Civ. No. C075668

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*

Petitioners

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Respondent

JOHN TOS, AARON FUKUDA, COUNTY OF KINGS, HOWARD JARVIS TAXPAYERS ASSOCIATION, COUNTY OF KERN, FIRST FREEWILL BAPTIST CHURCH, EUGENE VOILAND, CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY, KINGS COUNTY WATER DISTRICT, and UNION PACIFIC FAILROAD COMPANY,

Real Parties in Interest

Sacramento County Superior Court Case Number 34-2011-0113919-CU-MC-GDS and 34-2013-00140689-CU-MC-GDS; Department 31, Hon. Michael P. Kenny, Judge. Tel.: 916-874-6353

PRELIMINARY OPPOSITION OF REAL PARTIES IN INTEREST JOHN TOS, AARON FUKUDA, COUNTY OF KINGS, AND COUNTY OF KERN TO PETITION FOR EXTRAORDINARY WRIT OF MANDATE

Stuart M. Flashman, SBN 148396 Law Offices of Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533 Telephone and fax: (510) 652-5373 e-mail: stu@stuflash.com	Michael J. Brady, SBN 40693 1001 Marshall Street, Ste 500 Redwood City, CA 94063-2052 Telephone: (650) 364-8200 Facsimile: (650) 780-1701 e- mail: mbrady@rmkb.com	Theresa A. Goldner, County Counsel SBN 101838 Nicole M. Misner, Dep.Cty. Counsel SBN 188076 Kern Cty Admin. Ctr. 1115 Truxton Ave. 4th Fl. Bakersfield, CA 93301 Tel. (661) 868-3800
Attorneys for Real Parties in Interest **JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS**		Attorney for Real Party in Interest **COUNTY OF KERN**

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C075668
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533 TELEPHONE NO.: 510-652-5373 FAX NO. *(Optional):* 510-652-5373 E-MAIL ADDRESS *(Optional):* stu@stuflash.com ATTORNEY FOR *(Name):* Real Parties in Interest John Tos et al.	Superior Court Case Number: 34-2011-00140689 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: California High Speed Rail Authority et al. RESPONDENT/REAL PARTY IN INTEREST: John Tos et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Real Parties in Interest John Tos & Aaron Fukuda

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 3, 2013

Stuart M. Flashman
(TYPE OR PRINT NAME)

▶ Stuart M. Flashman
(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION AND OUTLINE OF ARGUMENT

Faced with two trial court rulings finding that Petitioners California High-Speed Rail Authority *et al.* (hereinafter, "Petitioners") violated terms of a voter-approved bond measure, Petitioners now ask the Court to intervene unnecessarily in two only loosely related cases, one of which is already ripe for appeal and the other delayed, at Petitioners' own doing, in its trial court proceedings. The Court should turn down this invitation.

In the validation action,[1] Petitioners have an adequate legal remedy by pursuing the expedited appellate procedure laid out in the validation statutes. (Code of Civil Procedure §860 *et seq.*, and specifically §§867 and 870(b); *Blue v. City of Los Angeles* (2006) 137 Cal.App.4th 1131, 1139 fn 7 [court granted expedited appellate review of validation judgment].) The availability of that remedy, contrary to the allegation in ¶26 of the Petition, makes pursuit of writ relief unnecessary, and hence improper. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112-113 [direct appeal is generally an adequate legal remedy for dissatisfaction with trial court judgment, and Petitioner bears burden of demonstrating inadequacy of appeal as remedy].)

Also contrary to the allegations in the Petition, in the second case, *Tos et al v. California High-Speed Rail Authority et al*., (Sacramento County Superior Court case #34-2011-0113919-CU-MC-GDS, hereinafter,

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[1] High-Speed Rail Authority and High Speed Passenger Train Finance Committee of the State of California v. All Persons Interested etc. (Sacramento County Superior Court case #34-2013-2013-00140689-CU-MC-GDS)

"Tos case") Petitioners' compliance with the trial court's peremptory writ of mandate (Petitioners' Appendix of Exhibits ["HSR"], Vol. 1, Tab 3, pp. 50-51), which was properly served on Petitioners on January 17, 2014,[2] will not moot the issues raised by the trial court's order of January 3, 2014 granting the petition for writ of mandate. Consequently, there is no urgent need to vacate the trial court's ruling or the issuance of its writ of mandate, or to interfere with the Petitioners' duty to comply with that writ.

Further, Petitioners admitted in the trial court that the bond issuance for the Spring of 2014 would begin in February (1 HSR 103:1-2), which means there would have needed to be a validation judgment in hand well before now in order for the administrative preparations for bond issuance to have been done in a timely manner. It is now already too late for bonds to be issued in the Spring issuance. There is, therefore, no urgency in terms of bond issuance.

Finally, on the merits, the trial court's two rulings simply say that in issuing Proposition 1A bonds and using their proceeds, Petitioners must comply with the legal requirements of the voter-approved measure. This is not a situation where the trial court construed a statute and that construction would require independent review by this Court. The trial court merely read and applied the plain language of the bond measure and required

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[2] See Tab A to Appendix of Exhibits of Real Parties in Interest John Tos *et al.*, submitted herewith

Petitioner California High-Speed Rail Authority (hereinafter, "Authority") to comply with its requirements.

Petitioners ask the Court to allow the Authority to ignore those requirements, but that is beyond the power of this Court, or any court. Once a valid bond measure has been approved by the voters, the agency has no choice but to comply with the bond measure's provisions; and so long as they are legal and proper, only the voters can modify those requirements. (*O'Farrell v. County of Sonoma* (1922) 189 Cal. 343, 347; *Shaw v. People Ex Rel. Chiang* (2009) 175 Cal.App.4th 577, 596.)

Real Parties in Interest John Tos, Aaron Fukuda, County of Kings, and County of Kern (hereinafter, "RPI") therefore respectfully request that the Extraordinary Petition for Writ of Mandate be summarily denied.

STATEMENT OF MATERIAL FACTS

A. GENERAL BACKGROUND

For purposes of the two cases at issue here, one can agree that the relevant facts start in 2008, when the Legislature took up and modified a previously-proposed high-speed rail bond measure and placed the modified measure, designated as Proposition 1A, on the November 2008 ballot for approval by the voters. (20 HSR 5121 *et seq.,* 5137 *et seq.*) The measure was approved by a relatively narrow 52.7% to 47.3% margin. (15 HSR 4197.)

B. THE FUNDING PLAN

In November 2011, the Authority prepared and submitted to the Legislature a Funding Plan (20 HSR 5174 *et seq.*), purportedly pursuant to Streets & Highways Code §2704.08(c), along with a Draft 2012 Business Plan (20 HSR 5194 *et seq.*) that was incorporated into the Funding Plan by reference.

The Funding Plan was required by the bond measure to identify or certify several crucial characteristics of the Corridor or Usable Segment that it was intended to provide funding for. (20 HSR 5130-5131.) The identification or certification of these characteristics was intended to assure the Legislature and the voters that construction and operation of that Corridor[3] or Usable Segment would be successful. (See, 20 HSR 5125 [analysis in Voter Information Guide stating that a detailed Funding Plan for each Corridor or Usable Segment would be prepared and submitted to the Legislature prior to any appropriation of funds]; 20 HSR 5126 [ballot argument in favor of measure stating that there would be "public oversight and detailed independent review of financing plans.") Among those characteristics were: 1) its estimated full cost for construction, 2) the sources of all funds to be invested in it, along with anticipated time for

[3] A "Corridor" is defined in Streets & Highways Code §2704.01(f) as "a portion of the high-speed train system as described in §2704.04." A "Usable Segment" is described in §2704.01(g) as "a portion of a corridor with at least two stations."

receipt of those funds, 3) certification that it could be completed as proposed, and 4) certification that all project-level environmental clearances needed to proceed to its construction had been completed. (Streets & Highways Code §2704.08(c)(2)(C),(D),(G), and (K).)

In fact, and as the trial court found based on undisputed evidence in the record, several of these identifications or certifications in the Funding Plan were improper. In particular, the Funding Plan did not identify all of the funds to be invested in the 300 mile long Usable Segment[4], but only in a 130 mile long "Initial Construction Section."[5] ("ICS") (1 HSR 80-82; 20 HSR 5185-5186.) Further, the Funding Plan did not and could not certify that all project level environmental clearances had already been completed so that the project could proceed to construction.[6] Instead, it certified that environmental clearances for the ICS would be completed before construction of that section was initiated. (1 HSR 82-84; 20 HSR 5192.)

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[4] Later identified more specifically in the April 2012 Revised 2012 Business Plan as the Initial Operating Segment – South ("IOS-South"). (27 HSR 7046 et seq., 7053, 7096 [tab 373].)

[5] Even here, the funds would not be sufficient to provide electrification or positive train control, two requirements if the Usable Segment was to be "suitable and ready for high-speed train operation." (§2704.08(c)(2)(H); 27 HSR 7099, 7114-7115.)

[6] In fact, as of the date the Funding Plan was completed and sent to the Legislature, none of the environmental clearances for the Usable Segment had been completed. (27 HSR 7113.)

C. THE REVISED BUSINESS PLAN AND THE LEGISLATIVE APPROPRIATION.

In April of 2012, the Authority approved and sent to the Legislature a revised version of its 2012 Business Plan. (27 HSR 7046 *et seq.*) The November 2011 Funding Plan was not, however, amended to incorporate the Revised Business Plan. While the Revised Business Plan changed a number of salient features of the proposed Phase I system, including introducing the "blended system"[7] and designating the IOS-South as the first Usable Segment, it did not correct any of the defects that the trial court found in the Funding Plan.

In July 2012, the Legislature took up the Authority's appropriation requests. While the measure approving the appropriations, SB 1029, passed the Assembly easily, it barely passed in the Senate, with the leadership of the Senate Transportation Committee, the committee with primary jurisdiction over the project, voting no. (15 HSR 4185 [showing Senators Lowenthal, Simitian, and Desaulnier voting no].)

D. INITIATION OF THE TOS SUIT.

On November 14, 2011, Real Parties in Interest John Tos, Aaron Fukuda, and County of Kings (hereinafter, "Tos Plaintiffs") filed their Complaint for Declaratory Relief; Complaint by Taxpayers/Interested Parties Under Code of Civil Procedure §526a to Prevent Commission of

[7] A system that used conventional rail segments to connect to the two Phase I termini. (See generally 27 HSR 7046 et seq. [tab 373].)

Illegal Act; Request for Permanent Injunction. (19 HSR 5109 *et seq.*) On December 13th, the Tos Plaintiffs filed their First Amended Complaint. (19 HSR 5079 *et seq.*) Defendants demurred to that complaint (19 HSR 5051), which demurrer was granted with leave to amend. (18 HSR 4845 *et seq.*) Subsequently, the Tos Plaintiffs filed their Second Amended Complaint (hereinafter, "SAC") (18 HSR 4806 *et seq.*), which remains the operative pleading in the Tos Case.

E. AUTHORIZATION OF BOND ISSUANCE AND THE VALIDATION ACTION.

In March of 2013, the Authority began consideration of requesting the issuance of approximately $8.5 billion of Proposition 1A bonds for high-speed rail construction. On March 18th, the Authority adopted a resolution requesting that the California High-Speed Passenger Train Finance Committee (hereinafter, "Committee"), which had been established by Proposition 1A (Streets & Highways Code §2704.12; 20 HSR 5132), authorize the issuance of those bonds. (8 HSR 2048-2049 [Tab 109].) The Authority forwarded the resolution to the Committee, but did not submit any additional information in support of the request.

That same day, the Committee met. No staff report or other supporting documentation was provided to the Committee. (3 HSR 714 ¶1.) The open session began with ten minutes of public comments, none of which provided evidence supporting authorization of bond issuance. After

that, consideration of bond authorization took one minute and 43 seconds, with no discussion by Committee members, just a voice vote approving the two resolutions authorizing bond issuance. (8 HSR 1953, 1956 *et seq.*, 2005 *et seq.*; 6 HSR 1553 [¶6], 1554 [¶11], 1555 [¶¶14, 15], 1613 [letter from Chief Counsel for Authority], 1623 *et seq.*[8]; 3 HSR 713 [stipulation by counsel for the Authority and the Committee that no documents were presented to the Committee in open session at its March 18, 2013 meeting other than the Authority's resolution requesting authorization for bond issuance and the two draft resolutions authorizing bond issuance].)

The following day, the Authority and the Committee jointly filed the Validation Action seeking to validate the Authority's and the Committee's determinations authorizing the bond issuance. (10 HSR 2760 et seq. [tab 189].) After preliminary skirmishes over the propriety of the summons and of the validation complaint, answers were filed by eight parties. (7 HSR 1929; 8 HSR 2122; 9 HSR 2469, 2479, 2496, 2507, 2514; 10 HSR 2727.)

After full briefing, the matter was heard on September 27, 2013. (1 HSR 97 et seq. [tab 7] [hearing transcript].) On November 26, 2013, the trial court issued its Ruling on Submitted Matter (1 HSR 52 *et seq*. [tab 4]), finding that a judgment validating the bond authorization could not be

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[8] The Declaration of Kathy Hamilton was submitted to the trial court without objection. In its ruling on the Validation Action, the trial court expressed reservations about the accuracy of the transcript attached to the declaration. However it did not strike the declaration, which is therefore part of the record before this Court.

entered because the authorization did not comply with statutory requirements. More specifically, there was no evidence before the Committee to support its determination authorizing bond issuance. The trial court designated the Tos Plaintiffs to prepare a proposed judgment for the court. (1 HSR 71.)

After extended negotiations with opposing counsel over the form of the judgment, a final judgment was approved by the plaintiffs' counsel and submitted to the court. Judgment was entered on January 3, 2014 (1 HSR 4), and Notice of Entry of Judgment was served on the plaintiffs by mail on January 16, 2014. (1 HSR 34.)

F. TRIAL ON MANDAMUS CAUSES OF ACTION IN TOS CASE.

By stipulation of the parties, after an informal telephonic case management conference (18 HSR 4773-4774 [tab 279]; 4784-4785 [tab 283]), the writ claims in the SAC that were based on an administrative record were heard, after full briefing, on May 31, 2013.[9] (1 HSR 171 et seq. [tab 8][hearing transcript].)

[9] The issues in the non-mandamus causes of action, which include injunctive relief under Code of Civil Procedure §526a and declaratory relief, were left to be decided after the court heard and decided the formal writ proceedings. The Tos Plaintiffs filed their opening brief for those proceedings along with their opening brief in the writ proceedings. A determination on whether to proceed with the non-writ claims by a court trial is currently pending in the trial court on defendants' motion for judgment on the pleadings, set for hearing on February 14, 2014.

On August 16, 2013, the trial court issued its Ruling on Submitted Matter, determining that, as a matter of law, the Authority had abused its discretion in approving the November 2011 Funding Plan. (1 HSR 74 *et seq*. [tab 5].) The court ordered further briefing on the appropriate remedy (if any) for the violation. After completion of that briefing, the court held a second hearing, on remedies, on November 8, 2013. (1 HSR 232 et seq. [tab 9][hearing transcript].) On November 26, 2013, the trial court issued its second Ruling on Submitted Matter in the case, finding that because ordering rescission of the Authority's approval of the Funding Plan would have real and practical effect, a writ of mandate would issue ordering that rescission. (1 HSR 52 *et seq*. [tab 4].) The court denied, however, the Tos Plaintiffs' requests that the writ include rescission of the Authority's construction contracts and that the court enjoin expenditure of state bond funds or federal grant funds towards construction, finding that such relief was not warranted at that time. The Tos Plaintiffs were directed to prepare a proposed order and a proposed writ of mandate for submission to the court.

As with the Validation Action, Tos Plaintiffs' counsel prepared the proposed order and writ and submitted them to opposing counsel for approval as to form. (See 1 HSR 276 [letter to court from counsel for Tos plaintiffs reviewing process for preparing and submitting proposed order].) There followed several rounds of negotiation over the form and content of

the order and writ. Eventually, counsel for defendants indicated that the form of the order and writ were acceptable. (1 HSR 277.) Shortly thereafter, however, defendants' counsel retracted that approval and asked for additional delay while the clients were consulted. (1 HSR 276 .) Eventually, counsel for defendants asked that Tos Plaintiffs agree not to seek issuance of a writ of mandate until a final judgment was entered. (1 HSR 279-280.) In the meantime, defendants' counsel indicated that defendants would stipulate to not using any Proposition 1A bond funds towards construction. (*Id.*) The Tos Plaintiffs rejected this proposal and submitted the proposed order and writ with an explanatory cover letter. (1 HSR 276-277 [tab 10].) On January 3, 2014, the trial court filed its order and issued the writ of mandate. (1 HSR 37 et seq., 50-51.) On January 17, 2014, the writ of mandate was personally served on the Tos Defendants, through their legal counsel. (Supplement of Real Parties in Interest John Tos et al. to Appendix of Exhibits, p.1.) The Writ of Mandate ordered the Authority to rescind its Funding Plan, and required the Authority to submit a return to the court within sixty days of receipt of service, indicating its compliance with the writ.

STANDARD OF REVIEW

An extraordinary petition for writ of mandate is, as the name indicates, extraordinary. (*Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 213.) Unlike the usual appeal, it is heard "outside normal

channels of appellate review." (*Jones v. Super. Ct*. (1994) 26 Cal.App.4th 92, 100.) Consequently, an appellate court's consideration of an extraordinary writ of mandate is discretionary, and is rarely granted. (*Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 766 fn. 4; *Omaha Indemnity Co. v. Super. Ct*. (1989) 209 Cal.App.3d 1266, 1272 [**"**Writ relief, if it were granted at the drop of a hat, would interfere with an orderly administration of justice at the trial and appellate levels."].) The burden is on the petitioner to demonstrate to the court that:

> (1) the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue; (2) the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action; (3) conflicting trial court interpretations of the law require a resolution of the conflict; (4) the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case; (5) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and (6) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal. (*Omaha Indemnity Co., supra,* 209 Cal.App.3d at 1273-1274 [internal citations omitted].)

Unless the above-referenced criteria are met, the appellate court should properly determine that, because a writ of mandate requires as a prerequisite that there be no plain, speedy, and adequate remedy at law available (*People v. Mena* (2012) 54 Cal.4th 146, 153), the petition should be summarily denied. (*See, Langford v. Superior Court* (1987) 43 Cal.3d 21, 27 [summary denial of petition improper where no plain, speedy and adequate remedy was available].)

In considering the merits of the trial court decisions, as opposed to whether the petition should be granted consideration, the appellate court (whether by writ review or by appeal) applies a two-part standard. When purely legal determinations, or determinations based on undisputed facts, are involved, the court reviews the trial court decision de novo. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 954.) When, however, factual determinations are involved, the trier of facts is given substantial deference and the trial court's determinations will be upheld unless there was an abuse of discretion. (*People v. Smith* (2005) 37 Cal.4th 733, 739; *County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1152-1153.)

ARGUMENT

A. THE WRIT PETITION SHOULD BE SUMMARILY DENIED.

1. PETITIONERS HAVE AN ADEQUATE REMEDY TO THE JUDGMENT IN THE VALIDATION ACTION BY APPEAL.

In order for an extraordinary writ petition to be considered by the Court, Petitioners must demonstrate that they have no plain, speedy, and adequate remedy in the ordinary course of law. (*Western States Petroleum Assn. v. Superior Court ("WSPA")* (1995) 9 Cal.4th 559, 566 fn.1.) Ordinarily, when a final judgment has already been entered in a case, an appeal is considered an adequate remedy for any error in the judgment. (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1221.)

> When the petitioner may immediately appeal, his remedy is considered adequate and writ relief is precluded, unless the petitioner "can show some special reason why it is rendered inadequate by the particular circumstances of his case. (*Id.*)

Here, Petitioners argue that an appeal, "may take years to resolve and incur the exorbitant costs, fiscal and otherwise, that will attend the delays …" (Petition at p.8 ¶26.) Petitioners ignore the fact that Code of Civil Procedure §867 requires that:

> Actions brought pursuant to this chapter shall be given preference over all other civil actions before the court in the matter of setting the same for hearing or trial, and in hearing the same, to the end that such actions shall be speedily heard and determined.

Given this mandate, and the provision of California Rules of Court, Rule 1.10, subd (c) [allowing shortening of time, unless otherwise provided by law, within which a party must perform any act under the rules], there is no reason why pursuing an appeal in the ordinary course would not be a plain, speedy, and adequate remedy. (*See, e.g*., *Blue,, supra,* 137 Cal.App.4th at 1139 fn 7 [court granted expedited appellate review of validation judgment].)

a. Requiring an appeal of the validation action would not cause any irreparable harm to petitioners.

Further, Petitioners cannot point to any irreparable harm that would occur if they were to pursue such an expedited appeal. Petitioners themselves admitted at the hearing in the Validation action that the state's spring bond sales would occur between February and April, and that a

validation judgment was necessary before preparations for the bond sale could occur. (1 HSR 103.) At this point, it being February already and assuming that a determination by this court ordering entry of a validation judgment would require briefing by the parties, that determination would be well over a month away, and it would be practically if not literally impossible for the bonds to be sold in the spring bond sale. In short, to use a perhaps not inappropriate metaphor, that train has already left the station and cannot serve as a basis for urgency.

Petitioners also argue that the short timeframe available to expend the federal grant funds requires that the Court reverse the trial court decisions so that bond funds will be available to provide a required match to the federal funds. (Petition at p.35.) While the American Recovery and Reinvestment Act requires that federal funds granted under that act be spent by 2017, it places no similar deadline on the expenditure of state matching funds. Indeed, the most recent Grant/Cooperative Agreement between the Authority and the Federal Railroad Administration (36 HSR 9445 et seq. [tab 445]) explicitly allows a "tapered" match, where expenditure of federal funds precedes expenditure of state matching funds. (See also, 13 HSR 3333:3-5 [Petitioners acknowledge that federal grant funds may be spent prior to any expenditure of state bond funds].)

It should also be noted that the delay in seeking to access bond funds has been a delay of Petitioners' own choosing. They could have sought

authorization to issue bonds at any point after the voters' approval of Proposition 1A. As Petitioners note, there is nothing that requires that bonds be issued at any particular time once issuance is authorized. (Petition at 23.)

Petitioners also argue that the trial court's rulings have galvanized political opposition to the high-speed rail project. (Petition at pp.35-36.) Of course, neither the trial court nor RPI have control over the political repercussions of litigation. In a democracy, it is not the role of the courts to try to control, or even shape, the tenor of political debates. That arena belongs to the other two branches of government. Certainly, it would be highly improper for the Court to rule in this case based on political considerations. (*See, e.g., People v. Prince* (2007) 40 Cal.4th 1179, 1299; *People v. Avila* (2006) 38 Cal.4th 491, 615 [appellate consideration of death sentence review is not impermissibly influenced by political considerations]

b. There is no pressing public interest that could not be addressed through an appeal.

Petitioners also argue that to accept the trial court's judgment would mean having to initiate a new validation action. (Petition at p. 9 ¶27.) Petitioners argue that the trial court decision "has cast doubt upon the procedures by which agencies may authorize and validate general obligation bonds …" (*Id.*) If Petitioners mean they need to worry about

whether they ought to place some evidence before the Committee in order to justify the bond sale authorization, this seems a trivial concern.

In the context of other validation proceedings, it has long been understood that validation is not a "rubber stamp," and that there must be at least some evidence in the record to support the decision whose validation is sought. (*See, e.g., Boelts v. City of Lake Forest* (2005) 127 Cal.App.4th 116, 120 [lack of evidence in the record supporting agency's conclusion that proposed redevelopment area was blighted required entry of judgment invalidating redevelopment plan].) If Petitioners (and others) are unable to come up with any evidence supporting authorization of bond issuance, then perhaps the conclusion should be that the issuance not be authorized; not that the law be reinterpreted such that the evidentiary requirement is thrust aside. In any case, such a major change in public policy would be better dealt with through the standard appellate process.

2. THE ISSUES IN THE TOS CASE WOULD NOT BE MOOTED BY COMPLIANCE WITH THE WRIT.

With regard to the trial court's order and writ of mandate in the Tos Case, Petitioners argue that unless the Court accepts the Petition and orders rescission of the order and writ, the Authority will be forced to comply with the writ, and that, in turn, would render the underlying issues moot and not susceptible to appeal once judgment is entered. (Petition at p. 11 ¶32.) As had already been explained to the trial court by Tos Plaintiffs and was

presumably accepted by that court (1 HSR 281-282 [tab 12]), this is not the case.

Petitioners had expressed concern to the trial court that compliance with a writ of mandate ordering rescission of the Authority's Funding Plan would moot any later attempt to appeal the trial court's ruling. (1 HSR 279-289 [tab 11]) They express the same concern here. (Petition at p. 11 ¶32, 47-48.)

Petitioners base their concern on a series of cases where a court had issued an order mandating a particular action, and the agency's subsequent compliance with the order by taking that action mooted the appeal. In each case, compliance with the order fully resolved the controversy that had engendered the lawsuit without the prospect of its recurrence, leaving nothing to be appealed.

Thus, in *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214, the trial court had issued a writ ordering the respondent city to reconsider the petitioner's application for a rent increase under the city's rent control ordinance. The court of appeal held that the city, having completed its reconsideration of the application in compliance with the writ, could no longer seek to avoid the reconsideration through an appeal.

Similarly, in *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 865-866, the trial court had issued a

writ requiring the city to place a proposal for a local coastal program on the ballot. Again, the city complied with the writ by placing the measure on the ballot. Having done so, nothing was left for the court of appeal to address in the appeal.

In each of these cases, the agency was ordered to take the positive action that had been sought by the plaintiff. Once that action was completed, the plaintiff's concerns had been fully addressed. A reversal on appeal could not "unring the bell." Further, these were not situations where plaintiff's complaint could be predicted to recur. Thus the appeal could accomplish no useful purpose and was therefore moot.

a. Compliance with the writ would not moot an appeal because the situation involved in this case is likely to recur.

The situation here is quite different. It is much more similar to that in *Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist. ("LAICH")* (2012) 209 Cal.App.4th 1348. In that case, the plaintiff had submitted a request to the defendant district for use of district facilities during a specific school year. (*Id.* at 1352.) The district denied the request and the plaintiff filed a petition for traditional mandamus, asserting that the district had a duty under state law to provide facilities. The trial court granted the writ and the district did not appeal. (*Id.* at 1353.)

In its return on the writ, the district asserted that it had complied with the writ by providing facilities at a high school within the district. The

plaintiff contested the return, arguing that the offered facilities were inadequate. The trial court nonetheless discharged the writ. The plaintiff timely appealed from the discharge. (*Id.*)

In the court of appeal, the district asserted that the appeal was moot, because the school year for which facilities had been requested had ended more than a year earlier. (*Id.* at 1354.) The court disagreed. It noted that, "… an exception to the mootness doctrine is the distinct possibility that the controversy between the parties may recur." (*Id.*) The court went on to note that the plaintiff school's request could be expected to recur on an annual basis, and that under the exception, the appeal was not moot. (*Id.*)

The situation here is similar. The trial court's writ requires the Authority to rescind its approval of its 2011 Funding Plan for an Initial Operating Segment of the high-speed rail system. However, unlike the cases presented by the Petitioner, but like *LAICH, supra*, mere rescission of the Funding Plan would not end the controversy. Assuming the Authority still wished to construct that segment (or, for that matter, a different Corridor or Usable Segment thereof), it would have to adopt a new Funding Plan (or readopt its prior plan) making recurrence of the controversy likely.

b. Compliance with the writ would not moot an appeal because absent an appeal the trial court's ruling would have continuing effect through res judicata and collateral estoppel.

Further, in the absence of an appeal, the trial court's ruling would continue to affect the Authority's future decision-making, an effect that a

successful appeal would reverse. The trial court's decision, absent an appeal, would prohibit the Authority from behaving similarly in future situations under either res judicata (if the Authority attempted to re-adopt the same Funding Plan) or collateral estoppel (if the same issue arose in the context of a different Funding Plan or with different plaintiffs). (*See, Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-830 [general discussion of the application of collateral estoppel].) Thus, even after the Authority's compliance with the writ of mandate was complete, a successful appeal of the trial court's order could still affect future actions, and the appeal would therefore not be moot. (*See, e.g., Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1046 [prospect of future application of collateral estoppel against appellant meant appeal was not moot]; *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach* (1993) 14 Cal.App.4th 312, 328 [plaintiffs' appeal of adverse rulings on portions of an otherwise favorable judgment was not moot because, in future litigation against the city on the same subject, those issues could arise again but their litigation be precluded by collateral estoppel].)

3. PETITIONERS' WILLFUL DELAY OF THE TRIAL COURT PROCEEDINGS PRECLUDES THEM FROM ASSERTING THE NEED FOR SPEED AS A BASIS FOR THIS WRIT PROCEEDING.

It is quite ironic that Petitioners now worry that delay in pursuing an appeal in these two cases jeopardizes their ability to construct a high-speed

rail system. The Tos Case was originally filed in November 2011, and the first amended complaint filed a month later. Petitioners' demurrer and the need to file a second amended complaint delayed the proceedings for another six months. Their unwillingness to allow a trial on the Declaratory Relief and Code of Civil Procedure §526a action to move forward and continued insistence that the entire case be heard as a writ proceeding based on an administrative record delayed the case for another six months, and even now continues to add to the delay.

After the Validation Action was filed, Petitioners sought to have these two cases consolidated (13 HSR tabs 225-233; 14 HSR tabs 242, 244, 245, 258-260), even though they have little in common, and only relented when the Tos Plaintiffs agreed to not only dismiss the one paragraph in the complaint that referred to bond issuance, but also to stipulate to addressing any issues involving the issuance or validity of bonds solely through the Validation action. (13 HSR 3398 *et seq*. [tab 228].)

In short, Petitioners' dilatory tactics have delayed these cases' resolution for well over a year. Now, however, they proclaim that time is of the essence, and even an expedited appeal process for the Validation action is not fast enough. As was stated in Tos Plaintiffs' letter to the trial court, "If defendants now find themselves boxed in … …this is a box of their own making." This is but a variant of the equitable maxim, "No one

can take advantage of his own wrong." (Civil Code §3517; *See, e.g., People v. Giles* (2007) 40 Cal.4th 833, 848.)

4. THE IRREPARABLE HARM THAT PETITIONERS COMPLAIN OF IS ILLUSORY.

Petitioners complain that in the absence of relief by this Court (originally by the Supreme Court), they will suffer irreparable harm. Some of that "irreparable harm" has already been addressed in this opposition and found wanting. What about the rest?

a. Petitioners have shown no irreparable harm from a possible GAO investigation or introduction of federal legislation.

Petitioners complain (Petition, p.10 ¶31) that the two trial court rulings have directly resulted in an investigation by the Government Accountability Office ("GAO") and introduction of legislation intended to cut off federal grant funds until sufficient non-federal funds are available. Neither claim suffices to show irreparable harm[10].

Petitioners have asked the Court to take judicial notice of a letter from Congressmen Tom Latham and Jeff Denham asking that the GAO "address the following questions" regarding the Authority's compliance with its grant agreements and the effect of the California litigation on those grants. This is quite different from Congress itself opening a Congressional

[10] In fact, the two documents have no relevance to the Petition or its appropriateness, and the request for judicial notice should therefore be denied. In the event this Court asserts jurisdiction, RPI will file an opposition to Petitioners' Motion for Judicial Notice (styled as a request for judicial notice).

investigation of the Authority, and the letter does not indicate that such an investigation has been authorized. Even so, assuming Petitioners have nothing to hide, what irreparable harm flows from the mere initiation of an congressional investigation *per se*?

As for the legislation introduced by Congressman Denham and others, literally thousands of bills are introduced in Congress each session. Very few of them are actually enacted. The mere introduction of a bill cannot be considered irreparable harm; in fact, it can hardly be considered any harm at all.[11]

B. THE TRIAL COURT'S DETERMINATIONS SHOULD BE UPHELD ON THEIR MERITS.

In the interest of not taking the Court's time unnecessarily, RPI will keep their discussion of the merits of the two cases to a minimum, reserving in-depth discussion to such time as when appellate review on the merits is actually at issue. This brief summary only serves to outline the major issues involved and explain why Petitioners' arguments against the trial court's decisions are groundless.

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[11] The writ petition also references a number of newspaper articles concerning the two trial court decisions, presumably as additional evidence supporting irreparable harm. Such newspaper articles are hearsay evidence (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 83) that is not admissible and RPI hereby object to that evidence and ask that it be stricken from the Petition.

1. THE TRIAL COURT'S JUDGMENT IN THE VALIDATION ACTION WAS PROPER.

a. Judicial review of the committee's decision to authorize bond issuance was proper.

Petitioners start with the astonishing assertion that the courts have no business conducting judicial review of the propriety of the Committee's action in authorizing the issuance of $8.5 billion in Proposition 1A general obligation bonds. (Petition p. 28.) Petitioners are essentially saying that the Committee's action was even less than ministerial – more like an automatic rubber stamp, because even a ministerial action can be challenged based on the failure to properly perform a mandatory duty. (*In re C.F*. (2011) 198 Cal.App.4th 454, 465.)

Petitioners quote from *Boelts*, *supra*, 127 Cal.App.4th 116 to the effect that determination of whether an act is necessary or desirable is "*probably* so elastic as not to impose any substantive requirements" [emphasis added] and that such a determination is "*largely* immune from judicial review." [emphasis added] This may be so, but just because a requirement is "probably" or "largely" characterized in a certain way does not mean it is invariably immune to judicial review. After all, the trial court's ruling acknowledged that all that was required is that there be evidence in the record to support the committee's determination. (1 HSR 25:4-8 [tab 1].) There could hardly be a lower threshold. The trial court did not even demand that the evidence be substantial. Unfortunately, the

Authority and the Committee, whether through negligence, ignorance, or arrogance, did not have any evidence in the record to support the determination. This lapse is especially egregious when the project involved is likely to be the largest and most expensive public works project in California's history. To say the least, this is not a common situation, but judicial review must be available to address it on the rare occasion that it occurs. Otherwise, as the trial court noted, there would be no way to protect against an arbitrary or capricious action. (*Id.*; see also, 1 HSR 122:2-27 [the court asks whether flipping a coin would be an appropriate basis for the decision; counsel for Petitioners replies yes].)

Petitioners cite to *City of Monrovia v. Black* (1928) 88 Cal.App. 686 as support for their position, but it addresses a different point. *City of Monrovia* stands for the proposition that a validation determination does not require formal findings in its support. Yet the trial court here was not complaining about an absence of findings; the problem was an absolute absence of evidence – something quite different. Nothing in Petitioners' citation indicates whether there was evidence to support the determination; only that there were no findings. "It is axiomatic that cases are not authority for propositions not considered." (*McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.)

b. The trial court's judgment in the Validation Matter was proper, based on the evidence before it.

Given that judicial review of the Committee's determination was proper, and that, by Petitioners' own admission, the Committee, in open session, had before it only the Authority's bare resolution requesting bond issuance and the two proposed resolution it intended to adopt, the trial court had no choice but to conclude there was no evidence to support its determination about "whether or not it was necessary or desirable" to authorize the bond issuance[12].

2. THE TRIAL COURT'S RULING IN THE TOS CASE WAS PROPER.

a. The provisions of the Funding Plan are enforceable by the courts, because they were promises made to the voters by the bond measure.

In the Tos Case as well, Petitioners take the position that the Authority's approval of its Funding Plan is not subject to judicial review. (Petition at p. 36.) According to Petitioners, the Funding Plan was intended solely for the benefit of the Legislature, and it, and it alone, was entitled to judge its sufficiency. That judgment, according to Petitioners, was

[12] Petitioners point to the possibility that evidence was presented in closed session that might have supported the authorization. (Petition at pp.33-35.) Yet the closed session was not called to consider bond issuance, but "potential litigation". Considering evidence supporting bond issuance would have been a violation of California's open meeting laws. Further, if evidence had been presented, it was Petitioners' burden to present that evidence to the court, in camera if necessary. Having failed to do so, Petitioners cannot now claim it exists. (*See, WSPA, supra,*.9 Cal.4th at 573.)

determined by whether the appropriation was approved. If it was, the Funding Plan passed muster; if not, it failed.

Petitioners' position ignores, however, the fact that the requirements for the Funding Plan were placed before the voters in the ballot measure. Not all of AB 3032, the legislation that created Proposition 1A, became part of the ballot measure. If the Funding Plan's requirements were intended solely for the Legislature's benefit, there was no reason why it needed to be placed before the voters and approved by them. The conclusion therefore must be that these provisions were included for the benefit of the voters, as well as the Legislature. Indeed, the analysis in the Voters' Handbook, as well as the ballot argument in favor of the measure, both trumpeted to the voters the financial protections that would be provided by the Funding Plan. (20 HSR 5125, 5126.) Thus the promises of specific requirements in the Funding Plan were made to the voters, and as with any promise made to the voters in a bond measure, are enforceable through judicial review. (*O'Farrell, supra*, 189 Cal. at 348; *Shaw*, *supra*, 175 Cal.App.4th at 595-596.) To accept Petitioners' arguments about the unaccountability of the Authority would be to set a very dangerous precedent. As was said many years ago in *Jenkins v. Williams* (3rd Dist, 1910) 14 Cal.App.89 in a similar context:

> It seems to us that the views herein expressed are consistent with the letter and spirit of the statute, and that the construction contended for by the plaintiffs would open the door to possible, if not probable, dangerous abuse of power, and would take from the vote of the people all its significance as well as defeat its purpose. (*Id.* at 98.)

b. The Funding Plan violated the plain language of the bond measure.

As with the Validation Action; once judicial review is allowed, it is obvious the Authority's action in approving the Funding Plan was, as the trial court found, an abuse of discretion.

Section 2704.08(c)(2) requires that a Funding Plan for a Corridor or Usable Segment include a series of statements, identifications, or certifications. Among these are: 1) disclosure of the full cost of constructing the Corridor or Usable Segment; 2) the sources of funds that are intended to be invested in building the Corridor or Usable Segment; 3) a certification that the Corridor or Usable Segment can be completed as proposed in the Funding Plan; 4) a certification that the Corridor or Usable Segment, when completed, would be suitable and ready for high-speed train operation; and 5) that the Authority had completed all project-level environmental clearances necessary to begin construction of the Corridor or Usable Segment. The Authority's Funding Plan, however, failed to comply with the plain language of these requirements.

While §2704.08(c)(2)(D) required identifying the source of all funds to be invested in constructing the Corridor or Usable Segment, the

Authority's Funding Plan only identified the source of funds to be used to construct the ICS – 130 miles instead of the 300 miles in the Authority's identified Usable Segment. (20 HSR 5185-5186.) Further, the total of identified funds was only roughly $6 billion (20 HSR 5185), while the cost of the full Usable Segment (required by subsection (c)(2)(C)) was identified as $27 to $33 billion (depending on whether a northern or southern segment was built). (20 HSR 5183-5184.) In either case, the unfunded gap was huge, making the certification that the segment could be completed as proposed (§2704.08(c)(2)(G)) meaningless. (20 HSR 5191.)

While §2704.08(c)(2)(K) required that the Authority certify that it had completed all project-level environmental clearances necessary to begin construction of the Usable Segment, the Authority's Funding Plan certified instead that the Authority will have completed all necessary clearances before it begins construction. (20 HSR 5192.)

c. The Authority's violations of the bond measure's direct mandates required rescission of the Funding Plan.

The trial court was not content with simply ordering rescission of the illegal Funding Plan. It insisted that rescission would only be appropriate if it would have "real and practical effects." (1 HSR 87:5-7.) It therefore ordered supplemental briefing on that issue. (*Id.* at 88.)

Based on the supplemental briefing, the trial court concluded that, contrary to Petitioners' assertion, approval of a Funding Plan under

§2704.08(d), required before bond proceeds could be committed or expended on construction, required the prior preparation of an adequate Funding Plan under subsection (c) of that section. It came to this conclusion taking into account the language of the measure itself, as well as the language of the analysis contained in the Voter Information Guide, which would have been read and relied upon by voters considering the bond measure. (See, 1 HSR 91-92 [trial court's explanation of its reasoning].)

The trial court therefore concluded that rescission of the Authority's approval of the subsection (c) Funding Plan would have real and practical effect and ordered issuance of a writ of mandate ordering that rescission. The trial court's action was entirely appropriate, and indeed required, given the Authority's noncompliance with the bond measure's mandatory requirements.

CONCLUSION

While there are unquestionable appealable issues in both the Validation Action and the Tos Case, the appropriate way for those issues to make their way to this Court is through the normal, orderly, appellate process, not through the filing of a hurried writ petition. Petitioners have not justified bypassing the normal process to reach this Court (or the Supreme Court) by taking the "express lane" of an extraordinary writ

petition. For all of the above reasons, RPI respectfully request that the Court summarily deny the Petition.

Dated:

Respectfully submitted,

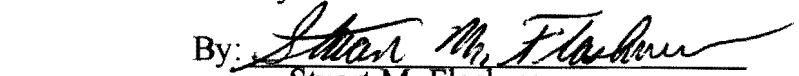
Michael J Brady

Stuart M. Flashman

Attorneys for Real Parties in Interest
John Tos, Aaron Fukuda, and County of Kings

Mark L. Nations, County Counsel
Nicole M. Misner, Deputy County Counsel

Attorneys for Real Party in Interest
County of Kern

By: 
Stuart M. Flashman

CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I, Stuart Flashman, certify that this Preliminary Opposition contains 7553 words, including footnotes, as determined by the word count function of my word processor, Microsoft Word 2002, and is printed in a 13-point typeface.

Dated: February 3, 2014

Stuart M. Flashman

Civ. No. C075668

CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT

CALIFORNIA HIGH-SPEED RAIL AUTHORITY *et al.*

Petitioners

v.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Respondent

JOHN TOS, AARON FUKUDA, COUNTY OF KINGS, HOWARD JARVIS TAXPAYERS ASSOCIATION, COUNTY OF KERN, FIRST FREEWILL BAPTIST CHURCH, EUGENE VOILAND, CITIZENS FOR CALIFORNIA HIGH-SPEED RAIL ACCOUNTABILITY, KINGS COUNTY WATER DISTRICT, and UNION PACIFIC FAILROAD COMPANY,

Real Parties in Interest

Sacramento County Superior Court Case Number 34-2011-0113919-CU-MC-GDS and 34-2013-00140689-CU-MC-GDS; Department 31, Hon. Michael P. Kenny, Judge. Tel.: 916-874-6353

SUPPLEMENTAL APPENDIX OF EXHIBITS

Stuart M. Flashman, SBN 148396 Law Offices of Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533 Telephone and fax: (510) 652-5373 e-mail: stu@stuflash.com	Michael J. Brady, SBN 40693 1001 Marshall Street, Ste 500 Redwood City, CA 94063-2052 Telephone: (650) 364-8200 Facsimile: (650) 780-1701 e- mail: mbrady@rmkb.com	Theresa A. Goldner, County Counsel SBN 101838 Nicole M. Misner, Dep.Cty. Counsel SBN 188076 Kern Cty Admin. Ctr. 1115 Truxton Ave. 4th Fl. Bakersfield, CA 93301 Tel. (661) 868-3800
Attorneys for Real Parties in Interest **JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS**		Attorney for Real Party in Interest **COUNTY OF KERN**

SUPPLEMENTARY APPENDIX OF EXHIBITS

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Attorney or Party without Attorney:	For Court Use Only
STUART M. FLASHMAN ESQ, Bar #148396 Law Offices Of: STUART M. FLASHMAN 5626 OCEAN VIEW DRIVE Oakland, CA 94618 *Telephone No:* 510-504-0154 *FAX No:* 510-652-5373 *Attorney for:* Plaintiff	Submitted to trial court as per local rules on 1/23/14
Ref. No. or File No.:	
Insert name of Court, and Judicial District and Branch Court: SACRAMENTO COUNTY SUPERIOR COURT	
Plaintiff: JOHN TOS, et al. *Defendant:* CALIFORNIA HIGH SPEED RAIL	

PROOF OF SERVICE	*Hearing Date:*	*Time:*	*Dept/Div:*	*Case Number:* 34-2011-00113919

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the -; PEREMPTORY WRIT OF MANDATE

3. a. Party served: CALIFORNIA HIGH-SPEED RAIL AUTHORITY
b. Person served: S. WONG, BUSINESS SERVICES ASSISTANT/AUTHORIZED TO ACCEPT, Asian, Male, 50 Years Old, Black Hair, Brown Eyes, 5 Feet 5 Inches, 160 Pounds

4. Address where the party was served: OFFICE OF ATTORNEY GENERAL
455 GOLDEN GATE AVE., STE 11000
San Francisco, CA 94102

5. I served the party:
a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party (1) on: Fri., Jan. 17, 2014 (2) at: 12:21PM

7. Person Who Served Papers:
a. AVELINO MISERAY

S&R Services
903 Sneath Lane
Suite #227
San Bruno, CA 94066
Phone 650.794.1923
FAX 650.989.4182

Recoverable Cost Per CCP 1033.5(a)(4)(B)
d. ***The Fee** for Service was:* $85.00
e. I am: (3) registered California process server
(i) Independent Contractor
(ii) Registration No.: 2012-0001265
(iii) County: San Francisco
(iv) Expiration Date: Wed, Nov. 12, 2014

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Fri, Jan. 17, 2014

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 February 3, 2014, I served the within PRELIMINARY OPPOSITION 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:

Stephanie Zook, Deputy Attorney General
California Attorney General
1300 I Street, Ste. 125
Sacramento, CA 95814
Stephanie.Zook@doj.ca.gov

Raymond L. Carlson, Esq.
Griswold, LaSalle, Cobb, Dowd & Gin LLP
111 East Seventh Street
Hanford, CA 93230
carlson@griswoldlasalle.com

Tim Bittle
Howard Jarvis Taxpayers Foundation
921 11th Street, Ste. 1201
Sacramento, CA 95814
tim@hjta.org

Blaine Green, Esq.
Pillsbury Winthrop Shaw Pittman LLP
Four Embarcadero Ctr., 22nd Fl.
P.O. Box 2824
San Francisco, CA 94126-2824
blaine.green@pillsburylaw.com

Nicole M. Misner, Deputy County Counsel
Office of the County Counsel
Kern County Administrative Ctr.
1115 Truxtun Ave., 4th Fl.
Bakersfield, CA 93301
nmisner@co.kern.ca.us

Thomas P. Feher, Esq.
LeBeau & Thelen LLP
5001 E. Commercecenter Dr. #300
P.O. Box 12092
Bakersfield, CA 93309
tfeher@lebeauthelen.com

Mark Harrison
First Free Will Baptist Church
2236 E. California Ave.
Bakersfield, CA 93307-2005
mikeakennedy@gmail.com

In addition, on the above-same day, I served the above-same document on the above-same parties by electronic delivery by attaching a copy of said document, converted to "pdf" file format, to an e-mail sent 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 February 3, 2014.

Stuart M. Flashman