voters. (*O'Farell v. County of Sonoma* (1921) 189 Cal. 343. 347; *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, 602; [Legislative amendment to initiative bond measure violative of the measure is invalid]; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 693 [Legislature's attempt to use bond funds for purpose not authorized by the measure was unconstitutional attempt to repeal restrictive provisions of the measure].)

Here, Proposition 1A described in detail various required elements of the high-speed rail system the bond measure was intended to fund. These elements included maximum allowable trip times for nonstop passenger service between various locations within the system, as well as requirements that the system as a whole be "financially viable" and that all of its individual corridors or usable segments individually be capable of operating without any government subsidy. In the Revised 2012 Business Plan, published months after adoption of the funding plan, CHSRA put forward a blended system as the potential final state of its high-speed rail system, with a cost of between $68 billion and $80 billion. (SAC, ¶16a at 11:19-21.) Plaintiffs have also alleged that the blended system that CHSRA intends to build will not meet the time requirement for a Los Angeles to San Francisco trip (SAC, ¶12) and will, in fact, require a public

operating subsidy, making it not financially viable under Proposition 1A's requirements (SAC, ¶16.) Plaintiffs have further alleged that, in spite of these deficiencies, the Legislature appropriated Proposition 1A bond funds towards its construction (SAC, ¶75). These allegations suffice to constitute a cause of action for illegal expenditure of public funds – i.e., a violation of Article XVI, Section I through the Legislature's attempting to repeal restrictive provisions of the bond measure and allow bond proceeds to be used for a project that is not what the voters approved in Proposition 1A and does not comply with the measure's requirements.

B. THE COMPLAINT ADEQUATELY PLEADS FACTS SHOWING WASTEFUL USE OF PUBLIC FUNDS, WHICH INCLUDE FUNDS GRANTED TO CHSRA.

Defendants assert that the SAC fails to allege that continued expenditure of funds granted to CHSRA would be a waste of public funds if the court were to find that use of Proposition 1A bond funds on CHSRA's project was improper. (Defendants' P&As at p.11.) Paragraph 18 of the SAC states:

> Plaintiffs allege that since Proposition lA was passed, Defendant Authority has spent hundreds of millions of dollars getting ready to construct the Central Valley Project (more than $500 Million, with more than $400 Million from Proposition lA itself). Plaintiffs allege that these expenditures have already taken place, are currently taking place and are ongoing. In the event that the Central Valley Project is found legally to be INELIGIBLE for Proposition lA funding, these hundreds of millions of expenditures will have been wasted.

While the SAC does not specifically name the funds coming from CHSRA's two grants, it alleges that more than $500 million has been spent thus far, with more than $400 million of that total coming from Proposition 1A bond funds. Given that the only funds available to the project have been Proposition 1A bond funds and grant funds awarded to CHSRA, and, as the Attorney General has publicly acknowledged in these proceedings, only the grant-derived funds would be spent to initiate construction, it must logically follow that the non-bond funds are precisely the grant-derived funds, which are unquestionably also public funds.

### C. THE FUNDS DERIVED FROM CHSRA'S GRANTS ARE PROPERLY SUBJECT TO AN ACTION UNDER §526a.

Defendants final argument is that the SAC's allegation that Plaintiffs include state taxpayers is insufficient to give Plaintiffs standing to enjoin CHSRA's expenditure of its grant-derived funds. (Defendants' P&As at p.12.) They point to *Cornelius v. Los Angeles County Metropolitan Transportation Authority* (1996) 49 Cal.App.4th 1761, 1777-1778 as support. *Cornelius* is not on point.

In *Cornelius*, the plaintiff sued to block the transportation authority's affirmative action program, a program the authority was required to undertake in order to receive federal funding, claiming that the program violated the U.S. Constitution. In rejecting the plaintiff's standing as a payer of state income tax, the *Cornelius* court pointed to the fact that only fifteen percent of the transportation authority's revenue came from state funds, and that there was no evidence that these state funds were involved in implementing the transportation authority's affirmative action program or would be involved in any illegal or wasteful expenditure due to the program. (*Id*. at 1776, 1778.) The court therefore found that, given the policy being contested and the small amount of state funding involved in the agency, the plaintiff could not demonstrate more than a tangential relationship between the state taxes he paid and the program he was challenging. (See *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 30 [explaining the court's holding in *Cornelius*].)

Here, by contrast, the only funds involved in the project are the state bond funds and funds granted to CHSRA by the Federal Railroad Administration, which, when received by CHSRA, become state property subject to §526a.[9] In short, the situation here is very different from that in *Cornelius* and justifies conferring standing on the Plaintiffs under §526a.

[9] §526a allows an action to restrain or prevent, "any illegal expenditure of, waste of, or injury to, the estate, funds, or other property …"

## IV. EVEN IF THE MOTION IS GRANTED, PLAINTIFFS SHOULD BE ALLOWED LEAVE TO AMEND THEIR COMPLAINT TO CORRECT DEFICIENCIES.

As noted earlier, even if a motion for judgment on the pleadings is granted, it is generally appropriate to do so while allowing the plaintiffs leave to amend their complaint. Indeed, failure to grant leave to amend where amendment to correct the defects identified in the motion is possible is an abuse of discretion. (*Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1106.)

Here, none of Defendants' arguments identify the kind of irremediable flaw, such as lack of failure to satisfy the statute of limitations, that would justify denying leave to amend. As Plaintiffs have explained, factual bases for causes of action for illegal or wasteful use of public funds unquestionably exist[10], even if they have not been pleaded as clearly and precisely as possible. Consequently, and especially as the claimed violations are either ongoing or prospective, in the event the Court decides to grant Defendants' motion, it should also grant Plaintiffs leave to amend their complaint to correct any deficiencies identified in the court's ruling.

## CONCLUSION

For all the above reasons, Defendants' motion should be denied and the case should move forward towards a trial on the merits of Plaintiffs' remaining claims.

Dated: January 23, 2014

Respectfully submitted,

Michael J. Brady

Stuart M. Flashman

Attorneys for Plaintiffs John Tos, Aaron Fukuda, and County of Kings

By: Stuart M. Flashman

Stuart M. Flashman

[10] Actual proof of those facts must await trial.

**PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL**

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 January 24, 2014, I served the within PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS; PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS 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:

Sharon O'Grady, Deputy Attorney General
Tamar Pachtar, Supervising Deputy Attorney General
Michele Inan, Deputy Attorney General
Office of California Attorney General
455 Golden Gate Ave., Ste. 11000
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In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as e-mail attachments, to the above-same parties at the e-mail addresses shown above.

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 January 24, 2014.

Stuart M. Flashman