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KAMALA D. HARRIS Attorney General of California 13 OCT 29 PM 3: 42 2 TAMAR PACHTER Supervising Deputy Attorney General LEGAL PROCESS #3 S. MICHELE INAN 3 Deputy Attorney General 4 State Bar No. 119205 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 5 Telephone: (415) 703-5474 Fax: (415) 703-5480 6 E-mail: Michele.Inan@doj.ca.gov Attorneys for Defendants/Respondents California High-Speed Rail Authority, Chief Executive Officer 8 Jeff Morales. Governor Edmund G. Brown Jr., State Treasurer Bill Lockyer, Director of Finance Ana 9 Matosantos, Secretary of California State Transportation Agency Brian P. Kelly and State 10 Controller John Chiang SUPERIOR COURT OF THE STATE OF CALIFORNIA 11 COUNTY OF SACRAMENTO 12 13 14 15 JOHN TOS, AARON FUKUDA; AND Case No. 34-2011-00113919 16 COUNTY OF KINGS, A POLITICAL DEFENDANTS/RESPONDENTS' SUBDIVISION OF THE STATE OF 17 SPECIAL APPLICATION TO STRIKE CALIFORNIA, OR DISREGARD NEW ARGUMENT IN THE REPLY BRIEF ON REMEDIES, OR 18 Plaintiffs, IN THE ALTERNATIVE, REQUEST FOR PERMISSION TO FILE A SUR-19 REPLY 20 CALIFORNIA HIGH SPEED RAIL Date: November 8, 2013 21 AUTHORITY; JEFF MORALES, CEO OF Time: 9:00 a.m. THE CHSRA; GOVERNOR JERRY Dept: 31 22 BROWN; STATE TREASURER, BILL Hon. Michael P. Kenny LOCKYER; DIRECTOR OF FINANCE, Trial Date: May 31, 2013 23 ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, Action Filed: November 14, 2011 24 TRANSPÓRTATION AND HOUSING. BRIAN KELLY; STATE CONTROLLER, 25 JOHN CHIANG; AND DOES I-V, INCLUSIVE. 26 Defendants. 27

The California High-Speed Rail Authority and the other respondents (collectively "Authority") ask the Court to strike or disregard new argument in petitioners' reply brief and the declarations of Rita Wespi and William Warren filed October 25, 2013. The new arguments and putative evidence are improper because they could have been but were not presented in Petitioners' (collectively "Tos") opening brief. Tos cannot cure deficiencies in his opening brief in the reply, and thereby deprive the Authority of a meaningful opportunity to respond. Nor should Tos be allowed to bootstrap irrelevant arguments into the upcoming oral argument. Alternatively, if the Court will consider reviewing the new argument in the reply brief and associated declarations, the Authority requests permission to respond by sur-reply, no later than Monday November 4, 2013.

## TOS' REPLY BRIEF

The Court asked the parties to address whether there were approvals that expended or committed Proposition 1A bond funds outside the scope of Streets and Highway Code section 2704.08, subdivisions (d) or (g). (Ruling, filed August 16, 2013.) The purpose was to determine whether a writ should issue to invalidate the funding plan prepared pursuant to subdivision (c) and the subsequent approvals. Tos' opening brief identified two contracts that purportedly commit \$470 million of bond funds for construction in violation of subdivision (d). In answer, the Authority declared that no bond funds have expended or committed in violation of subdivisions (d) or (g).

Tos' reply brief is premised on a new set of alleged facts and argument which could have been presented readily in his opening brief.<sup>2</sup> Tos now asserts that the Authority has committed \$2.118 billion (up from \$470 million) to construct the rail project in the two contracts (Tos Reply, pp. 4:1-9, 5:19-6:2 [Authority "has committed over two billion dollars"]; Warren Decl., ¶ 12; see Wespi Decl., ¶ 6), and uses the new higher amount to respond to the Authority's opposition brief based on the lower amount (see, e.g., id., p. 6:8-11; Warren Decl., ¶ 11). And, relying on the

All statutory references are to Streets and Highway Code section 2704.08.

<sup>&</sup>lt;sup>2</sup> None of the evidence is true, nor are the declarants competent to testify on matters of government contracting and accounting.

terms of the federal grants and the higher amount known to Tos and cited in his opening brief, Tos now argues that: (1) the Authority cannot use the ARRA grant funds to pay for *any* contract costs, leaving only state bond funds to pay contract costs (*id.*, p. 3:11-18; Warren Decl., ¶ 10); (2) the ARRA grant requires the Authority to begin paying the full contract costs by April 2014 (*id.*, p. 5:13-18; Warren Decl., ¶¶ 7-9); and (3) both grants (the ARRA and 2010 grant) commit state funds in violation of debt limit provisions set forth in article XVI, section 1 of the California Constitution (*id.*, pp. 4:15-16, 6:3-11 & 18-19).

## ARGUMENT

The Authority asks the Court to strike or disregard the new argument and declarations because they are based on contracts and federal grants known to Tos and cited in his opening brief. All these sources were matters of public record known to Tos long before the filing of the opening brief.<sup>3</sup> Tos was required to present all points in the opening brief and could have done so easily based on his understanding of the underlying documents.

It is improper to raise arguments for the first time in a reply brief. (Balboa Ins. Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1010.) A petitioner cannot cure deficiencies in an opening brief by loading the reply brief with the evidence missing from the opening brief. (Opdyk v. California Horse Racing Board (1995) 34 Cal.App.4th 1826, 1830.) To allow this to occur would be particularly unfair to the Authority in a case as important as this case. (See Tyler v. Children's Home Society (1994) 29 Cal.App.4th 511, 526, fn. 8.)

Further, the new arguments are meritless and the declarants are not competent to testify. By raising them on reply, Tos either deprives the Authority of any meaningful opportunity to respond, or requires that the Authority be put to the additional effort and delay of filing an additional brief by permission. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362 [inclusion of additional evidentiary matter with reply should only be allowed in exceptional case]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765 [inclusion of new matter requires

<sup>&</sup>lt;sup>3</sup> Contemporaneously with his opening brief Tos asked the Court to take judicial notice of the two contracts (see Tos' Request for Judicial Notice, filed September 16, 2013, Exhibits A and B thereto), and he referred to the ARRA grant agreement in footnote 11 of the opening brief.

1	additional delay]; American Drug Stores, Inc. v. Stroh (1992) 10 Cal. App. 4th 1446, 1453 [points	
2	raised for the first time in a reply brief will ordinarily not be considered because this would	
3	deprive the respondent of an opportunity to counter the argument]; accord, Save the Sunset Strip	
4	Coalition v. City of West Hollywood (2001) 87 Cal. App. 4th 1172, 1181, fn. 3; see also Ruling,	
5	filed August 16, 2013, pp. 13:16-14:2 [arguments raised for the first time in a reply brief on the	
6	merits will not be considered].)	
7	For these reasons, the Authority requests that the new evidence and argument be stricken or	
8	disregarded, or in the alternative, that the Authority be permitted to file a sur-reply by November	
9.	4, 2013.	
10	Dated: October 29, 2013	Respectfully Submitted,
11		Kamala D. Harris Attorney General of California
1.2		TAMAR PACHTER Supervising Deputy Attorney General
13	:	Supervising Deputy Attorney General
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15		S. Michele Inan
16		Deputy Attorney General Attorneys for Defendants/Respondents California High-Speed Rail Authority, Chief Executive Officer Jeff Morales, Governor
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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name:

Tos, et al. v. California High Speed Rail Authority, et al.

No.:

34-2011-00113919

## I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 29, 2013, I served the attached

DEFENDANTS/RESPONDENTS' SPECIAL APPLICATION TO STRIKE OR DISREGARD NEW ARGUMENT IN THE REPLY BRIEF ON REMEDIES, OR IN THE ALTERNATIVE, REQUEST FOR PERMISSION TO FILE A SUR-REPLY by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Michael J. Brady Ropers Majeski Kohn & Bentley 1001 Marshall St, Suite 500 Redwood City, CA 94063

Stuart M. Flashman Law Offices of Stuart M. Flashman 5626 Ocean View Drive Oakland, CA 94618-1533 Attorneys for Plaintiffs

Raymond L. Carlson Griswold, LaSalle, Cobb, Dowd & Gin, L.L.P. 111 E 7th Street Hanford, CA 93230 Attorneys for Kings County Water District

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 29, 2013, at San Francisco, California.

Sandy Shum

Declarant

Signature

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