Michael J. Brady
101 Marshall St., Ste. 500
Redwood City, CA 94063
Telephone: (650) 364-8200
Fax:)(650) 780-1701
e-mail: mbrady@rmkb.com

Stuart M. Flashman (SBN 148396)
5626 Ocean View Dr.
Oakland, CA 94618-1533
Telephone/Fax: (510) 652-5373
e-mail: stu@stuflash.com

[Exempt from filing fees per Government Code §6103]

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

HIGH-SPEED RAIL AUTHORITY AND HIGH-SPEED PASSENGER TRAIN FINANCE COMMITTEE, for the STATE OF CALIFORNIA Plaintiffs vs. ALL PERSONS INTERESTED IN THE MATTER OF THE VALIDITY OF THE AUTHORIZATION AND ISSUANCE OF GENERAL OBLIGATION BONDS TO BE ISSUED PURSUANT TO THE SAFE, RELIABLE HIGH-SPEED PASSENGER TRAIN BOND ACT FOR THE 21ST CENTURY AND CERTAIN PROCEEDINGS AND MATTERS RELATED THERETO,, Defendants	No. 34-2013-00140689 filed March 19, 2013 Assigned for all purposes to Department 31, Hon. Michael P. Kenny JOINT OPPOSITION BRIEF OF DEFENDANTS JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS TO VALIDATION CLAIM OF PLAINTIFFS CALIFORNIA HIGH-SPEED RAIL AUTHORITY *ET AL.*

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I.
INTRODUCTION

Plaintiffs California High-Speed Rail Authority ("Authority") and California High-Speed Passenger Train Finance Committee ("Committee", and the foregoing, collectively, "Plaintiffs") seek to validate their actions in authorizing the issuance of up to almost nine billion dollars in state general obligation bonds under Proposition 1A, the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century. The validation complaint should be denied for substantive and procedural reasons (failure of proof).

Substantively, the project to which Plaintiffs propose to apply the bond proceeds has been fundamentally altered by the Authority and the Legislature such that it no longer complies with the purposes for which the voters approved those bonds. Consequently, the State Constitution (Article XVI, Section 1 which states that bond funds must be used for the purpose intended by the voters) prohibits the use of the bond funds for the Authority's project. Since Proposition 1A does not allow any other use of those bond funds, issuance of the bonds is neither necessary nor desirable. Rather, issuance of the bonds, when there is no valid use to which the bond funds could be put, would be wasteful, in violation of Code of Civil Procedure §526a.

As will be shown *infra* the purported authorization is also procedurally improper. Plaintiffs have totally failed to sustain their burden of proving that it is necessary or desirable and appropriate for the bonds to issue, and therefore likewise for validation to occur.

II.
STATEMENT OF FACTS AND OF THE CASE

A. BRIEF HISTORY OF CALIFORNIA'S HIGH-SPEED RAIL PROJECT.

In 1993, then-governor Pete Wilson signed Executive order W-48-93, creating the High Speed Ground Transportation Task Force to investigate alternative high-speed surface transportation passenger systems and make recommendations on constructing an appropriate system. (Request for Judicial Notice of Defendants John Tos et al. ("Tos RJN"), Exhibit A.) In response to the taskforce's studies, the legislature created the Authority to follow up on the taskforce and prepare a plan for the financing, construction, and operation of a statewide

intercity high-speed train system. (Public Utilities Code §§185000 et seq.)

The Authority prepared a series of studies and, in 2001 in cooperation with the Federal Railroad Administration ("FRA"), undertook a programmatic environmental review process for the statewide system. That process led, in 2005, to the Authority's certifying a Final EIR/EIS for the statewide system and giving its program-level approval to a statewide system.[1]

B. THE HIGH-SPEED PASSENGER TRAIN BOND ACT.

Following up on the approval of a statewide system, the legislature approved and placed on the November 2008 general election ballot Proposition 1A ("the Act"), a bond act allocating 9.95 billion dollars of state general obligation bonds to construction of the high-speed rail system and related activities. (Streets and Highways Code §§2704 et seq.)

The Act was anything but a blank check for the use of public funds by the Authority. It set numerous specific standards and criteria for the high-speed rail system that the bond funds were to be used for. Among these were that the system be a true high-speed rail system capable of sustained speeds of up to 200 miles per hour (§2704.09(a)), that it have a nonstop travel time from Los Angeles to San Francisco of no more than 160 minutes (§2704.09(b)(1)), that it be capable of operating at headways of five minutes or less (§2704.09(c)), that it allow a "single-seat" ride from Los Angeles to San Francisco without any change of train (§2704.09(f), and that the system not require any local, state, or federal operating subsidy (§2704.08(c)(2)(J).

C. THE 2011 FUNDING PLAN, 2012 BUSINESS PLAN, AND THE LEGISLATIVE APPROPRIATION.

In November 2011, the Authority prepared, released, and submitted to the legislature's transportation and fiscal committees, the Director of Finance, and the peer review group established pursuant to Public Utilities Code §185035, a Funding Plan purportedly in compliance with §2704.08(c) of the Act.[2] Associated with the preparation and release of the Funding Plan,

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[1] The approval reserved judgment on the choice between Altamont and Pacheco Pass alignments for the transition between the Central Valley and the Bay Area, with that choice to be made through a supplemental programmatic EIR/EIS.

[2] Defendants ask that, for purposes of providing general background information for this case [see, *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 579 -extra-record evidence admissible to provide background information], the Court take judicial notice of the administrative record lodged with the Court in the related case *Tos et al. v. California High-Speed Rail Authority et al*., Case 34-2011-00113919-CU-MC-GDS – see Tos RJN, and

the Authority prepared a Draft 2012 Business Plan ("Draft Business Plan") that explained how the Authority planned to finance, build, and operate the high-speed rail system. (AR 74 et seq.) That plan was explicitly incorporated by reference into the Funding Plan. (AR 59.)

Subsequently, in April 2012, the Authority released a Revised 2012 Business Plan ("Revised Business Plan). (AR 1931 et seq.) That plan made substantial changes to the Draft Business Plan. In particular, it put forward the "blended system" as a lower cost alternative to the full build-out envisioned in the Draft Business Plan (AR 1938) and suggested this might well be the final end-state for the Phase I (Los Angeles to San Francisco) high-speed rail system. (AR 1941, 1948, 1971 *et seq*.) No revisions were, however, made to the Funding Plan, and the Revised Business Plan was not incorporated into the Funding Plan.

In July of 2012, and based on the application of the Director of Finance and the legislature's review of the Funding Plan and Revised Business Plan, the legislature approved and the Governor signed SB 1029, which appropriated $2.6 billion in bond funds, plus $3.2 billion in federal trust funds (from a federal grant under the American Recovery and Reinvestment Act) towards acquisition and construction of the Initial Operating Segment ("IOS") of the high-speed system as proposed in the Revised Business Plan. (AR 2792, 2793.)

D. LITIGATION ON THE FUNDING PLAN AND APPROPRIATION.

Shortly after the Authority's approval of its Funding Plan, in November 2011 Defendants Tos *et al*. ("Tos Plaintiffs") filed suit against the Authority and various state government officials challenging the legality of the Funding Plan and more generally of the state's high-speed rail system as described in the Draft Business Plan. The Tos Plaintiffs subsequently amended their complaint in July 2012 to include the adoption of the Revised Business Plan and approval of SB 1029. The lawsuit alleged that the Authority's approval of the Funding Plan was done in violation of provisions of Proposition 1A, and that the project itself, as well as the appropriations included in SB 1029, constituted illegal expenditures of public funds in violation of Code of Civil Procedure §526a.

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specifically of the Funding Plan. [AR 57 *et seq*.] In doing so, Defendants note that in taking judicial notice of documents, the Court acknowledges their existence and contents, but not the truth of any matter stated therein. (*Herrera v. Deutsche Bank National Trust Co*. (2011) 196 Cal.App.4th 1366, 1375.

The case was assigned for all purposes to this department and bifurcated so that the challenge to the Funding Plan approval was heard first, on May 31, 2013. On August 16, 2013, this Court issued its decision finding the Authority's approval of the Funding Plan to be an abuse of discretion. Determination of an appropriate remedy, as well as consideration of the §526a portion of the suit, is still pending before this Court.

E. AUTHORIZATION OF BOND ISSUANCE.

While small portions of the bonds provided for in Proposition 1A had been authorized for specific purposes as set forth in §2704.08(g) of the Act, the vast majority of the Proposition 1A bonds had not been authorized for issuance prior to 2013. On March 18, 2013, the Authority held a meeting and approved a resolution requesting the Committee to approve authorization of just under $8.6 billion in bonds towards the planning and construction of the IOS of the high-speed rail system. (Exhibits A and B to Declaration of Angela Reed in Support of High-Speed Rail Authority and High-Speed Passenger Train Finance Committee's Opening Trial Brief ("Reed Decl.").) This in spite of the fact that the Authority had admitted not having sufficient funding identified to be able to complete the IOS. (See, Ruling on Submitted Matter in Case #34-2011-00113919-CU-MC-GDS, issued August 16, 3013.) The Authority forwarded a copy of the approved resolution to the Committee, which met that same afternoon with only underlings present to represent the actual committee members (Declaration of Geoffrey Palmertree in Support of High-Speed Rail Authority and High-Speed Passenger Train Finance Committee's Opening Trial Brief ("Palmertree Decl."), Exhibit C at pp. 15-16) and, without any discussion, voted unanimously to approve the resolution authorizing bond issuance. (Id.) This validation action was filed the following day.

III. ARGUMENT

A. THE PROPOSED PURPOSE FOR USE OF THE BOND FUNDS HAS BEEN SUBSTANTIALLY CHANGED BY THE PLAINTIFFS FROM WHAT THE VOTERS APPROVED, REQUIRING DENIAL OF THE VALIDATION COMPLAINT

The project for which the bonds are to be issued is no longer the project for which Proposition 1A bonds are authorized.

It is fundamental to California ballot measure law that a measure is to be interpreted to effectuate the intent of the voters who enacted it. (*Professional Engineers In California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) In general, the intent is presumed to have been accurately expressed in the plain language of the measure, and unless the measure itself is unclear or ambiguous, the meaning of the plain language will govern. (*Id.*)

Here, the language of the Act was very clear in indicating that the bonds were being authorized to finance the construction of a genuine high speed rail system throughout the State. (Streets and Highways Code § 2704.01(e) [definition of "high speed train system"], 2704.04(a).) Further, while the measure allowed that system to be developed incrementally, rather than as a single project, the initial phase [Phase I] was intended to run between the Transbay Terminal in San Francisco, Union Station in Los Angeles, and Anaheim. (*Id.*, subsection (b)(2).) The Act also allowed, upon funding being provided, for the Authority to construct one of seven high speed rail corridor segments (*Id.*, subsection (b)(3).) However, it was abundantly clear throughout the measure that the bond funds were to be spent to construct a genuine high speed train system, and nothing else[3].

In the spring of 2012, however, the Authority adopted its Revised Business Plan, purportedly pursuant to Proposition 1A. (Request for Judicial Notice of the "related" lawsuit, *Tos, et al. v. California High Speed Rail Authority*.) In the Revised Business Plan, the Authority disclosed that it intended to spend portions of the bond funds authorized by Proposition 1A for improvements to the "Metrolink" system of conventional rail in the San Fernando Valley and Los Angeles Basin area. (See Revised Business Plan at p. 3-2 [showing expenditures for "upgraded diesel Metrolink corridor"]; see also Revised Business Plan at ES-4 ["improvements will be made to the existing Amtrak Metrolink rail corridor between Union Station and Anaheim to improve safety, reliability, capacity, and travel times in that corridor."]) These improvements

[3] The Act does allow a limited amount of bond funding to be used for certain ancillary projects intended to improve the connectivity of conventional rail systems that connect with the high-speed rail system. (§2704.095 of the Act.) However this was not part of the bonds whose authorization is sought to be validated here.

were to an existing conventional rail commuter system that connected the San Fernando Valley with Union Station in Los Angeles and ensured that, for the foreseeable future, bond money would not be spent for construction of a genuine high speed rail system in that area, completely contrary to the intent of the voters who -approved Proposition 1A.

In addition, the Revised Business Plan also added two other provisions that were not envisioned by the voters who approved Proposition 1A to be part of the alleged high speed rail system.

First, the Revised Business Plan introduced the concept of a "blended system" where part of the system might be to high speed rail, but part would be, at best, upgraded conventional rail systems. That is to say, those conventional rail systems would be improved over the currently operating systems by switching from diesel power to electric units, removing at least some of the grade crossings from the rail right-of-way, and adding positive train control, a safety system that would allow trains to operate safely at reduced headways. The Revised Business Plan did not specifically say that a full high speed train system would not ever be completed, but what it did say was:

> If a decision is made in the future to construct the Phase I Full Build System, this would involve constructing fully electrified high speed rail infrastructure between San Jose and San Francisco and between Los Angeles and Anaheim. The projected schedule for completing the Full Build System is 2033, and the total cost is $67 billion in 2011 dollars which would translate to $91 billion in year-of-expenditure dollars. An alternative approach to construction of a Full Build Option on the San Francisco Peninsula was developed and reported in the Draft 2012 Business Plan. *It is not under consideration*. (AR at 2018 [emphasis added].)

Even beyond completion of a "blended" Phase 1 system, the Revised Business Plan discussed upgrading the system to the Phase 2 System by adding service to Sacramento and San Diego without any indication that Phase 2 would also include upgrading a blended Phase 1 system to a full, genuine high-speed rail system. (AR 1982.) The Revised Business Plan also indicated that, "If required, a Full Build option for Phase 1 could be completed by 2033 at an incremental cost of $23 billion in year-of-expenditure dollars, for a cumulative cost of $91.4 billion." (AR 1949.) Significantly, none of the various projections for the future built-out

system (e.g., Exhibits 5-12, 5-13, 5-14, 5-15, 6-5, 6-6, 6-7, 6-11, 6-12, 7-4, 7-7) included projections for a "Full Build option" even though those projections extended though 2060.

In addition, the Funding Plan acknowledged that in the event the Authority was unable to provide high speed train service on a usable segment, it would arrange to have a conventional rail service provider "such as Amtrak" begin using the segment, built with Proposition 1A bond funds, to provide conventional rail service. (AR at 72.)

While these construction projects under the Revised Business Plan would certainly be improvements over what is currently available, the problem is that the voters clearly stated that the bond funds were to pay for a genuine high speed rail system, not a hybrid or blended system or improvements to conventional rail systems.

In short, the modifications that the Authority has made to the plans, and the Legislature ratification of those modifications, indicate that the system is no longer planned to be a genuine high speed rail system providing single seat passenger service between the San Francisco Transbay Terminal and the Los Angeles Union Station in less than two hours and 40 minutes.

The issue of whether a bond issuance can properly be authorized when the project for which the bonds were approved by the voters has substantially changed from what the voters approved has apparently never been litigated in California. It has, however, been repeatedly litigated that bond proceeds may not be spent except for the project the voters approved (e.g., *O'Farrell v. Sonoma County* (1922) 189 Cal. 343.) It only stands to reason that if the project has changed sufficiently that it would no longer be appropriate to allow the bonds funds to be used on it, it would be equally inappropriate and, indeed a waste of taxpayer funds, to allow the bonds to be issued when they could not properly be expended. If bonds were issued in such a situation, the only legal course available, other than going back to the voters to approve the changed project, would be for the public agency to refund the bond proceeds to the investors. At that point, those investors could properly demand damages for the loss of income caused by, in essence, prematurely calling the bonds. Those damages would be entirely wasteful as the California taxpayers would get absolutely no benefit from the expenditure.

How the Authority and the Legislature have changed and altered the project from what the voters intended is demonstrated in the Declaration of the "father" of high speed rail, Quentin L. Kopp. His Declaration is Exhibit A submitted along with Plaintiffs' Trial Brief, Part II in the related action (*Tos, et al. v. California High Speed Rail Authority, et al.*). The Declaration is discussed in detail in section XIV of the *Tos* Trial Brief, Part II. Senator Kopp indicates the following:

- The purpose of the bond funds was to build a genuine high speed rail system, nothing less;
- The Revised Business Plan, adopted by the Authority and approved by the Legislature, completely altered this fundamental purpose. This Revised Business Plan envisioned the spending of the Proposition 1A bond funds on conventional rail improvements all over the State depleting those bond funds The voters never intended that to happen;
- There was never any intent, understanding or discussion of spending bond funds to build a conventional rail system in the Central Valley (which is exactly what the Authority intends to do through construction of the ICS);
- Spending bond funds for these purposes makes mandatory requirements of Proposition 1A unachievable and makes it questionable at best whether the "blended" system so created could operate without a public subsidy.

In short, Senator Kopp, former chair of the High Speed Rail Authority during the critical time leading up to Proposition 1A, and after Proposition 1A, states that the intent of the voters has been completely betrayed by these changes.

As the California Supreme Court has indicated, it would be illegal and a violation of the Constitution for the legislative body to attempt to alter or change a bond measure, and specifically the project for which the bond proceeds were intended, after it has been approved by the voters without seeking and receiving th voters' approval for the change. (See *O'Farrell v. Sonoma County*, *supra*.) This violates Article XVI, Section1, of the California Constitution.

Of course, the Authority was well aware of all these infirmities. Further, while the

Committee was not provided information about these problems (or about anything else) by the Authority when the Authority requested the bond authorization, the Committee should have been generally aware of the changed nature of the project. More to the point, counsel for Defendants Tos et al. sent a letter to State Treasurer Bill Lockyer, the chair of the Committee, shortly before the Committee's March 18th meeting notifying him of the pendency of the Tos *et al*. v. California High-Speed Rail Authority et al. litigation and its potential impact on the legality of using bond proceeds on the project as proposed. (Declaration of Stuart M. Flashman in Opposition to Validation Complaint, ¶__ and Exhibit A thereto.) In light of the information conveyed by that letter, it was improper for Committee to determine that issuance of Proposition 1A bonds to fund construction activities was either necessary or desirable.

Based on the above legal and factual arguments, validation should not be approved.

B. PLAINTIFFS HAVE NOT COMPLIED WITH NUMEROUS REQUIREMENTS BEFORE AUTHORIZATION FOR ISSUANCE OF THE BONDS CAN BE APPROVED; THE PLAINTIFFS THEMSELVES RECITE THE SAFEGUARDS THAT ARE REQUIRED, BUT FAIL TO DEMONSTRATE HOW THEY HAVE BEEN COMPLIED WITH

Section 2.01 of Resolution IX states the following:

> The Committee has examined the request and supporting statements for the issuance of Obligations and has determined that it is necessary and desirable to authorize the issuance and sale of Obligations under the Act to carry out the purposes set forth in Sections 2704.04 and 2704.06 of the California Streets and Highways Code in an aggregate principal amount not to exceed the Authorized Amount . . .

As we shall argue in the next section, the Committee had before it absolutely no evidence whatsoever to support its decision to authorize issuance of the bond.

In the same section, the Finance Committee claims that:

> The Committee has further determined that all conditions, things and acts required by law to exist, happen and be performed precedent to and in connection with the issuance of the Obligations do exist, have happened and have been performed in due time, form and manner as required by law.

The Committee, by so stating and declaring, seems to be taking the position that everything that is required by law to be done in connection with Proposition 1A had been done,

and that all conditions precedent to issuance of the bonds or building of a high speed train system had been complied with.

As already determined by this Court, this claim is demonstrably false. Specifically, the Authority's Funding Plan, prepared and submitted under §2704.08(c) of the Act, did not comply with the requirements of that subsection. We are not talking about something that will happen in the future, but a violation that has already occurred. This violation is outlined as follows:

Environmental

The environmental requirements of Proposition 1A are outlined in the *Tos* case, Trial Brief, Parts I and II, and Closing Brief, Parts I and II.

Plaintiffs were required to submit, before the Funding Plan was submitted (November, 2011), a certification that Plaintiffs had completed all environmental clearances for the usable segment that Plaintiffs had selected. For their usable segment, the Plaintiffs affirmatively selected the 300-mile segment running from Merced to the San Fernando Valley. The Funding Plan was submitted in November, 2011, but the Plaintiffs deliberately refused to comply with Proposition 1A and submitted no certification that all the environmental requirements for the usable segment had been completed. As this Court determined, §2704.08(c) required that the certification cover the entire usable segment, and that the clearances have been completed as of the date of the Funding Plan. So, this is a violation that has already occurred, is a continuing violation and, therefore, it would be totally inappropriate to issue the bonds with such a violation hanging over the project. Environmental compliances are difficult and complex, and there no assurance this project can go through until all clearances have been obtained.[4]

Inadequate Funding

Again, the law requires the Plaintiffs to select their usable segment. They did. Proposition 1A then requires that all the funding necessary to complete the usable segment as a

[4] As a matter of practicality and fact, as our Opening and Closing Briefs and the supporting exhibits in the *Tos* case indicate, only about 5% of the required environmental clearances have been obtained for the usable segment selected by the Authority – a tiny fraction of what is required.

high speed train segment be committed or secured before construction of the usable segment commences, and that the Funding Plan certify that this is the case. Again, this Court has already determined that this requirement was violated, and that violation is ongoing. The total cost for the usable segment is $31 billion. The Authority has, at most, $6 billion committed. As this Court recognized, the Authority has, at the moment, no reasonable expectation of receiving further federal funding in the foreseeable future. There has been no local funding; private investors have expressed zero interest; the State has recently proposed to make use of AB 32 cap and trade auction proceeds, but it is not at all clear whether those proceeds will, or even can be, made available, nor what their amounts would be. The critical funding requirement has simply not be satisfied. This fundamental financial safeguard is a critical reason why bonds should not be issued and why the bonds would be at dire risk were they to be issued.

No Electrification

Proposition 1A requires that the usable segment to be selected by the Authority must be electrified and have all the components of a genuine high speed rail system. This provision has already been violated; the Authority has unequivocally announced that the first part of the usable segment they have selected (also known as the ICS) will not be electrified but will be a conventional rail system only, perhaps "some day" to be changed into an electrified system. As the Declaration of Quentin L. Kopp, Exhibit A to the *Tos* Trial Brief, Part II, points out, this was never contemplated by the drafters or the voters or even the Authority while he was chairman. Proposition 1A funds were always to be spent exclusively for a genuine high speed rail system, not for the building or improvements of conventional rail systems.

It would be inappropriate to authorize the issuance of the bonds or to approve Plaintiffs' validation complaint in light of these violations.

C. THE VALIDATION COMPLAINT SHOULD BE DENIED BECAUSE THERE IS ABSOLUTELY NO EVIDENCE SUPPORTING THE DECISION OF THE FINANCE COMMITTEE TO AUTHORIZE ISSUANCE OF THE BONDS

When $8.5 billion in bonds are to be issued, one would think that some evidence would be required to justify the issuance. Indeed, the very language of the Act requires that the

Committee determine, "whether it is necessary or desirable to issue bonds authorized pursuant to this chapter …" (§2704.13 of the Act.) That determination cannot be made without substantial evidence being available to support it.

On March 18, the High Speed Rail Authority Board of Directors met and passed Resolution IX requesting that the Finance Committee approve the authorization for issuance of the bonds. The Finance Committee met that very afternoon to consider the request.

But what was presented to the Finance Committee in the way of supporting documentation or evidence?[5] Nothing whatsoever. The only thing presented to the Finance Committee was the Resolution of the Authority itself, to which were attached no documents, evidence, or other justification for issuance of the bonds. Presented to the Finance Committee was simply a request for authorization for issuance for the bonds – nothing more. (Palmertree Decl., ¶¶ 3 and 4; Declaration of Rita Wespi in Opposition to Validation Complaint, ¶¶ 11, 14-16; Declaration of Kathy Hamilton in Opposition to Validation Complaint, ¶¶3, 6.)

The language of the Resolution passed by the Board of Directors of the Authority does say the Authority can submit documents and materials in support of the request. But there are none! The package before the Finance Committee contained no documentation, no evidence, no supporting material to justify authorization for issuance of the bonds. The only thing they had before them was the bare request from the Authority – nothing more. Although the Resolution of the Authority envisions the members can present whatever materials they wish to justify issuance of the bonds, nothing was done by anyone.

There was no substantive discussion on the merits as to the justifications for authorizing issuance of the bonds or the reason supporting such.[6] This was simply a rubber-stamp approval

[5] Defendants Tos *et al.* intend to call as witnesses on the trial date of September 27th both High-Speed Rail Authority Chief Executive Officer Jeff Morales and High-Speed Passenger Train Finance Committee Chairman Bill Lockyer to testify as to the proceedings at the two meetings and the documentation available at those meetings.

[6] As stated, *supra*, the applicable rules require the authorization to be "desirable and necessary;" for something to be desirable and necessary requires some facts to support such a finding. The meager record that we have does not even indicate that the Finance Committee in approving the Authority's request said that it was desirable and necessary at all.

of a request from the Authority which itself was not supported by any substantial evidence or documentation.[7]

This is a failure of proof. While the Committee's determination was in an administrative, rather than a judicial, proceeding, the general principle that decisions must be based on substantial evidence presented to the decision makers still holds. Even for a legislative or quasi-legislative decision, a decision will be rejected as arbitrary and capricious if it is not supported by substantial evidence that was presented to the decision makers. (*Y.K.A. Industries, Inc. v. Redevelopment Agency of the City of San Jose* (2009) 174 Cal.App.4th 339, 359 fn. 22.)

Here, as is clear from the evidence before this Court, there was no evidence before the Committee to support its determination that it was necessary or desirable to authorize the issuance of Proposition 1A bonds. This Court, in light of this failure, should deny Plaintiffs' request for validation and dismiss the complaint. It is too late for Plaintiffs to cure this defect in their Closing Brief. The hearings of March 18th have already been held; the determinations that were made that day must be supported by evidence that was before those decision makers at that time, and no additional support for the action taken can now be presented. Presumably, the Plaintiffs have placed before this Court all of the evidence in their possession, and that evidence is insufficient as a matter of law to support the Committee's determinations. The proof is woefully insufficient.

E. DEFENDANTS TOS, FUKUDA AND KINGS COUNTY RESERVE THE RIGHT TO ASSERT ARGUMENTS MADE BY OTHER DEFENDANTS IN OPPOSITION TO THE PLAINTIFFS' VALIDATION COMPLAINT

This case has multiple defendants. Each defendant will be filing a responsive brief on August 22. Some of the arguments made by individual defendants will be supportive of positions taken by Defendants Tos, Fukuda and Kings County. Defendants Tos, et al., reserve the right to expand on arguments that are made by other defendants which support the positions

[7] Also see the attached Declaration of Rita Wespi. Ms. Wespi indicates that an organization named CAARD submitted a public records request to the Authority, and the Authority admitted that no information or materials whatsoever was submitted to Finance Committee by the Authority or anyone else to support their approval.

of Tos, et al.

For example, Defendant Union Pacific Railroad (UPRR) has long asserted that the blended system which has been adopted by the Authority will have a "severe" effect on UPRR's freight service. Under the rules and regulations and laws pertaining to the use of Federal Railway Administration (FRA) money for this HSR project, no FRA money, and no ARRA Federal money, can be spent until written consent is given by UPRR for use of, and encroachment upon, its various rights of way throughout the area covered by the HSR project. The Authority takes the position that those written agreements have been discussed now for more than three years, but according to the answer filed by UPRR to this validation complaint, no such agreements have been reached.

This, therefore, is one of the "conditions precedent" that must be fulfilled before construction can start, and before Federal money can be spent. This directly relates to Proposition 1A. Since no Proposition 1A funds can be released without "matching" Federal funds, and Federal funds must be withheld until a written agreement is obtained from UPRR, then no construction can start, and it would be fundamentally inappropriate for bonds to be issued or sold before this important condition precedent has been satisfied.

There may be other arguments made by the other defendants which should be treated similarly; namely, important requirements or conditions precedent which have not been fulfilled and which make it inappropriate for authorization for issuance of the bonds to take place and for this validation complaint to survive.

IV.
CONCLUSION

Validation should be denied and the complaint should be dismissed for failure of Plaintiffs to sustain their burden of proving that Plaintiffs' decisions were proper, justifing their validation by the Court, and for Plaintiffs' failure to present evidence to support validation.

Dated: August 22, 2013

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

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

By: 

Stuart M. Flashman

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 within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On August 22, 2013, I served the within JOINT OPPOSITION BRIEF OF DEFENDANTS JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS TO VALIDATION CLAIM OF DEFENDANTS CALIFORNIA HIGH-SPEED RAIL AUTHORITY ET AL.; REQUEST FOR JUDICIAL NOTICE OF DEFENDANTS JOHN TOS, AARON FUKUDA, AND COUNTY OF KINGS IN OPPOSITION TO VALIDATION COMPLAINT; DECLARATION OF STUART M. FLASHMAN IN OPPOSITION TO VALIDATION COMPLAINT OF CALIFORNIA HIGH-SPEED RAIL AUTHORITY ET AL.; DECLARATION OF RITA WESPI IN OPPOSITION TO VALIDATION COMPLAINT; and DECLARATION OF KATHY HAMILTON IN OPPOSITION TO VALIDATION COMPLAINT 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

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

Blaine Green, Esq.
Pilsbury 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

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 22, 2013.

Stuart M. Flashman