Law Offices of
Stuart M. Flashman
5626 Ocean View Drive
Oakland, CA 94618-1533
(510) 652-5373 (voice & FAX)
e-mail: stu@stuflash.com

September 17, 2013

Hon. Vance W. Raye, Presiding Justice
Third District Court of Appeal
Stanley Mosk Library and Courts Building
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

RE: Town of Atherton et al. v. California High-Speed Rail Authority, Case No. C070877.

Dear Justice Raye,

Enclosed please find an original and three copies of Appellants' Joint Supplemental Brief on Federal Preemption, along with an original of Appellants' Joint Motion for Judicial Notice. An additional copy of each document is being submitted electronically through the Court's website.

To very briefly summarize the answers provided to the two questions you posed in requesting this supplemental briefing:

1) Does federal law preempt state environmental law with respect to California's high-speed rail system? (See City of Auburn v. United States Government (9th Cir. 1998) 154 F.3d 1025; Association of American Railroads v South Coast Air Quality Management Dist. (9th Cir. 2010) 622 F.3d 1094.)

Short answer: Federal preemption under to ICCTA does not apply to Respondent California High-Speed Rail Authority's ("Respondent") compliance with CEQA for two reasons: first, because CEQA is an informational, rather than a regulatory statute, and therefore cannot, in itself, prevent a rail project subject to STB jurisdiction from moving forward; secondly, because Respondent's approval of the project and associated CEQA compliance fall under the market participant exception and are therefore not preempted.

2)Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the trial court or is preemption jurisdictional in nature? (See, International Lognshoremen's Ass'n, AFL-CIO v Davis (1986) 476 U.S. 380, 390-391; Elam v. Kansas City Southern Ry. Co. (5th Cir.. 2011) 635 F.3d 796, 810; Girard v. Youngstown Belt Ry. Co. (Ohio 2012) 979 N.E.2d 1273, 1280.)

Short answer: Because Respondent's CEQA compliance is not jurisdictionally preempted by the ICCTA, any preemptive claim that the project should only have had to comply with NEPA, but not CEQA, is a choice of laws affirmative defense. This defense, not having been raised in Respondent's Answer or in the trial court proceedings, has been waived.

Appellants would also note that Respondent's claim of preemption should also be denied on the basis of laches. Respondent has been aware of the potential for its project to come under STB jurisdiction for many years, yet it proceeded to actively pursue CEQA review of the project. In doing so, it led Appellants, and the public, to rely on the application of CEQA to the project. If CEQA compliance was to be foregone in

favor of NEPA, Appellants and others who have relied on Respondent to properly comply with CEQA in participating in the CEQA process and who have litigating over Respondent's noncompliance with CEQA would be severely prejudiced.

Most sincerely,

Stuart M. Flashman
Counsel for Appellants Town of Atherton et al.