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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF SACRAMENTO

11

12 HIGH-SPEED RAIL AUTHORITY and)
HIGH-SPEED PASSENGER TRAIN)
13 FINANCE COMMITTEE, for the STATE)
OF CALIFORNIA,)
14)
Plaintiffs,)

Case No. 34-2013-00140689

15 vs.)

ASSIGNED FOR ALL PURPOSES TO
HONORABLE MICHAEL P. KENNY
DEPARTMENT 31

16)
17 ALL PERSONS INTERESTED IN THE)
MATTER OF THE VALIDITY OF THE)
AUTHORIZATION AND ISSUANCE OF)
18 GENERAL OBLIGATION BONDS TO BE)
ISSUED PURSUANT TO THE SAFE,)
19 RELIABLE HIGH-SPEED PASSENGER)
TRAIN BOND ACT FOR THE 21ST)
20 CENTURY AND CERTAIN)
PROCEEDINGS AND MATTERS)
21 RELATED THERETO,)

TRIAL BRIEF OF UNION PACIFIC
RAILROAD COMPANY

Entitled To Preference Over All Other
Civil Actions (Code Civ. Proc., § 867)

22 Defendants.)
23

Trial Date: September 27, 2013
Judge: Hon. Michael P. Kenny
Dept. 31

24 Interested Party UNION PACIFIC RAILROAD COMPANY ("Union Pacific" or
25 "UP") hereby submits the following trial brief in response to the Opening Trial Brief in
26 Support of Validation Judgment ("Op. Tr. Br.") submitted by the High-Speed Rail Authority
27 ("HSRA") and High-Speed Train Passenger Finance Committee ("Committee") (collectively,
28 "the Authority") in connection with the California high-speed rail project.

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Section 2704 *et seq.*2

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Section 2704.136, 12

1 I. INTRODUCTION.

2 Union Pacific submits this brief to ensure that the scope of any validation judgment in
3 this action is limited to the validity of issuance of the bonds and authorizing resolutions—as
4 the Authority has repeatedly represented in its trial brief and other filings¹—and does not
5 extend to claims relating to the use of the bond proceeds, nor any other issues² beyond
6 whether the Authority “properly and lawfully authorized the bonds at issue in this action”
7 such that “judgment validating these bonds is warranted.” Op. Tr. Br. 2:10.

8 Taking the Authority at its word, the only issue to be adjudicated now is whether the
9 bonds recently approved by the Authority were properly approved and are valid on their
10 face.³ *Id.* at 4:12-6:3. After Union Pacific and other defendants filed their answers or
11 responsive pleadings (motion to quash, demurrer, cross-complaint), raising concerns about
12 the broadly worded scope of the validation complaint and prayer for relief, the Authority
13 has stated at every opportunity that it seeks only “to confirm the validity of high-speed rail
14 bonds [the Authority] recently authorized.” *See, e.g., id.* at 1:6. Similarly, this Court has
15 ruled that the Authority’s validation suit is a vehicle reserved for the sole purpose of
16 confirming the validity of the issuance of the bonds, and that claims relating to use of bond
17 proceeds or other issues could be considered at a later time.⁴

18
19 ¹ Opposition to motion to quash summons, opposition to demurrer, motion to strike cross-
20 complaint, discussed *infra*, Part III.D, F.

21 ² For example, whether the high-speed rail project can meet statutory trip-time requirements
22 with “blended service,” and whether it can do so—as required by the Memorandum of
Understanding (“MOU”) between UP and HSRA—while avoiding disruption to UP
freight operations. *See infra*, Part III.C.

23 ³ As described below, part of the reason Union Pacific seeks an order expressly affirming
24 that validation of the bonds will not affect the terms or enforceability of the MOU is that
25 HSRA has declined to affirm this fact in writing. It said nothing about the issue in its
26 opening brief, even though Union Pacific dedicated much of its Responsive Pleading and
27 Answer to the question. During subsequent discussions after the Authority filed its
opening brief, HSRA declined Union Pacific’s request to put anything in writing about
whether an order validating the bonds could limit the effectiveness or enforceability of
the MOU. The uncertainty created by the content and pattern of HSRA’s responses to
Union Pacific’s concerns and inquiries makes this important to address.

28 ⁴ *See* rulings on motion to quash summons and demurrer, discussed *infra*, Part III.D.

1 Thus, what is not at issue in this bond validation lawsuit is any determination
2 whether the high-speed rail project meets the trip-time requirements of the Safe, Reliable
3 High-Speed Passenger Train Bond Act for the 21st Century, Streets and Highways Code
4 section 2704 *et seq.* (“HSR Act”), as set forth in section 2704.09 of the Streets & Highways
5 Code. Neither does the Authority’s lawsuit seek to validate any of the substantive
6 requirements for design, construction, operation, performance, or use of funds set forth in
7 the HSR Act. Nor does it seek to adjudicate any rights or claims arising from the
8 Memorandum of Understanding by which HSRA agreed to ensure the high-speed rail
9 project does not disrupt existing and future UP freight operations, including access to
10 customers. Any and all of these issues are outside the scope of this bond validation action
11 and, accordingly, remain open for adjudication (if necessary) at a later date. The validation
12 judgment—if the Court is inclined to enter such a judgment in favor of the Authority—
13 should confirm this explicitly.

14 The Authority has not submitted any evidence in this action to validate the
15 substantive requirements (*e.g.* trip-time) of the HSR Act, and it would be premature to
16 adjudicate whether such requirements have been satisfied. Significantly, for purposes of
17 meeting the trip-time requirements and MOU compliance, HSRA has yet to produce
18 detailed routes and service plans in the areas where it proposes to construct or operate high-
19 speed rail on, or in close proximity to, rights of way used by Union Pacific freight trains.
20 Based on information that is currently available, it is impossible at this time to determine
21 (1) whether the high-speed rail project can meet statutory trip-time requirements with
22 blended or shared service, and (2) whether it can do so while avoiding disruption to UP
23 freight operations, as required by the MOU. If this Court were, nevertheless, to conclude
24 that these substantive requirements fall within the scope of the Authority’s validation
25 action, then the Court should deny validation because there is no evidence these
26 requirements have been met.⁵

27 ⁵ In addition, if the Authority argues or this Court determines that the scope of this
28 validation action encompasses whether the Authority has complied with all requirements
(continued...)

1 In short, Union Pacific requests that if the Court is inclined to grant validation, the
2 judgment should simply validate that the bonds have been issued in conformity with the
3 Bond Issuance Law (as defined below) and are valid on their face; and the judgment should
4 expressly confirm that any issues or claims relating to the use of bond proceeds, the
5 substantive requirements of the HSR Act (*e.g.* trip-time), and compliance with the MOU are
6 outside the scope of validation. To that end, the scope of any validation judgment should
7 be as specified in and limited to the prayer for relief set forth in Union Pacific’s Answer to
8 the Validation Complaint. UP Responsive Pleading and Answer, pp. 14-15.

9 II. STATEMENT OF FACTS RELATING TO UNION PACIFIC’S INTERESTS.

10 A. Union Pacific’s Freight Rail Network.

11 As stated in its Responsive Pleading and Answer (“Answer”), Union Pacific
12 operates a freight rail franchise, in rights of way owned by UP and others, in California and
13 twenty-two other states. Answer, ¶ 4. The UP system is part of a national freight rail
14 network that forms a vital link in the nation’s interstate and international commerce. *Id.*
15 UP’s freight tracks are located throughout the State of California, including in the Central
16 Valley, in the Los Angeles Basin, and on the San Francisco Peninsula. *Id.* UP serves all of
17 the state’s major ports, including the Port of Los Angeles, Port of Long Beach, and Port of
18 Oakland. *Id.* UP also facilitates international trade through border crossings that connect
19 with rail networks in Mexico and Canada. *Id.*

20 Union Pacific rights of way run in close proximity to, and in some locations are
21 encroached upon by, portions of the proposed right of way for the approximately 800-mile
22 high-speed rail project (“HSR Project” or “Project”). Answer, ¶ 5. At various stages in the
23 development and environmental review of the HSR Project, UP has participated and
24 commented in order to protect UP’s freight rail network and avoid impacts to its operations.

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(...continued)

27 of the HSR Act, then this Court must deny validation based on its August 19, 2013 ruling
28 in *Tos v. California High Speed Rail Authority, et al.* (“*Tos*”), Case No. 34-2011-
00113919 (ruling that HSRA’s funding plan failed to comply with the requirements of
Section 2704.08(c)(2), subsections (D) and (K) of the HSR Act). *See infra*, Part IV.C.

1 *Id.* During review of the Project, UP has raised significant operational, safety,
2 environmental, and other concerns arising from the proposed construction and/or operation
3 of the HSR Project on or adjacent to UP rights of way. *Id.*

4 B. HSRA's Change To "Blended Service."

5 Ever since the HSR Project was proposed in California in the 1990s—and
6 continuing until last year—the Project's announced plan was to construct and operate high-
7 speed rail on new tracks dedicated to HSR service. Answer, ¶ 6. That plan changed
8 fundamentally in April 2012, when HSRA adopted a "Revised Business Plan." *Id.*

9 Under the Revised Business Plan, HSRA has proposed for the first time to operate
10 part of its network through blended or shared operations with existing commuter services.
11 Answer, ¶ 6. In many places these commuter lines operate on freight tracks that Union
12 Pacific owns or on which it has rights to operate freight service. *Id.* In some locations, most
13 notably the San Francisco Peninsula, it appears that HSRA may contemplate operating high-
14 speed trains on the very same tracks as freight and conventional passenger trains. *Id.* HSRA
15 proposes having passengers transfer to existing commuter service to complete their travel into
16 urban areas such as Los Angeles, Sacramento, and San Francisco. *Id.* HSRA refers to these
17 proposals as "blended service" or "blended operations" (collectively, "blended service").⁶ *Id.*
18 Significantly for Union Pacific, blended/shared service has the potential to disrupt or impede
19 severely UP's existing and future freight-rail operations—including access to existing and
20 future customers—and it is uncertain whether blended service can meet the trip-time
21 requirements of the HSR Act for truly high-speed passenger rail.⁷ *Id.*

23 ⁶ The Revised Business Plan refers to *blended systems* and *blended operations*, "which are
24 the integration of high-speed trains with existing intercity and regional/commuter rail
25 systems via coordinated infrastructure (the system) and scheduling, ticketing, and other
26 means (operations)." See <http://californiastaterailplan.dot.ca.gov/docs/1a6251d7-36ab-4fec-ba8c-00e266dadec7.pdf>, last visited August 21, 2013.

26 ⁷ The trip-time requirements are set forth in section 2704.09 of the Streets & Highways
27 Code, which requires that HSR be designed to achieve maximum non-stop service travel
28 times for seven specified corridors, including 2 hours and 40 minutes from San Francisco
to Los Angeles, and 30 minutes from San Francisco to San Jose. Sts. & Hwy. Code
§ 2704.09(b).

1 C. The MOU Between Union Pacific And HSRA.

2 When the Revised Business Plan was adopted, Union Pacific raised concerns to
3 HSRA about how blended service could cause serious disruption to UP's existing and
4 future freight operations. Answer, ¶ 7. UP subsequently engaged in negotiations with
5 HSRA and some of the commuter railroads whose operations would be affected by shared
6 service under the Revised Business Plan, and on July 11, 2012, the parties executed the
7 MOU to ensure the HSR Project does not disrupt UP freight operations. *Id.* The purpose
8 and effect of the MOU is to secure Union Pacific's rights and ability to continue meeting its
9 common carrier obligations, including access to new and existing customers. *Id.* To
10 further protect UP's rights in the future, as HSRA develops more specific routes and plans
11 for HSR on particular segments that could affect UP, the MOU specifically reserves UP's
12 rights to participate in future proceedings, including potential claims or litigation
13 concerning any aspect or portion of the Project. *Id.*

14 D. Status Of HSR Routes And Service Patterns.

15 Since executing the MOU, Union Pacific and HSRA have participated in
16 negotiations for the formation of additional definitive agreements that will be necessary for
17 construction of the Project to begin—including a construction and maintenance agreement,
18 an engineering agreement, and an insurance and indemnity agreement—but no such
19 agreements have yet been completed. Answer, ¶ 8. HSRA's alignment, construction, and
20 operational plans for HSR in general, and blended/shared service in particular, likewise
21 have yet to be developed. *Id.* Because the Project's specific routes and service patterns
22 have not been established, Union Pacific is unable to verify whether HSRA can satisfy its
23 commitments to UP under the MOU to avoid disruption of freight operations, and at the
24 same time achieve the trip-time requirements for high-speed rail under the HSR Act. *Id.*

25 III. STATEMENT OF PROCEEDINGS.

26 A. The Authority's Resolutions Authorizing Issuance Of Bonds.

27 At a public meeting on March 18, 2013, HSRA adopted a resolution ("HSRA
28 Resolution"), pursuant to its authority under Streets and Highway Code section 2704.12,

1 requesting the Committee to authorize the issuance of bonds, commercial paper notes, and
2 re-funding bonds under the Bond Issuance Law. Declaration of Angela Reed in Support of
3 Plaintiffs' Opening Trial Brief ("Reed Decl."), Exs. A-B. Later that same day, at its
4 publicly noticed meeting, the Committee adopted two resolutions of its own, pursuant to its
5 authority under Streets and Highway Code section 2704.13:

- 6 1. Resolution IX, authorizing the issuance of "State of California High-Speed
7 Passenger Train Bonds or Commercial Paper Notes" in the principal amount
8 not to exceed \$8,599,715,000. Declaration of Geoffrey Palmertree in
9 Support of Plaintiffs' Opening Trial Brief ("Palmertree Decl."), Exs. A-B.
- 10 2. Resolution X, authorizing the issuance of "State of California High-Speed
11 Passenger Train Refunding Bonds" to re-fund any bonds or commercial
12 paper notes issued under Resolution IX or bonds issued under Resolution X.
13 Palmertree Decl., Ex. C.

14 The HSRA Resolution and the Committee resolutions (Resolution IX and Resolution X) are
15 referred to herein collectively as "the Resolutions." Streets and Highway Code sections
16 2704.12 and 2704.13, pursuant to which HSRA and the Committee adopted the
17 Resolutions, are referred to collectively as "the Bond Issuance Law."

18 B. The Validation Complaint.

19 HSRA and the Committee filed their Complaint for Validation ("Complaint" or
20 "Compl.") on March 19, 2013, the day after the Resolutions were adopted. The Complaint
21 requests that the Court issue a judgment declaring the validity of (1) the general obligation
22 bonds and commercial paper notes authorized by the Authority; (2) any re-funding bonds
23 issued to refund the bonds; (3) any contracts related to the issuance and sale of the bonds,
24 commercial paper notes, or re-funding bonds; (4) the resolutions authorizing the issuance
25 and sale of the bonds, commercial paper notes, or re-funding bonds; and (5) "certain
26 proceedings and other matters related thereto." Compl., ¶ 1.

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1 The Complaint and the attached Resolutions⁸ do not discuss the substantive
2 provisions of the HSR Act, such as trip-time requirements, nor allege that the use of bond
3 proceeds will comply with each of these specific requirements. Neither does the Complaint
4 (or attached Resolutions) mention the MOU by which HSRA has agreed to ensure the HSR
5 Project does not disrupt Union Pacific freight operations. The specific allegations of the
6 Complaint are limited to how HSRA and the Committee complied with the procedural
7 requirements for issuance of bonds when they adopted their respective Resolutions.
8 Compl., ¶¶ 9-12.

9 However, the Complaint broadly requests entry of a judgment determining that the
10 bonds are “consistent” with the HSR Act as a whole (Compl., ¶ 1), rather than just the
11 procedural and authorization requirements for proper adoption of the Resolutions under the
12 Bond Issuance Law. In addition, the prayer for relief broadly seeks a determination that all
13 conditions precedent have been satisfied (Compl., Prayer, ¶ 3(a)); that all proceedings in
14 connection with the bonds “were, are, and will be in conformity” with the applicable
15 provisions of “all laws and enactments” (Compl., Prayer, ¶ 3(c)); and that any challenges
16 based on uses of proceeds of the bonds will not affect the determination of validity of the
17 bonds (Compl., Prayer, ¶ 3(e)). The Complaint also requests a blanket injunction against
18 any future litigation, to restrain “all persons or entities” from the institution of any action
19 challenging “any matters herein adjudicated or which could have been adjudicated.”
20 (Compl., Prayer, ¶ 4.)

21 C. Union Pacific’s Answer to the Complaint.

22 On May 9, 2013, Union Pacific filed its Answer, as an interested party, in
23 response to the Complaint. Union Pacific joined this action to protect its interests in its
24 freight rail network, and to preserve its rights arising out of and related to the MOU (by
25 which HSRA has agreed to ensure the HSR Project does not disrupt UP freight
26 operations). Answer, 1:23. In light of the broad and overly preclusive relief that the

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28 ⁸ The Resolutions are attached as Exhibits A, B and C to the Complaint.

1 Authority seemed to be requesting in its Complaint, it was necessary for UP to answer in
2 order to protect its rights.

3 The Answer lays out Union Pacific’s concerns that the proposed use of “blended”
4 service on the San Francisco Peninsula and on any other portion of the HSR Project—with
5 routes and service patterns yet to be determined by HSRA, and any impacts on UP freight
6 service not yet known or knowable—may harm Union Pacific by disrupting or impeding
7 existing and future freight-rail operations, as well as access to customers; may not achieve
8 the trip-time requirements of the HSR Act without disrupting UP freight service; and may
9 otherwise interfere with UP’s property and contractual rights intended to preserve freight
10 rail operations, including all rights under its MOU. Answer, ¶ 2.

11 Union Pacific filed the Answer to make sure that the scope of validation was limited
12 to whether the Authority was duly authorized to issue the high-speed rail bonds under the
13 Bond Issuance Law, and whether those bonds are valid on their face. Answer, ¶ 3. The
14 Answer’s prayer for relief sets forth a scope of validation judgment that is consistent with
15 what the Authority says it seeks to validate: that the bonds have been properly issued and
16 are valid on their face. *Id.*, at pp. 14-15.

17 D. Demurrer, Motion To Quash And Rulings On Same.

18 Several other defendants have attacked the Complaint on its face, and/or challenged
19 the service of the summons issued in conjunction therein, contending the Complaint is
20 uncertain because the scope of the requested validation is ambiguous and overbroad. In
21 responding to the demurrer and motion to quash, the Authority has represented to the Court,
22 parties, and public that it seeks only to confirm the validity of the issuance of the bonds,
23 and that claims relating to use of bond proceeds or other substantive issues are outside the
24 scope of this action. In its court filings in opposition to the demurrer and motion to quash,
25 the Authority stated:

- 26 • “[T]he Complaint for Validation is clear as to the matters to be validated—
27 the authorized bonds.” High Speed Rail Authority and High-Speed
28 Passenger Train Finance Committee’s Opposition to Demurrer of John Tos,

- 1 Aaron Fukuda, and County of Kings to Complaint for Validation
2 (“Demurrer Opp.”) at 1:6-7.
- 3 • “The Complaint for Validation only seeks to validate bonds and not use of
4 proceeds.” *Id.*, 3:7.
 - 5 • “Plaintiffs seek a judgment that the bonds are valid.” High Speed Rail
6 Authority and High-Speed Passenger Train Finance Committee’s Opposition
7 to Kings County Water District’s Motion to Quash Form of and Publication
8 of Summons (“Opp. to Motion to Quash”) at 3:23.

9 In overruling the demurrer and denying the motion to quash, the Court adopted the
10 Authority’s position on the limited scope of this validation action.⁹

11 E. The Authority’s Opening Trial Brief.

12 On June 28, 2013, the Authority filed its opening trial brief. There, the Authority
13 describes the scope of this validation action as “narrow,” because it merely relates to the
14 “procedural requirements for proper bond authorization” (which the Authority characterizes
15 as minimal). Op. Tr. Br. 2:7. The exhibits attached to the validation complaint, and the
16 evidence submitted by the Authority with its trial brief, are consistent with a narrow
17 validation as to procedural requirements only. All the Authority has submitted are the
18 Resolutions and the agenda notices for the meetings at which those Resolutions were
19 adopted. *See* Complaint, Exs. A-C; Reed Decl., Exs. A-B; Palmertree Decl., Exs. A-C.

20 F. The Authority’s Motion To Strike Cross-Complaint.

21 On August 7, 2013, the Authority filed a motion to strike the cross-complaint of
22
23

24 ⁹ Judge Brown denied Defendant Kings County’s Motion to Quash Service of Summons,
25 stating “Any challenge to the use of the proceeds may be raised at a later date.” *See*
26 May 29, 2013 Ruling on Submitted Matter (Motion to Quash Form of and Publication of
27 Summons (“Order on Motion to Quash”) at p. 2. Similarly, Judge Kenny, in overruling
28 the demurrer, stated: “Read as a whole, the complaint makes it sufficiently clear that
plaintiffs seek a judgment validating the issuance and sale of bonds under the [HSR Act].
The complaint also makes clear that any challenges to the use of the bond proceeds are
not part of the validation action itself and thus will not be affected by a judgment in the
validation action.” Minute Order of July 2, 2013 (“Order on Demurrer”) at p. 2.

1 Kings County Water District for Determination of Invalidity.¹⁰ In its motion to strike, the
2 Authority argues the cross-complaint should be stricken “because it seeks to challenge a
3 new and different matter—a contract award—that is not the subject of the Complaint for
4 Validation (Complaint) of certain high-speed rail bonds.” Memorandum of Points and
5 Authorities in Support of Motion to Strike the Cross-Complaint of Kings County Water
6 District for Determination of Invalidity, 1:3-5. The Authority says the only matters at issue
7 in the Complaint “are high-speed rail bonds and their authorization.”¹¹ *Id.*, 1:9.

8 G. The Authority’s Responses To Discovery Requests.

9 In July 2013, the Howard Jarvis Taxpayers Association (“Jarvis”) served requests
10 for admissions to HSRA concerning trip-time requirements, including whether riders on the
11 HSR system would be able to get from Los Angeles to San Francisco in 2 hours, 40 minutes
12 or less; whether the tracks on the HSR system would be exclusively reserved to high-speed
13 rail trains only; and whether high-speed trains would be required to “share tracks with
14 commuter and/or freight trains.” On August 19, 2013, HSRA responded to the Jarvis
15 discovery requests entirely with objections. HSRA objected to the requests “on the ground
16 that the pleadings in this action seek to confirm the validity of the certain bonds and
17 authorizing actions, and the propounded discovery is therefore irrelevant and immaterial.”
18 Plaintiff High-Speed Rail Authority’s Response to Requests for Admission, Set One,
19 3:26-28. HSRA repeated the theme of its trial brief “that the Authority only seeks to
20 validate bonds and not use of proceeds,” and HSRA objected that the requested admissions
21 relating to trip-time requirements “ha[ve] no relevance to whether the bonds are valid.” *Id.*
22 at 4:9 and 4:17-18.

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26 ¹⁰ In the cross-complaint, Kings County Water District seeks to set aside HSRA’s award of
27 the initial construction contract for the HSR Project on the grounds the award violated
28 HSRA’s own bid evaluation and contract procedures.

¹¹ The Authority’s motion to strike the cross-complaint of Kings County Water District is
noticed for hearing on November 22, 2013.

1 IV. ARGUMENT.

2 A. The Scope Of This Validation Action Is Confined To The Validity Of The
3 Issuance Of The Bonds Themselves.

4 1. Substantive issues are beyond the scope of the Authority's action.

5 The Authority has represented to this Court and the public that it seeks only
6 validation of the bonds in this lawsuit, and that any substantive issues or challenges relating
7 to the use of bond proceeds are not subject to this validation action. Whether the HSR
8 Project can meet statutory trip-time requirements with blended service—and whether it can
9 do so while avoiding disruption to UP freight operations, as required by the MOU—are
10 substantive issues that are clearly beyond the scope of the trial brief and evidence submitted
11 by the Authority.

12 The Authority's opening brief states repeatedly that the scope of the validation case
13 is confined to the issue of the validity of the bonds and does not encompass "use of funds"
14 issues (such as trip-time requirements). For example:

- 15 • Plaintiffs "brought this validation action to confirm the validity of high-
16 speed rail bonds they recently authorized." Op. Tr. Br. 1:5-6.
- 17 • A "validation judgment is needed to ensure that the bonds themselves cannot
18 be called into question in future litigation." *Id.*, 1:10-11.
- 19 • "Plaintiffs do not seek to validate the *use* of the bond proceeds, only the
20 bonds themselves. Any challenges to how the bond proceeds can be spent
21 may be brought later and have no impact on this validation action." *Id.*,
22 1:15-17 (emphasis in original).
- 23 • "The scope of the validation action is narrow and the procedural
24 requirements for proper bond authorization are minimal." *Id.*, 2:7-8.
- 25 • "Without a judicial determination regarding their validity, Plaintiffs cannot
26 begin to market or sell their bonds." *Id.*, 3:25-26.
- 27 • "The Complaint for Validation specifies that Plaintiffs only seek to validate
28 bonds and not use of funds." *Id.*, 6:4-6.

1 The opening brief does not mention trip-time or other substantive requirements of the HSR
2 Act; not does it mention “blended service,” Union Pacific’s concerns about disruption of
3 existing or future freight operations, or the MOU.

4 The record submitted by the Authority with its opening brief prevents this Court
5 from issuing anything other than a narrow, procedural validation. The only evidence
6 submitted by the Authority consists of the Resolutions passed to authorize issuance of the
7 bonds and related meeting agendas. *See Op. Tr. Br.*, 2:27-3:12; *see also Reed Decl.*,
8 Exs. A-B; *Palmertree Decl.*, Exs. A-C. These documents describe the events of a single
9 day: March 18 2013, the day HSRA requested issuance of the bonds, and the Committee
10 approved the bond issuance. HSRA and the Committee adopted the Resolutions pursuant
11 to sections 2704.12 and 2704.13, respectively, of the HSR Act. *See id.* Neither of these
12 sections refers to trip-time (found in section 2704.09) or other substantive requirements for
13 high-speed rail. *Id.*

14 Based on the Authority’s position, the provisions of the HSR Act properly at issue
15 in this validation action are sections 2704.12 and 2704.13, which Union Pacific refers to as
16 the Bond Issuance Law in the UP Answer. As set forth in the prayer for relief in the UP
17 Answer, any judgment should be limited to validation of compliance with the Bond
18 Issuance Law.

19 2. The Authority should be estopped from claiming the validation
20 judgment includes substantive issues.

21 The Authority’s representations regarding the narrow scope of their validation
22 request have helped persuade this Court to allow the action to go forward. In opposing the
23 demurrer to the Complaint and a motion to quash service of the summons, the Authority
24 argued the “Complaint for Validation only seeks to validate bonds and not use of
25 proceeds.” *See, e.g., Demurrer Opp.*, at 3:7. The Court adopted this argument in ruling on
26 the demurrer and motion to quash, in both cases expressly stating the issues relating to the
27 use of bond proceeds are not part of the validation lawsuit and will not be affected by any
28 validation judgment. *See Order of Motion to Quash*, at 2; *Order on Demurrer*, at 2. Thus,

1 the Authority should be estopped from claiming—in this action or in any subsequent
2 proceeding—that any validation judgment in this action extends to the substantive
3 requirements of the HSR Act.¹²

4 To hold the Authority to its word, and to avoid inconsistent rulings, the scope of any
5 validation judgment should be limited to procedural compliance with the Bond Issuance
6 Law. A judgment broadening the scope of the validation case—which differs from the
7 Court’s previous order regarding the summons (an integral due process step in a validation
8 proceeding) and sufficiency of the pleading—would greatly infringe the procedural and
9 substantive rights of Union Pacific and others.

10 Union Pacific has attempted, on multiple occasions, to obtain a stipulation or other
11 form of written confirmation from the Authority that the validation action specifically does
12 not involve (1) whether the high-speed rail project can meet statutory trip-time
13 requirements with blended/shared service, and (2) whether it can do so while avoiding
14 disruption to UP freight operations, as required by the MOU. The Authority has verbally
15 confirmed this, but has declined UP’s request to commit its position to writing. In any
16 event, the Authority cannot tell Union Pacific and the Court that it is requesting a narrowly
17 tailored validation judgment, and then later request a broad judgment—or assert in a
18 subsequent proceeding that it had been granted a broad judgment validating all substantive
19 requirements of the HSR Act. Any judgment must preserve, for a later date, the ability to

20 ¹²The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of
21 inconsistent positions, “prevents a party from asserting a position in a legal proceeding
22 that is contrary to a position previously taken in the same or some earlier proceeding.”
23 *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181. The doctrine is
24 equitable, and should be applied with discretion, particularly in circumstances where “a
25 party’s inconsistent behavior will otherwise result in a miscarriage of justice.” *Daar &*
26 *Newman v. VRL International* (2005) 129 Cal.App.4th 482, 490–491. The policies
27 underlying judicial estoppel are general considerations of the orderly administration of
28 justice and regard for the dignity of judicial proceedings. Litigants should not be
permitted to play “fast and loose with the courts.” *Minish v. Hanuman Fellowship* (2013)
214 Cal.App.4th 437, 448-449. Judicial estoppel applies when: (1) the same party has
taken two positions; (2) the positions were taken in judicial or quasi-judicial
administrative proceedings; (3) the party was successful in asserting the first position
(*i.e.*, the tribunal adopted the position or accepted it as true); (4) the two positions are
totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud,
or mistake. *Id.* (citing *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987).

1 challenge use of the bond proceeds, including for violations of the trip-time requirements
2 and any claims arising from the MOU.

3 3. The Authority knew about the issues Union Pacific raised in its
4 Answer, but chose not to respond to those issues in this action.

5 On the last page of its opening trial brief, the Authority says it “will address any
6 additional arguments raised by defendants on reply. Although Plaintiffs have attempted to
7 anticipate issues Defendants will raise, Plaintiffs cannot know at this time what legal
8 and/or factual arguments Defendants may make in opposing validation.” Op. Tr. Br. 8:6-
9 10. The Authority also warns it may submit “additional ... evidence on reply.” *Id.* at
10 8:13-14.

11 In fact, the Authority knows very well what Union Pacific’s concerns are, because
12 those concerns, issues and arguments (regarding whether the Authority can meet trip-time
13 requirements with blended service, and meet those requirements while complying with the
14 MOU) are plainly expressed in the Answer that UP filed on May 9, 2013—almost two
15 months before the Authority filed its opening brief. The Authority had several
16 opportunities to respond to those concerns (*supra*, Part IV.A.2), but declined to do so.

17 When preparing its opening brief, the Authority made a strategic decision not to
18 address trip-time or other substantive requirements of the HSR Act, and not to respond to
19 Union Pacific’s expressed concerns about blended service and compliance with the MOU.
20 Considering those issues as beyond the scope of this validation, the Authority elected to
21 submit no evidence or argument on them. It would severely prejudice Union Pacific and
22 other defendants if the Authority were to submit new argument and evidence on these
23 issues by way of reply.

24 B. It Is Premature To Determine That The Authority Has Complied With Trip-
25 Time Requirements And Can Do So Without Violating The MOU.

26 The trip-time and other substantive portions of the HSR Act governing use of bond
27 funds, and the design, operation and performance of the HSR Project, cannot be validated
28 now because it would be premature. Based on information currently available, it is

1 impossible to determine (1) that the Authority can achieve the trip-time requirements of the
2 HSR Act, and (2) that the Authority can do so while, as required by the MOU, avoiding
3 disruption to Union Pacific's existing and future freight operations.

4 HSRA has yet to produce detailed routes and service plans in the areas where it
5 proposes to construct or operate HSR on, or in close proximity to, rights of way used by
6 Union Pacific freight trains. HSRA's current plan calls for the first constructed segment to
7 be in the Central Valley of California, not the San Francisco Peninsula (where trip-time
8 requirements are more relevant because blended service appears to be the preferred option
9 there). HSRA's alignment, construction¹³, and operational plans for HSR in general—and
10 blended service in particular—have yet to be developed and shared with Union Pacific.
11 Given that the HSR Project's specific routes and service patterns have not been established,
12 Union Pacific is unable to determine that HSRA can achieve the trip-time requirements of
13 the HSR Act and that HSRA can do so while, as required by the MOU, avoiding disruption
14 of UP freight operations. *See Answer*, ¶¶ 3, 8.

15 In its opening brief, the Authority argues that certain market conditions and maturity
16 dates cannot be established until the bonds are actually offered for sale. *Op. Tr. Br.* 1:18-
17 2:6; 7:4-11. It is even more true that issues concerning use of the bond proceeds cannot be
18 adjudicated until the bond proceeds are actually ready to be used. Because compliance with
19 trip-time requirements and the MOU will depend on the specific routes and service patterns
20 that HSRA selects for the HSR Project—which have yet to be established—these matters
21 cannot be validated at this time.

22

23

24

25 ¹³HSRA intends to use a design/build process for construction of the Project. This means
26 that instead of developing and approving final plans before construction begins, its
27 contractor will start with partially developed plans and design the remainder of the details
28 and elements during construction. Because HSRA has elected to use this approach,
important features of the design, such as curvature and grade of track, that will affect
speed and travel time are not now known and will not be knowable until much later in the
process.

1 C. If The Court Decides The Validation Lawsuit *Does* Encompass Trip-Time
2 And All Other Requirements Of The HSR Act, Validation Must Be Denied.

3 Finally, should the Authority claim and/or this Court determine that the scope of this
4 validation lawsuit extends to all requirements of the HSR Act, and that this action is the
5 sole vehicle to adjudicate compliance with trip-time (and related compliance with the
6 MOU) and all other requirements of the HSR Act, then validation should be denied because
7 (1) the evidence fails to show that HSR meets trip-time requirements and does so without
8 violating the MOU, and (2) this Court has already determined that the Authority failed to
9 comply with requirements of the HSR Act.

10 1. The Authority has submitted no evidence in this matter to support
11 validation of trip-time requirements.

12 As a threshold issue, the Authority has not submitted any evidence in this matter to
13 support validation of trip-time and other substantive requirements of the HSR Act.

14 Therefore, the Court should deny validation with respect to these issues.¹⁴

15 _____
16 ¹⁴In the *Tos* lawsuit, HSRA produced certain evidence relating to trip-time requirements.
17 That evidence is not before the Court in this validation action—but, even if it were, the
18 evidence in *Tos* fails to support a determination that HSR meets trip-time requirements.
19 In opposing the *Tos* plaintiffs’ claims that the HSR Project fails to meet the two-hour, 40
20 minute trip-time requirement between San Francisco and Los Angeles, HSRA submitted a
21 declaration of Frank Vacca, the Chief Program Manager for the Project, together with a
22 “Phase I Blended Travel Time Assessment.” The Blended Travel Time Assessment
23 found “the best time[s]” that might be achieved are: (1) exactly 30 minutes for San
24 Francisco to San Jose, and (2) 2 hours, 32 minutes for San Francisco to Los Angeles. The
25 Vacca Declaration and Assessment are based on questionable assumptions, including:

- 26 • 110 mph maximum speed between San Francisco and San Jose, “with an unimpeded
27 path ... in the SF-SJ corridor.” But in fact, HSRA envisions sharing the SF-SJ
28 corridor with Union Pacific freight and Caltrain commuter service. The
“unimpeded path” assumption ignores Union Pacific’s existing freight operations,
including the potential impacts that high-speed rail would have on freight service,
and vice versa.
- The travel times generated are the “best time that might be achieved under current
proposed alignment and conditions. Actual travel times will be based on the final
alignment in the approved environmental documents.” But the “current proposed
alignment” is unclear and operating “conditions” are not yet specified.
- “FRA strategies and regulations are in place to support mixed fleet traffic (freight,
conventional passenger, high-speed passenger) to operate at speeds up to 110 mph.”
But there is no discussion of how mixed-fleet traffic would operate without
impeding high-speed rail, freight-rail, commuter rail, or each of them.

(continued...)

1 V. CONCLUSION.

2 For each of the reasons set forth herein, Union Pacific respectfully requests that, if
3 the Court is inclined to grant validation, the judgment should only validate that the bonds
4 have been issued in conformity with the Bond Issuance Law and are valid on their face; and
5 the judgment should expressly confirm that any issues or claims relating to the use of bond
6 proceeds, the substantive requirements of the HSR Act (*e.g.* trip-time), and compliance with
7 the MOU are outside the scope of validation. To that end, the scope of the validation
8 judgment should be as specified in and limited to the prayer for relief set forth in Union
9 Pacific's Answer (pp. 14-15).

10 Otherwise, the Authority's request for validation should be denied.

11 Dated: August 22, 2013.

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