Civ. No. C070877

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

TOWN OF ATHERTON *et al.*,

Plaintiffs/Appellants

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity,

Defendant/Respondent

On Appeal from the Judgment and Post-Judgment Order of the Sacramento County Superior Court
Honorable Michael P. Kenny, Judge
Cases No. 34-2008-80000022CUWMGDS
and 34-2010-80000679CUWMGDS

APPELLANTS' JOINT MOTION TO STRIKE PORTIONS OF RESPONDENT'S ANSWERS, OR, IN THE ALTERNATIVE, TO ALLOW FILING OF FURTHER SUPPLEMENTAL ARGUMENT; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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Plaintiffs/Appellants Town of Atherton et *al.* in the above-captioned consolidated appeals ("Appellants") hereby move the Court to strike portions of Respondent's Answers to the Letter Brief of Amicus Curiae Citizens for California High-Speed Rail Accountability ("CCHSRA") and the Supplemental Brief of Amicus Curiae Preserve Our Heritage ("POH"). More specifically, Appellants ask that the Court strike portions of Sections II (pp.17-24) of the Answer to the CCHSRA brief and portions of Section II (pp. 10-11) of the Answer to the POH brief on the grounds that they raise new legal points not previously addressed in the briefing without allowing Appellants an opportunity to respond. The new points are: 1) that Respondent, in applying CEQA to its own project, is not acting as a market participant but applying a state-mandated regulatory statute; 2) that only Respondent, not a third party, may invoke the market participant exception, and 3) that because there is no case law applying the market participant exception to environmental clearance of a public agency project under the ICCTA, the exception does not apply.

Alternatively, Appellants request that the Court grant Appellants the opportunity to file an additional supplemental brief to specifically respond to the new points raised in Respondent's Answers.

SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

After the close of regular briefing for this appeal, and after the case had been scheduled for oral argument, Defendant/Respondent California High-Speed Rail Authority ("Respondent") brought to the Court's attention the fact that the Federal Surface Transportation Board ("STB") had recently taken jurisdiction over the high-speed rail project at issue in this case. Respondent suggested that this action might serve to preempt the application of CEQA to the project and that the Court might wish to explore this question through supplemental briefing. The Court subsequently ordered supplemental briefing on the issue, with one supplemental brief each to be filed sequentially by Respondent and Appellants, in that order.

Subsequent to the completion of that briefing, several non-parties applied to the Court to file amicus briefs on the specific issue of federal preemption. The Court granted those applications and allowed the parties to file answers to those briefs.

Respondent has now filed answers to the letter brief of amicus CCHSRA and the supplemental brief of POH. Those briefs had raised issues also raised in Appellants' Joint Supplemental Brief on Preemption, notably the applicability of the so-called "market participant exception." However, that issue had not been addressed in Respondent's supplemental brief on preemption. Not only do Respondent's Answers to the two amicus brief address the points raised in those briefs (which is permissible), but they add several new points not previously brought before the Court.

If this was normal briefing and the brief was Respondent's Opposition Brief on Appeal, Appellants would be able to address those points in their reply brief. Under the current circumstances, however, Appellants have no ability to do so. Appellants therefore ask that either the new arguments be stricken from the two Answers or that Appellants be allowed to file additional briefing responding specifically to the new arguments.

ARGUMENT

I. IT WAS IMPROPER FOR RESPONDENT TO RAISE NEW POINTS IN ITS ANSWERS WHEN THOSE POINTS COULD HAVE BEEN ANTICIPATED IN ITS ORIGINAL BRIEF AND APPELLANTS HAVE NO CHANCE TO RESPOND.

The normal course of appellate briefing is that the appellant files an opening brief, the respondent files an opposition to that brief, and the appellant finally files a reply to the opposition. (Rules of Court Number 8.200.) Under these circumstances, any points raised in the respondent's opposition brief can be addressed in appellant's reply. However, it is long-standing policy that the appellant may not raise in its reply any point not already raised previously. (*Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 463; *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295 fn.11.)

In *Varjabedian, supra*, the California Supreme Court explained that, "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." The court cited previous California Supreme Court precedent extending back to 1898. (*Id.*) The situation here is somewhat different, but the same principle applies.

Here, Respondent had originally brought to the Court's attention the potential for this appeal to be preempted by provisions of the Interstate Commerce Commission Termination Act. The Court subsequently ordered supplemental briefing on this issue, with Respondent and Appellants each being allowed to file a single supplemental brief. Knowing that it was only allowed to file a single brief, it was incumbent upon Respondent to raise and address not only those points it felt supported preemption, but also the points it could reasonably expect Appellants to raise in opposition. This is particularly true when the issue of federal preemption was neither presented nor addressed in the trial court proceedings.

In particular, it should have been obvious to Respondent that the applicability of the market participant exception would be a point raised by Appellant to oppose preemption. Yet Respondent's supplemental brief totally ignored this issue. Were it not for the fortuitous circumstance of two amicus briefs being filed that raised the issue, Respondent would properly have been foreclosed from addressing it. However, once the issue was raised in those briefs, Respondent used the opportunity of its answers to not only address the issue, but to raise and argue several new points related to that issue, leaving Appellants no opportunity to respond. As with points first raised in a reply, this is obviously unfair to the Appellants. An appropriate response would be to strike the new points. (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268.)

II. ALTERNATIVELY, APPELLANTS SHOULD BE ALLOWED TO SUBMIT SUPPLEMENTAL BRIEFING ON THE NEW POINTS RAISED BY RESPONDENT.

If the Court should decide that it wishes to consider the new points raised in Respondent's answers, fairness requires that Appellants be allowed to submit further supplemental briefing to address those points. In *Williams v. Calif. Physic. Serv.* (1999) 72 Cal.App.4th 722, 743, for

example, the plaintiff and appellant, in its reply brief, raised a new argument that it had not raised in its opening brief. Rather than reject the argument outright, however, the court allowed the defendant and respondent to submit supplemental briefing on the issue.

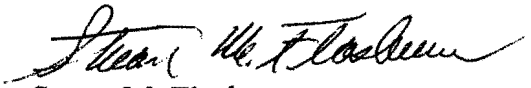
The same principle of fairness that governs the general rule that arguments first raised in an appellate reply brief not be considered by the court also mandates that if such an issue it to be considered, the opposing party should be allowed a fair and equal opportunity to address the issue.

CONCLUSION

Respondent's Answers to the two brief of *amici curiae* raise new points of law concerning the applicability of the market participant exception to preemption under the ICCTA. Respondent raised its new points knowing full well that Appellants would have no opportunity, in the normal course of events, to respond to those issues. This was fundamentally unfair. Consequently, the Court should either strike those points from Respondent's Answers, or allow Appellants the opportunity to file an additional supplemental brief to address the newly-raised points.

Dated: November 11, 2013

Respectfully submitted,



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