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**GDSSC COURTHOUSE
SUPERIOR COURT
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SACRAMENTO COUNTY**

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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SACRAMENTO**

10 TRANSPORTATION SOLUTIONS DEFENSE
11 AND EDUCATION FUND,

12 Petitioner and Plaintiff

13 vs.

14 CALIFORNIA AIR RESOURCES BOARD, *et*
15 *al.*,

16 Respondents and Defendants

17 JOHN CHIANG, *et al.*,

18 Real Parties In Interest

No. 34-2014-8001974-CU-WM-GDS

Action under the California Environmental
Quality Act

Assigned for all purposes to Hon. Shelleyanne
W.L. Chang, Dept. 24

**PETITIONER'S OPPOSITION TO
DEMURRERS AND TO REAL PARTY
CALIFORNIA HIGH-SPEED RAIL
AUTHORITY'S MOTION TO STRIKE**

Date: August 19, 2016

Time: 10:00 AM

Dept. 24

Judge: Hon. Shelleyanne W.L. Chang

Trial Date: Not Yet Set

Action Filed: June 23, 2014

BY FAX

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INTRODUCTION

Petitioner filed this action to challenge the approval by Respondent California Air Resources Board (“ARB”) of its 2014 updated Climate Change Scoping Plan (“Scoping Plan”) based on violations of the California Environmental Quality Act² (“CEQA) and of the Global Warming Solutions Act of 2006³ (“AB 32”). In its Fifth Cause of Action, Petitioner also challenges the Legislature’s appropriation of funds from the Greenhouse Gas Reduction Fund (“GGRF”) as violating AB 32 and not being properly supported by the Scoping Plan. ARB, has demurred to Petitioner’s fourth cause of action, claiming it fails to state facts sufficient to state a cause of action because the specific statutory section cited in the Petition does not apply to the Scoping Plan and because the Scoping Plan is not a regulation. Both ARB and Real Party in Interest California High-Speed Rail Authority (“CHSRA”) have demurred to the fifth cause of action, either based on uncertainty (ARB) or failure to state facts sufficient to state a cause of action, based on declaratory relief being inappropriate, both because the cause of action raises a non-justiciable political question and, as to the general question of appropriations from the Greenhouse Gas Reduction Fund (“GGRF”), because it seeks an advisory ruling. CHSRA has also separately filed a motion to strike the claims in the Fifth Cause of Action.

ARB’s and CHSRA’s demurrers focus on specific statutory provisions of AB 32, which they contend do not support Petitioner’s claims. However, they fail to see the forest for the trees. Petitioner’s argument is that both the Scoping Plan’s inclusion of CHSRA’s high-speed rail project, and the Legislature’s appropriation of funding from the GGRF to construct that project, violate the basic intent of AB 32 – reducing California’s emissions of greenhouse gases *before the year 2020*. When the provisions of AB 32 for both the Scoping Plan and appropriation of funds from the GGRF are construed in the context of the Legislature’s intent in adopting AB 32, both ARB’s and the Legislature’s actions violate that intent and therefore Petitioner’s claims are valid causes of action. If the Court feels that the specific allegations in the petition do not state a cause of action, Petitioner asks that the Court grant leave to amend the petition to more clearly

² Public Resources Code §21000 et seq.

³ Health & Safety Code § 38500 et seq.

1 state its claims that both the Scoping Plan and the appropriation of GGRF money for high-speed
2 rail construction (and any other project that would increase, rather than decrease, GHG
3 emissions) violate AB 32.

4 **STATEMENT OF FACTS AND OF THE CASE**

5 **I. AB 32, THE CALIFORNIA GLOBAL WARMING SOLUTIONS ACT OF 2006.**

6 As noted by both ARB and CHSRA, in 1996 the Legislature enacted AB 32, the
7 California Global Warming Solutions Act.⁴ The Legislature found that:

8 (a) Global warming poses a serious threat to the economic well-being, public
9 health, natural resources, and the environment of California. The potential adverse
10 impacts of global warming include the exacerbation of air quality problems, a
11 reduction in the quality and supply of water to the state from the Sierra snowpack,
12 a rise in sea levels resulting in the displacement of thousands of coastal businesses
13 and residences, damage to marine ecosystems and the natural environment, and an
14 increase in the incidences of infectious diseases, asthma, and other human health-
15 related problems. (Health & Safety Code § 38501.)

16 That same statutory section also made several statement of the Legislature's intent in
17 enacting AB 32. Perhaps most notably here, the section stated:

18 (h) It is the intent of the Legislature that the State Air Resources Board design
19 emissions reduction measures to meet the statewide emissions limits for
20 greenhouse gases established pursuant to this division in a manner that minimizes
21 costs and maximizes benefits for California's economy, improves and modernizes
22 California's energy infrastructure and maintains electric system reliability,
23 maximizes additional environmental and economic co-benefits for California, and
24 complements the state's efforts to improve air quality.

25 AB 32 set as a specific goal to be attained through its provisions: that by the year 2020,
26 the state achieve a statewide reduction in greenhouse gas emission to a level equivalent to that
27 produced in 1990. (Health & Safety Code § 38550.) While that goal would remain in effect
28 unless otherwise amended or repealed (Health & Safety Code § 38551 (a)), ARB was charged
29 with making recommendations to the Governor and the Legislature about how to continue
reductions beyond 2020. (*Id.*, subd. (c).)

⁴ It should be noted that since then, the scientific community has opted to refer to the issue as global climate change rather than global warming, as the climate effects will vary with the are involved.

1 **II. THE CLIMATE CHANGE SCOPING PLAN.**

2 As part of the overall regulatory scheme it enacted, AB 32 charged ARB with preparing
3 and adopting a Scoping Plan on or before January 1, 2009. (Health & Safety Code § 38561.)
4 The scoping plan was to identify how to achieve “the maximum technologically feasible and
5 cost-effective reductions in greenhouse gas emissions from sources or categories of sources of
6 greenhouse gases by 2020 under this division.” (*Id.* at subd. (a).) The Scoping Plan was to
7 include not only proposals for direct emission reduction measures, but also alternative
8 compliance mechanisms, market-based compliance mechanisms, and potential monetary and
9 nonmonetary incentives that ARB found necessary or desirable to help achieve the maximum
10 feasible, cost-effective reductions in GHG emissions by 2020. (*Id.*, subd. (b).) The Scoping Plan
11 was also to be updated every five years (*Id.* subd. (h)), presumably to reflect whatever GHG
12 emission reductions were enacted for periods beyond 2020.

13 ARB prepared and adopted its initial scoping Plan in 2008. (Petition, ¶17⁵.) That Plan
14 was challenged by a petition for writ of mandate, which was granted in part. (*Association of*
15 *Irrigated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1493.) The trial
16 court found no violations of AB 32’s requirements, but did find that ARB’s environmental
17 analysis violated CEQA for failing to adequately consider alternatives to a statewide “cap and
18 trade” program. (*Id.*) ARB revised and reapproved its environmental analysis in accordance
19 with the trial court’s writ (*Id.* at p. 1494), while the court of appeal affirmed the trial court’s
20 finding of compliance with AB 32. (*Id.* at p. 1505.)

21 In February 2014, ARB released a draft First Updated Scoping Plan (“Updated Plan”).
22 (Petition ¶ 20.) The Updated Plan proposed that CHSRA receive funding from the Greenhouse
23 Gas Reduction Fund (“GGRF” [see below]) for construction of its high-speed rail project.
24 (Petition, ¶¶ 21, 22.) Petitioner submitted comments on the Updated Plan pointing out that GHG
25 emissions from high-speed rail construction had been grossly underestimated in the Draft Plan,
26 and that if properly considered, that construction would actually cause an increase in GHG

27 _____
28 ⁵ Neither demurrer attempts to challenge any of the Petition’s factual allegations based on
29 requests for judicial notice. Therefore, Petitioner, like ARB and CHSRA, will assume for this
demurrer that the Petition’s factual allegations are true.

1 production, making it ineligible for GGRF funding. (Petition, ¶¶ 21, 22.) Those comments were
2 ignored. (Petition ¶ 21.) ARB approved the Updated Plan and its Final Environmental Analysis
3 (Petition, ¶ 23), after which Petitioner filed suit.

4 **III. THE GREENHOUSE GAS REDUCTION FUND.**

5 In itemizing the items to be included in the Scoping Plan to be developed by ARB,
6 Health & Safety Code § 38561(b) (within AB 32) specifically included to “identify and make
7 recommendations on ... market-based compliance mechanisms.” The Legislature also tasked
8 ARB to develop regulations to establish such a market-based compliance mechanism. (Health &
9 Safety Code §§ 38570 *et seq.*)

10 Pursuant to these directions, ARB, in 2013, established a statewide “Cap and Trade”
11 system as its market-based compliance mechanism. (*See*, Government Code § 16428.8(b)
12 [referencing California Code of Regulations, Title 17, §§ 95800-96022, establishing regulations
13 for California’s Cap and Trade program].) Prior to, and in preparation for the establishment of
14 the Cap and Trade program, the Legislature, in 2012, established the GGRF as the repository for
15 fees collected under the Cap and Trade program. (Government Code §§ 16428.8 *et seq.*) The
16 legislation also provided alternative provisions to establish Legislation governing how the funds
17 in the GGRF could be used. (Government Code § 16428.85.)

18 That same year, the Legislature enacted the Greenhouse Gas Reduction Fund Investment
19 Plan and Communities Revitalization Act to establish how funds in the GGRF could be spent.
20 (Health & Safety Code §39710 *et seq.*) More specifically, in § 39712(a)(2), the Legislature
21 established that:

22 The state shall not approve allocations for a measure or program using moneys
23 appropriated from the fund except after determining, based on the available
24 evidence, that the use of those moneys furthers the regulatory purposes of
25 Division 25.5 (commencing with Section 38500) and is consistent with law. If any
26 expenditure of moneys from the fund for any measure or project is determined by
a court to be inconsistent with law, the allocations for the remaining measures or
projects shall be severable and shall not be affected.

27 And, in subsection (b) §39712 went on to say:
28
29

1 (b) Moneys shall be used to facilitate the achievement of reductions of greenhouse
2 gas emissions in this state consistent with Division 25.5 (commencing with
Section 38500) ...

3 Finally, and most specifically, in 2014, as part of the budget process, the Legislature
4 enacted Health & Safety Code § 39719, which, in pertinent part, provided:

5 (a) The Legislature shall appropriate the annual proceeds of the fund for the
6 purpose of reducing greenhouse gas emissions in this state in accordance with the
requirements of Section 39712.

7 (b) To carry out a portion of the requirements of subdivision (a), annual proceeds
8 are continuously appropriated for the following: ...

9 ... (2) Beginning in the 2015–16 fiscal year, notwithstanding Section
10 13340 of the Government Code, 25 percent of the annual proceeds
11 of the fund is hereby continuously appropriated to the High-Speed
12 Rail Authority for the following components of the initial
operating segment and Phase I Blended System as described in the
13 2012 business plan adopted pursuant to Section 185033 of the
Public Utilities Code:

14 (A) Acquisition and construction costs of the project.

15 (B) Environmental review and design costs of the project.

16 (C) Other capital costs of the project.

17 (D) Repayment of any loans made to the authority to fund
the project.

18 **IV. CALIFORNIA’S HIGH-SPEED RAIL PROJECT**

19 In 1996, the Legislature established CHSRA and designated it to plan, develop, and
20 implement an intercity high-speed rail network within California. (Public Utilities Code §§
21 185030, 185032.) In 2008, the Legislature proposed, and the voters enacted, Proposition 1A, a
22 \$9.95 billion general obligation bond measure to help fund the planning and construction of
23 CHSRA’s high-speed rail system. (Streets & Highways Code §§ 2704 *et seq.*) The proposed
24 system would include service between San Francisco, San Jose, Los Angeles, Anaheim, San
Diego, and the Central Valley. (Streets & Highways Code § 2704.04(a).)

25 As explained earlier, while CHSRA represented to ARB that its high-speed rail project
26 would result in reducing carbon emissions, Petitioner had presented ARB with evidence showing
27 that, because CHSRA’s analysis ignored the GHG emissions associated with the many thousands
28 of tons of cement needed to build the system, construction of the high-speed rail system would
29

1 result in a net increase in GHG production, contrary to the requirements of AB 32. (Petition,
2 ¶21.)

3 4 **STANDARD OF REVIEW**

5 A demurrer tests the legal sufficiency of a pleading. (*Quelimane Co. v. Stewart Title*
6 *Guaranty Co.* (1998) 19 Cal.4th 26, 47.) It does not examine the truth of matters alleged in the
7 complaint. (*Id.*) Nor does it consider possible difficulties in proving allegations. (*Id.*) In
8 considering a demurrer, the court assumes the truth of all properly pled material facts (*Apple*
9 *Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 942) and,
10 “...the allegations [in the complaint] must be liberally construed with a view to attaining
11 substantial justice among the parties.” (*American Airlines, Inc. v. County of San Mateo* (1996)
12 12 Cal.4th 1110, 1118.)

13 A demurrer must be overruled if the allegations in the complaint state a cause of action
14 under any legal theory. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Wyatt v.*
15 *Mortimer* (1937) 21 Cal.App.2d 28 [even when complaint had been successfully demurred to
16 and then amended multiple times, granting demurrer is improper if final amended complaint
17 appears to state a valid cause of action].) Finally, even if a demurrer is sustained, leave to amend
18 must be granted so long as there is a reasonable possibility that the defects in the complaint may
19 be cured by amendment. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

20 **ARGUMENT**

21 **I. THE PROVISIONS OF AB 32 SHOULD BE CONSTRUED TO EFFECTUATE** 22 **THE LEGISLATURE’S INTENT AND TAKEN IN THE CONTEXT OF THE** 23 **ENTIRE LEGISLATIVE SCHEME.**

24 It is well established that the court’s role in construing a statute is to effectuate the intent
25 of the Legislature in enacting the statute. (*People v. Wright* (2006) 40 Cal.4th 81, 92.) Further:

26 We construe the words of a statute in context, and harmonize the various parts of
27 an enactment by considering the provision at issue in the context of the statutory
28 framework as a whole. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478,
29 487.)

1 While ordinarily the plain language of a statute is the best indicator of the Legislature's
2 intent (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 350), the plain language of a specific
3 section of a statute cannot be allowed to frustrate the Legislature's stated intent, nor to lead to
4 absurd results. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.)

5 As applied here, Health & Safety Code § 38501 begins AB 32 with an explicit statement
6 of findings supporting its enactment and statements of the Legislature's intent. Such explicit
7 statements of intent should be the starting point in construing the meaning of the statute's
8 provisions, as it provides the clearest indication of the Legislature's intent. (*In re Kali D.* (1995)
9 37 Cal.App.4th 381, 386.) In subsection (h) of that section, the Legislature states, in relevant
10 part:

11 It is the intent of the Legislature that the State Air Resources Board design
12 emissions reduction measures to meet the statewide emissions limits for
13 greenhouse gases established pursuant to this division ...

14 What were those limits? They were defined explicitly in Health & Safety Code § 38550:

15 By January 1, 2008, the state board shall, after one or more public workshops,
16 with public notice, and an opportunity for all interested parties to comment,
17 determine what the statewide greenhouse gas emissions level was in 1990, and
18 approve in a public hearing, a statewide greenhouse gas emissions limit that is
19 equivalent to that level, *to be achieved by 2020*. [emphasis added]

20 Further, Health & Safety Code § 38510 explicitly states:

21 The State Air Resources Board is the state agency charged with monitoring and
22 regulating sources of emissions of greenhouse gases that cause global warming in
23 order to reduce emissions of greenhouse gases.

24 Thus, the Legislature clearly intended that ARB was to be responsible for identifying,
25 evaluating, and effectuating the regulation of GHG emission sources to achieve AB 32's goal of
26 reducing the states GHG emission to 1990 levels by the year 2020. ARB's and CHSRA's
27 demurrers ignore this overarching legislative intent, focusing instead on specific statutory
28 sections which they claim show that the Fourth and Fifth Causes of Action cannot succeed.
29 However, any consideration of the meaning and effect of specific sections of AB 32 must take
into account the statute's legislative intent and what it aimed to accomplish.

1 **II. ARB’S DEMURRER TO THE FOURTH CAUSE OF ACTION SHOULD BE**
2 **OVERRULED.**

3 ARB’s demurrer to the Fourth Cause of Action argues that because the Scoping Plan is
4 not a regulation, it “is not a legally binding document.” (Memorandum in Support of Demurrer
5 by Respondents California Air Resources Board to Verified Petition for Peremptory Writ of
6 Mandate and Complaint for Declaratory Relief [“ARB P&As for Demurrer”] at p. 2:26.) ARB
7 asserts that because Petitioner cites the standard that GHG reductions be real, permanent,
8 quantifiable, verifiable, and enforceable⁶, and under § 38562 that standard applies to regulations,
9 which the Scoping Plan is not; that there is no standard that applies to measures proposed in the
10 Scoping Plan.

11 That assertion is nothing short of nonsensical. If that were the case, the Scoping Plan
12 could not be relied upon; yet the Legislature’s intent in requiring its preparation and periodic
13 updating was clearly that it serve as the foundation for the adoption of regulations and other
14 actions ARB is mandated to take to implement AB 32. Thus, because the measures proposed in
15 the Scoping Plan would serve as the basis for ARB’s regulations – to which the standard in §
16 38562 would apply, the same standard must necessarily apply to the measures in the Scoping
17 Plan. Taking this logic to its inescapable conclusion, the fundamental legislative intent of AB 32
18 must involve achieving real, permanent, quantifiable, verifiable, and enforceable reductions in
19 California’s GHG production by 2020. That standard must therefore also apply to all the actions
20 the Legislature mandated under AB 32 to implement its legislative intent.

21 Even if, arguendo, the standards set in § 38562 did not apply to measures included in the
22 Scoping Plan, § 38561 itself requires that the Scoping Plan identify ways of achieving, “the
23 maximum technologically feasible and cost-effective reductions in greenhouse gas emissions
24 from sources or categories of sources of greenhouse gases by 2020 under this division.” The
25 Petition, however, alleges that, based on the evidence before ARB, CHSRA’s high-speed rail
26 project could not meet those criteria because it could only cause an increase in GHG emissions
27 by 2020. (Petition, ¶¶ 21, 36, 37, 39, 59.) Any future reductions in GHG production due to the

28 ⁶ ARB points to Health & Safety Code § 38562 as the source of this standard. (ARB P&As for
29 Demurrer at p. 5:22.) Petitioner referenced AB 32, but did not cite § 38562 as its source.

1 operation of the high-speed rail system could not even begin until the system became operational
2 – well after the 2020 deadline set by AB 32.⁷

3 Of particular note, §38561(f) specifically called for ARB to “identify opportunities for
4 emission reductions measures from all verifiable and enforceable voluntary actions, including,
5 but not limited to, carbon sequestration projects and best management practices.” Voluntary
6 actions would be those not directly subject to ARB regulation – i.e., actions that would not, in
7 and of themselves, be GHG emission sources subject to ARB regulation. CHSRA’s high-speed
8 rail project would, to some extent, fall in this category. While the actual construction activities
9 of CHSRA and its contractors would be emission sources subject to ARB regulation⁸, indirect
10 emissions, such as those associated with cement production required for the high-speed rail
11 construction, would not be subject to direct ARB regulation through CHSRA. It was such
12 voluntary activity that ARB intended to influence through use of the GGRF funding. However,
13 as alleged in the Petition, funding high-speed rail construction from the GGRF would not be a
14 verifiable and enforceable source of GHG emission reductions. It would, instead, result in an
15 increase in GHG emissions. Thus even under § 38561 itself, inclusion of high-speed rail
16 construction in the Scoping Plan was directly contrary to the dictates of AB 32, making the
17 Fourth Cause of Action valid.

18 **III. THE DEMURRERS AND MOTION TO STRIKE AGAINST THE FIFTH CAUSE**
19 **OF ACTION SHOULD BE OVERRULED.**

20 CHSRA has demurred to the Fifth Cause of Action for failing to state facts sufficient to
21 state a cause of action, as well as a motion to strike based on the same legal arguments. ARB has
22 joined in CHSRA’s demurrer, as well as filing separate demurrers based on failure to state a
23 claim and uncertainty.

24 On ARB’s uncertainty demurrer, it has provided no supporting argument or even
25 explanation of the basis for the demurrer. Further, it would be improper to provide such basis,
26

27 ⁷ Even then, evidence placed in the record by Petitioner demonstrated that CHSRA’s high-speed
28 rail system, as proposed, could not fully offset the greenhouse gas emissions from its
29 construction, if at all, until many years after AB 32’s 2020 deadline.

⁸ CHSRA had promised to fully offset all of these direct GHG emissions.

1 either by argument or explanation, for the first time in its reply brief. (*People v. Rangel* (2016)
2 62 Cal.4th 1192, 1218-1219.) The special demurrer for uncertainty must therefore be overruled.
3 (*See, Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [issue
4 unsupported by pertinent or cognizable legal argument deemed abandoned].)

5 On ARB's general demurrer, Petitioner concedes the narrow issue of declaratory relief's
6 propriety to address inclusion of the high-speed rail project in the Scoping Plan. That issue was
7 addressed in the Fourth Cause of Action for mandamus. Petitioner therefore agrees that the issue
8 is superfluous. The same is not true, however, for CHSRA's general demurrer (joined in by
9 ARB) to Petitioner's request for a declaration that the legislative appropriation from the GGRF
10 to CHSRA for high-speed rail construction violates AB 32. That appropriation was a legislative,
11 not an administrative, act. Therefore mandamus would not have been a proper remedy.
12 (*California High-Speed Rail Authority v. Superior Court* ["*CHSRA v. Sup. Ct.*"] (2014) 228
13 Cal.App.4th 676, 714 [writ of mandate ordering reversal of legislative appropriation improper].)

14 CHSRA and ARB argue that declaratory relief would represent an improper interference
15 with the Legislature's plenary power of appropriation. (Real Party in Interest California High-
16 Speed Rail Authority's Memorandum of Point and Authorities ["CHSRA P&As"] at pp. 5-9.)
17 They point to *Butt v. State of California* (1992) 4 Cal.4th 577, 598, which states, in pertinent
18 part:

19 However, nothing in the California or federal cases on which Justice Kennard
20 relies even hints that a court may nullify a specific *and valid* exercise by the
21 Legislature and the Executive of fundamental budgetary powers explicitly
22 entrusted to those branches, simply for the purpose of satisfying a judgment or
23 order that is unrelated to the appropriation. [emphasis added]

24 The question raised by Petitioner's declaratory relief cause of action, however, is
25 precisely whether the Legislature's appropriation from the GGRF for high-speed rail
26 construction was valid under the provisions of the governing statutes, Health & Safety Code §§
27 39710 *et seq.* and §§ 38500 *et seq.* If the appropriation violated the authorizing statutory
28 provisions, it was improper, and the courts have a right and duty to so declare. (*See, e.g., Shaw*
29 *v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577,615 [legislative appropriations violating
statute adopted by initiative declared invalid]; *see also, Mandel v. Myers* (1981) 29 Cal.3d 531,

1 541 [when Legislature improperly restricted an appropriation, court could order payment in spite
2 of the restriction].)

3 CHSRA and ARB also argue that declaratory relief is improper because the Legislature
4 has not provided for a challenge to its appropriative actions, citing *CHSRA v. Sup. Ct., supra*,
5 228 Cal.App.4th at p. 715. However, unlike in *CHSRA v. Sup. Ct.*, that is not the case here. In
6 *CHSRA v. Sup. Ct.*, the court noted that nothing in Streets & Highways Code § 2704.08, the
7 statutory section that established the framework for the appropriation being challenged, provided
8 for such a challenge. (*Id.* at pp. 714-715.) Here, by contrast, Government Code § 16428.9(d)
9 specifically states:

10 If any expenditure of moneys from the [GGRF] fund for any measure or project is
11 determined by a court to be inconsistent with law, the funding for the remaining
12 measures or projects shall be severable and shall not be affected.

13 Implicit in that subdivision is that it would be proper for a court to find, through a
14 declaratory relief action, that providing funding to a specific project from the GGRF was
15 inconsistent with law, and therefore invalid.

16 Further, in the Greenhouse Gas Reduction Fund Investment Plan and Communities
17 Revitalization Act,⁹ a follow-up measure to AB 32 enacted in 2013, Health & Safety Code §
18 39712(b) states:

19 The state shall not approve allocations for a measure or program using moneys
20 appropriated from the fund except after determining, based on the available
21 evidence, that the use of those moneys *furtheres the regulatory purposes of*
22 *Division 25.5 (commencing with Section 38500) and is consistent with law.* If any
23 expenditure of moneys from the fund for any measure or project is determined by
24 a court to be inconsistent with law, the allocations for the remaining measures or
25 projects shall be severable and shall not be affected. [emphasis added]

26 Again, the Legislature explicitly contemplated the availability of declaratory relief to
27 remedy an improper legislative appropriation from the GGRF. This subsection also specifically
28 prohibits any appropriation that fails to further the regulatory purposes of AB 32 (see italicized
29 portion of the above citation), whose primary purpose is reducing the state's greenhouse gas
emissions prior to 2020.

⁹ Health & Safety Code §§39710-39723.

1 Finally, CHSRA and ARB argue that, in making legislative factual findings in support of
2 the appropriation to CHSRA, the Legislature found that the appropriation “furthers the
3 regulatory purposes of AB 32 by facilitating the achievement of reductions in greenhouse gases
4 in the state.” (Exhibit B to CHSRA’s Request for Judicial Notice at p. 8; see also, further
5 findings on pp. 9-10.) They go on to say that this finding, “is conclusive.” (CHSRA P&As at p.
6 8:4.) However, as explained earlier, the legislative purpose in enacting AB 32 was not simply to
7 generally reduce greenhouse gas emissions at some point in the nebulous future. It set a specific
8 goal – reducing greenhouse gas emissions to 1990 levels – and a specific date for reaching that
9 goal – 2020. The question, then, is whether to Legislature’s findings in SB 862 sufficed to meet
10 the requirement of Health & Safety Code § 39712(b). If not, the appropriation violated the
11 Legislature’s own requirements and was therefore not authorized. As was explained in
12 *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1218, “The principle of strict
13 construction does not mean, as the Legislature asserts, that the judicial inquiry is reduced to
14 superficiality.” In other words, the courts, in reviewing a legislative appropriation, do not simply
15 act as a “rubber stamp” for the Legislature’s actions. In this context, that means that the court
16 must look beyond the Legislature’s bald statements. The test for validity of a legislative
17 enactment is deferential – whether it was arbitrary, capricious, or totally lacking in evidentiary
18 support. (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 576.)
19 Nevertheless, a legislative finding of fact that is unsupported, and indeed contradicted, by the
20 evidence, cannot be allowed to stand. (*See, Id.* at pp. 572-573.)

21 Thus, if Petitioner can show, as it has alleged, that the uncontradicted evidence shows
22 that the Legislature’s appropriation of GGRF funds to the high-speed rail project would not
23 decrease, but would instead increase greenhouse gas emissions prior to 2020, it would be entitled
24 to relief in the form of a declaration that the specific appropriation was made in violation of AB
25 32 and the Greenhouse Gas Reduction Fund Investment Plan and Communities Revitalization
26 Act and was therefore invalid. Because the Fifth Cause of Action states facts sufficient to
27 support this claim, the demurrers must be overruled.

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1 **IV. IF THE COURT GRANTS THE DEMURRERS, PETITIONERS SHOULD BE**
2 **GRANTED LEAVE TO AMEND.**

3 If the Court were to conclude that either of the two challenged causes of action was
4 insufficient as stated in the Petition, Petitioner should be granted leave to amend to provide the
5 allegations needed to make them sufficient. As Petitioner has explained, the central purpose of
6 AB 32, in light of the role of greenhouse gases in causing global warming (Health & Safety Code
7 § 38510) is to reduce California's greenhouse gas emissions to their 1990 levels by 2020.

8 In order to be consistent with that purpose, and hence with AB 32, any program identified
9 in the Scoping Plan or for which an appropriation is made from the GGRF must contribute to
10 reaching that goal. Petitioner's fundamental claim is that, because of the huge and unmitigated
11 release of CO₂ associated with the cement manufacturing required for construction of the
12 California high-speed rail project, and the fact that the project would not become even partially
13 operational until well after 2020, inclusion of support for high-speed rail construction in the
14 Scoping Plan or appropriation of funding for that construction from the GGRF would be
15 inconsistent with and would not further the regulatory purposes of AB 32. If the Court feels that
16 the current allegations are insufficient to state those claims, Petitioner would ask that the Court
17 grant leave to amend the Petition to state those claims.

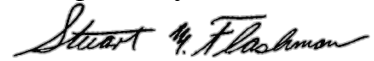
18 **CONCLUSION**

19 The fundamental claims that Petitioner seeks to bring before the Court in its Fourth and
20 Fifth Causes of action are: 1) that the Updated Scoping Plan was in violation of AB 32 in
21 including construction of CHSRA's high-speed rail project; and 2) that the Legislature was in
22 violation of AB 32 and of the Greenhouse Gas Reduction Fund Investment Plan and Community
23 Revitalization Act in appropriating funds from the GGRF to construction of CHSRA's high-
24 speed rail project. Petitioner believes that the allegations in its Petition adequately support those
25 claims, and on that basis the demurrers and motion to strike should be overruled. However, if
26 the Court feels that any of the demurrers should be granted, Petitioner should be given leave to
27 more clearly and adequately state the allegations needed to support these claims.

28 Dated: August 8, 2016
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Respectfully submitted,



Stuart M. Flashman
Attorney for Petitioner
Transportation Solutions Defense
and Education Fund

PROOF OF SERVICE BY 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 action involved herein. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On August 8, 2016, I served the within PETITIONER'S OPPOSITION TO DEMURRERS AND TO REAL PARTY CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S MOTION TO STRIKE on the parties listed below by placing true copies thereof enclosed in sealed envelopes with priority mail express postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Mark Poole, Deputy Attorney General
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1515 Clay Street, 20th Floor
P.O. Box 70550
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Baine Kerr, Deputy Attorney General
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Los Angeles, CA 90013

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Los Angeles, CA 90013

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 August 8, 2016.



Stuart M. Flashman