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LEGAL PROCESS #3

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EXEMPT FROM FEES PER
GOVERNMENT CODE §6103

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8 JOHN TOS, AARON FUKUDA,
AND COUNTY OF KINGS
9

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

11 **IN AND FOR THE COUNTY OF SACRAMENTO**

12 JOHN TOS, AARON FUKUDA, and COUNTY
13 OF KINGS,
Plaintiffs
14 v.
15 CALIFORNIA HIGH SPEED RAIL Authority *et*
al.,
16 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' OBJECTIONS AND
OPPOSITION TO DEFENDANTS'
SPECIAL APPLICATION TO STRIKE**

Date: November 8, 2013
Time: 9:00 AM
Dept. 31
Judge: Hon. Michael P. Kenny

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20 Plaintiffs John Tos, Aaron Fukuda, and County of Kings ("Plaintiffs") hereby object to
21 Defendants/Respondents' Special Application to Strike or Disregard New Argument in the
22 Reply Brief on Remedies, or in the Alternative, Request for Permission to File a Sur-Reply
23 ("Plaintiffs' Application") on the grounds that it was filed in violation of the provisions of Title
24 3, Division 11, Chapter 4 of the California Rules of Court, which govern *ex parte* applications in
25 trial court proceedings. Defendants' Application was submitted to the Court with no prior notice
26 to Plaintiffs' counsel and asks the Court to take almost immediate action without noticing any *ex*
parte appearance before the Court and without providing the required declarations of facts.

27 **BY FAX**

1 Defendants' Application was filed in violation of Rules of Court 3.1201 [Required
2 documents – documents lacking], 3.1202 [Contents of application – lack of affirmative factual
3 showing based on a declaration of personal knowledge], 3.1203 [Time of notice to other parties –
4 no notice provided], 2.1204 [Content of notice and declaration regarding notice – no notice or
5 declaration provided], 3.1206 [Service of papers – papers served by mail requiring five business
6 days additional time, yet relief requested within undefined but shorter time], and 3.1207
7 [Personal appearance requirements – application seeks relief without personal appearance].
8 Based on Defendants' multiple violations of the Rules of Court, Defendants' Application should
9 be summarily denied as improperly submitted.

10 Further, on the merits, Plaintiffs' Reply Brief on Remedies ("Plaintiffs' Reply") did not
11 raise any new issues not already addressed in Plaintiffs' Opening Brief on Remedies. Rather,
12 Plaintiffs' Reply properly addressed and refuted the points raised in Defendants/Respondents'
13 Memorandum of Points and Authorities in Opposition to Plaintiffs/Petitioners' Request for
14 Remedies (Defendants' Opposition"). The only new evidence presented accompanying
15 Plaintiffs' Reply is evidence to rebut the evidence presented by Defendants. Nevertheless, in the
16 interest of fairness, Plaintiffs are willing to allow Defendants to submit a short (5 pages or less)
17 sur-reply brief limited to the specific topic of the evidence first submitted by Plaintiffs in the
18 declarations accompanying Plaintiffs' Reply.

19 ARGUMENT

20 I. PLAINTIFFS HAVE NOT RAISED NEW ISSUES IN THEIR REPLY BRIEF

21 Defendants assert that Plaintiffs' Reply raises new issues not previously asserted in
22 Plaintiffs' Opening Brief on Remedies ("Opening Brief"). This is incorrect. The Opening Brief
23 raised four primary issues: 1) that the sequence of events laid out in Streets & Highways Code
24 §2704.08(c) and (d) was intended by the legislature and the voters to be followed in full, and that
25 subsequent steps of the sequence could not be completed until the earlier steps had been properly
26 done (Opening Brief at pp. 1-6); (2) that the Authority's failure to prepare and submit a proper
27 funding plan under §2704.08(c) precluded it from proceeding to the required steps under
28 subsection (d) until it had first corrected the deficiencies in the subsection (c) funding plan
29 (Opening Brief at p. 7); 3) that the Court could and should take action to prevent the Authority

1 from moving forward with actions involving compliance with subsection (d), including
2 commitment or expenditure of Proposition 1A bond funds towards construction of the usable
3 segment identified in the subsection (c) funding plan and in subsequent construction contracts,
4 until the provisions of subsection (c) had been substantially complied with (Opening Brief at pp.
5 8-9); and 4) that the Court should proceed to consider Plaintiffs' claims under Code of Civil
6 Procedure §526a and should temporarily restrain the authority from expending funds granted to
7 it by the federal government on construction activities until it had the opportunity to consider
8 Plaintiffs' §526a claims, because those claims implicate the propriety of expending the deferral
9 grant funds (Opening Brief at p. 10).

10 Subsidiary to those primary issues, Plaintiffs also addressed several secondary issues. In
11 particular, Plaintiffs addressed Defendants' expected response that no bond funds would be
12 needed for the Authority to complete the two contracts it had already executed for construction
13 of CP1, and therefore, since neither contract committed bond funds towards construction, neither
14 rescission nor injunctive relief would be proper. Plaintiffs argued that, because of the size of the
15 contracts and the conditions on the federal funds, commitment of bond funds would be
16 necessary, and in fact had already been made. (Opening Brief at pp. 8-9.)

17 Defendants' Opposition attempted to rebut these latter arguments. In doing so, it went
18 "into the weeds" to introduce evidence about the details of the construction contracts and the
19 federal grants and their provisions. (Declaration of Dennis Trujillo; Defendants/Respondents'
20 Request for Judicial Notice.) It also argued that the Authority had neither expended nor
21 committed bond funds toward the two construction contracts, and that the contracts could be
22 completed without the use or commitment of bond funds. (Defendants' Opposition at pp. 6-11.)

23 Plaintiffs' Reply, contrary to Defendants' assertion, did not introduce new issues.
24 Rather, it simply attempted to rebut the arguments raised in Defendants' Opposition, and
25 specifically Defendants' claims that 1) the Authority had neither committed not expended bond
26 funds towards the two construction contracts, and 2) the Authority could complete both
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1 construction contracts without committing or expending bond funds. Such rebuttal argument is
2 standard fare for a reply brief.

3 **II. BECAUSE OF THE UNUSUAL CIRCUMSTANCES SURROUNDING THIS**
4 **BRIEFING, PLAINTIFFS WOULD AGREE TO ALLOW A LIMITED SUR-**
5 **REPLY SOLELY TO ADDRESS THE NEW EVIDENCE PRESENTED.**

6 The situation resulting in the latest round of briefing is unusual in a writ proceeding.
7 Normally, a writ proceeding will be based on an administrative record. (*Western States*
8 *Petroleum Assn. v. Superior Court* (“WSPA”) (1995) 9 Cal.4th 559.) Once briefing has
9 occurred, the Court will review the briefing and the evidence in the record and determine
10 whether a writ should issue. In this case, the Court raised a concern about the real and practical
11 effect of a writ, and asked the parties to address that concern by an additional round of briefing
12 on the proper remedy for the Authority’s violations of Proposition 1A.

13 Because determining a proper remedy required considering the situation as it currently
14 exists, several years after the decision challenged in the writ proceeding, the evidence could not
15 be limited to the administrative record that was before the Authority when it approved the
16 subsection (c) funding plan. (*See, WSPA, supra*, 9 Cal.4th at 575 fn.5 [courts may consider
17 extra-record evidence on issues other than validity of agency’s action].) Consequently, both
18 Plaintiffs and Defendants necessarily introduced supplemental evidence on events that occurred
19 after the administrative record had closed. While this is not usual for a typical writ proceeding,
20 where it is presumed that all relevant evidence is already before the Court, it is quite normal and
21 usual in a trial situation where factual evidence is being presented to the Court. Although the
22 Court asked the question of the proper remedy in the context of a writ proceeding, the situation is
23 in fact more analogous to the remedies phase of a court trial. (*See, e.g., Colgan v. Leatherman*
24 *Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 693 [evidence introduced during remedies phase
25 of trial].)

26 As in a court trial, while the issues to be decided are laid out in general terms in the
27 complaint, and defined in more detail in the plaintiff’s opening trial brief, there can be several
28 rounds of argument and evidence production, with each round further narrowing the range of

1 factual disputes upon which evidence is presented. Plaintiffs acknowledge that because, as in a
2 court trial, they appropriately introduced evidence to rebut that submitted by Defendants, it
3 would be appropriate to allow Defendants an opportunity to submit such additional evidence and
4 argument as appropriate to attempt to rebut Plaintiffs' newly-introduced evidence. Therefore,
5 Plaintiffs would agree to allow Defendants to submit a short sur-reply brief, limited to no more
6 than five pages, and specifically limited to addressing the new evidence submitted with
7 Plaintiffs' Reply¹. However, Plaintiffs would also ask that if Defendants choose to introduce
8 additional evidence in support of their sur-reply brief, Plaintiffs be allow the opportunity to
9 respond to that evidence either by a short supplemental brief or at hearing.

10 CONCLUSION

11 Defendants' Special Application to Strike was procedurally improper. Further, contrary
12 to Defendants' assertions, Plaintiffs did not introduce any new issues in their Reply Brief. The
13 motion to strike should therefore be denied. However, given the unusual circumstances of the
14 current briefing, Plaintiffs would agree to allow Defendants a limited five-page sur-reply brief to
15 specifically address the new evidence submitted with Plaintiffs' Reply².

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17 Dated: October 30, 2013
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25 ¹ Plaintiffs would note, however, that much of the argument in the reply brief addressed evidence
26 that had already been introduced by Defendants. That should not be addressed in the sur-reply.

27 ² e.g., correspondence with the Authority submitted as Exhibit A to Wespi Decl., Capital Outlay
28 and Expenditure Report submitted as Exhibit B to Wespi Decl., etc.

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Respectfully submitted,

Michael P. Brady

Stuart M. Flashman

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

By: *Stuart M. Flashman*

Stuart M. Flashman

PROOF OF SERVICE BY MAIL FACSIMILE, 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 October 30, 2013, I served the within PLAINTIFFS' OBJECTIONS AND OPPOSITION TO DEFENDANTS' SPECIAL APPLICATION TO STRIKE on the parties listed below by placing a true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as follows:

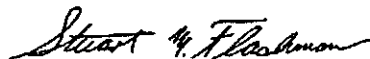
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In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as an e-mail attachment, to the above-same parties at the e-mail addresses shown above and served the above-same document on the above-same parties by facsimile transmission at the telephone numbers 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 October 30, 2013.



Stuart M. Flashman