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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, et al.,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al,

Defendants.

CASE NO. 34-2011-00113919

PLAINTIFFS' CLOSING BRIEF

Trial Date: May 31, 2013

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I.

DEFENDANTS' CLAIMS OF WAIVER AND ABANDONMENT ARE CYNICAL AND COMPLETELY WITHOUT MERIT. INSTEAD, IT IS DEFENDANTS, BY FAILING TO RESPOND TO PLAINTIFFS' ARGUMENTS AT ALL, WHO HAVE ABANDONED AND WAIVED THEIR RIGHT TO CHALLENGE SUCH ARGUMENTS AND WHO HAVE, THEREFORE, ADMITTED THE VALIDITY OF PLAINTIFFS' ARGUMENTS IN IMPORTANT RESPECTS

Defendants acknowledge that plaintiffs have made allegations of 10 violations of Proposition 1A. But they take the position that plaintiffs have waived their right to challenge these violations because Plaintiffs did not include them within the writ section of the brief (Part I) and have therefore abandoned those arguments premised on violations of Proposition 1A. Defendants contend that all ten violations must be contained within the writ part of the brief, and that none can be contained within the 526(a) part of the brief (Part II), and since only two of the violations are contained within the writ section, a decision on the writ claim against the plaintiffs will wipe out plaintiffs' right to litigate all 10 violations. This is an extraordinary, naïve, and cynical claim.

There are 10 alleged violations of Proposition 1A. But each one is separately argued. Defendants' claim boils down to an objection that some of the violations are placed in the writ part of the brief (Part I) and others are contained in the 526(a) part of the brief, and that this "placement problem" is devastating to plaintiffs' entire case.

Here is an example of the foolishness of defendants' position: writs of mandamus are supposed to decide pure issues of law, not factually disputed issues. Yet plaintiffs' position would require defendants to litigate in the writ claim disputed factual issues such as: Will a subsidy be required? Is the ridership study erroneous and lacking evidentiary support? Are the revenue projections unsupported and contrary to the weight of the evidence? Are the operating costs projections ridiculously below worldwide averages? Is the promise of a two hour 40 minute travel time from Los Angeles to San Francisco unsupported by the evidence? Issues such as these are complex economic issues common to the operation of any railroad. They are strongly disputed concerning the underlying factual foundation. An examination of the briefing so far, including 13 of the 15 declarations filed by plaintiffs, demonstrate this fact. And yet, defendants

would insist that plaintiffs put these issues within the writ part of the case, at which point the Court would say they are improperly there because writs are not supposed to resolve disputed issues of fact! This is but an illustration of the absurdity of defendants' position.

The Practical Approach:

When plaintiffs' counsel (Mr. Flashman and Mr. Brady) sat down to divide up the work on this complex opening brief, challenging the entire scope of the High Speed Rail Project, and the complex inner workings of Proposition 1A/AB 3034, what they did was this: separate the issues into gradations of importance. Next, place the foremost three legal issues (involving pure issues of law) within the writ section of the brief; and place the foremost issues involving disputed questions of fact within the 526(a) part, together with remaining issues that could be more easily resolved within the 526(a) part, and appropriately so.

We believe that all of this was consistent with the trial judge's decision that "legal issues" will be tried first and factual issues later (depending on how the legal issues were resolved in the writ portion of the case). Therefore, in the writ portion, the following important and purely legal issues were placed: (1) Did the Authority violate the environmental compliance requirements? (2) Did the Authority violate the requirements that there be adequate funding in place or committed or secured for completion of the usable segment selected by the Authority? (3) Is the Authority permitted to build a "partial" usable segment, or, stated in another way, is the Authority permitted to build the usable segment that it selected in phases or pieces and starting out with a conventional rail portion, which is not electrified? These issues present pure issues of law.

Turning to the 526(a) part of the case, Proposition 1A requires that there can be no subsidy for operating costs on the usable segment, and that an adequate ridership study be done on the usable segment. In order to analyze whether a subsidy will be required, not only must ridership be studied, but also anticipated revenues and projected operating costs. All of these relate to the complex subject of the economics of operating a railroad in the United States. The factual underpinnings of these four issues are strongly contested as the mountain of evidence in plaintiffs' opening brief demonstrates.

Another very significant issue is what is commonly called the "trip time" issue – a

promise made to the voters by the Authority that a passenger boarding a train in Los Angeles can reach San Francisco in two hours and 40 minutes. This is also a strongly contested issue about which there has been huge controversy. Contested questions of fact plainly exist. All of these issues belong in the 526(a) part of the case. It cannot be put into the writ part of the case, because that would be procedurally improper. For due process reasons, plaintiffs must have an opportunity to litigate these issues, and the 526(a) part of the case is the only place to do so. There are other issues which have been placed in the 526(a) part of the case, such as completion date, the issue of misrepresentations concerning fares and costs, the change of trains issue, what illegal expenditure of Proposition 1A funds has already occurred. An overarching issue, covered in both the mandamus section and the 526(a) section, is whether the change in the entire framework of the project, and the Legislature's approval of the same, is unconstitutional and violates Proposition 1A itself. That issue also may involve contested questions of underlying facts or mixed questions of law and fact.

In setting up the case in this fashion, plaintiffs' two counsel believe that they are complying exactly with the order of trial for which the Court indicated its preference. The writ claims (the legal claims) will be tried first. The decision on the writ claims could well impact the way that some of the 526(a) claims are tried, or what remains of the 526(a) claims. This will be briefed, *infra*, because it is an important subject, with unusual ramifications. But there was never any order of this Court that the 526(a) part of the case would be postponed for many months (as defendants desire) after the resolution of the writ claims. To the contrary, there is no reason why the 526(a) part of the case cannot proceed immediately after the writ decision is made. Our opening brief is prepared in anticipation of that order of proceeding. The plaintiffs went to a great deal of time and effort to expedite the handling of the 526(a) part of the case. They gathered evidence (144 requests for judicial notice), together with 15 declarations setting forth evidentiary facts and expert opinions, many of which are from leading experts in the United States on the issues involved in this case.

And what is the approach of the defendants? They purport to ignore all of this, object to the entirety of plaintiffs' brief, Part II, the 526(a) issues. The defendants take the position that

after the writ case is decided, the 526(a) part of the case should be thrown onto the regular trial calendar, with discovery opened up, ADR proceedings held, law and motion proceedings opened up, case management hearings, and trial setting conferences. This is absurd and is completely contrary to the efficient ways that the Sacramento Superior Court runs it operations and contrary to the Rules of Court in Sacramento.

In short, this case involves writ issues, and other non-writ issues. It was transferred to this Court for that reason. Nothing has occurred that would justify some sort of "postponement" other than allowing the case to proceed immediately after the writ decision is rendered and the Court decides to what extent the 526(a) claims can proceed.

Issues of Fairness and Prejudice:

Many months ago, defense counsel was most anxious for a quick trial on this matter because this litigation was creating a cloud over the project. Plaintiffs' counsel agreed to the May 31, 2013, date, and that date has been on the calendar for many months. There has been plenty of time for discovery; plenty of time for law and motion. Defendants have instituted neither; plaintiffs have instituted discovery, including requests for admissions, expert disclosure (none received from defendants, resulting in a waiver under C.C.P. 2034 of the right of defendants to present experts when the 526(a) action goes to trial). It would be a complete betrayal of fairness to allow a material postponement of the 526(a) trial, as defendants desire. Why would the defendants have such as wish? The explanation is simple: the defendants have announced that construction of the High Speed Rail Project will commence six weeks after the May 31, 2013, trial date. Defendants would vastly prefer to have the trial commence after construction has started, because then they will be able to argue to the Court that unacceptable prejudice will result if the case is allowed to be decided after construction has started (the "once the horse has left the barn" argument). On the other hand, in the interest of justice, the ideal time to have a trial on the merits is before construction starts and before any such claimed prejudice can result. This explains why the paramount strategy of the plaintiffs is to keep and retain the May 31, 2013, trial date. If things proceed along the regular course, the plaintiffs should be able, especially with an expedited trial proceeding which plaintiffs will encourage and promote, to

have a final trial court decision on the merit on the writ and the 526(a) part before construction commences. Surely, this is the proper result and one that serves the interest of justice, fairness, and lack of prejudice. On the subject of prejudice, plaintiffs have put in an enormous amount of time and effort, gathering evidence, gathering expert and other declaration, lining up possible oral witnesses (not too many), making arrangements for accommodation and office assistance, and the many other activities associated with getting ready for a complex trial. The Attorney General is located in Sacramento and has no such burdens.

Any Waiver is on the Part of the Defendants:

The failure of defendants to treat plaintiffs' 526(a) part of the case seriously is unacceptable and has consequences. Note that in the "objection" that defendants have filed with respect to Part II of the case (the 526(a) part) going to trial, the defendants will not even stoop to mentioning 526(a) at all. They treat the claim as some sort of afterthought, not to be given any attention whatsoever, even though it is a central part of this lawsuit. The defendants should have filed a brief on the merits responding to the many arguments made by the plaintiffs. Their failure to do so constitutes a waiver of their right to challenge any of the arguments in plaintiffs' opening brief. By their actions, they have also necessarily waived other important matters: they have waived the right to challenge on the merits or on evidentiary grounds all of the evidence presented by plaintiffs in their opening brief; they have waived their right to challenge plaintiffs' 144 requests for judicial notice, since the trial brief was the opportunity to do that; they have waived their right to present experts at the 526(a) trial, because they have deliberately chosen (at high risk) not to engage in a mutual exchange of experts, as plaintiffs have done pursuant to C.C.P. § 2034. These are heavy consequences, but we ask this Court to so rule, once the 526(a) part of the case gets underway.

Finally, as will be discussed below, defendants are completely off base in claiming that the decision on the writ automatically wipes out every single 526(a) claim. This, again, is an absurd legal position, unsupported by law, which we shall demonstrate, *infra*.

II.

THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT BAR THE COURT FROM CONSIDERING THE ISSUES RAISED IN PART II OF PLAINTIFFS' TRIAL BRIEF

In its objection to Part II of the plaintiffs' trial brief, the Authority argues that plaintiffs cannot "re-litigate claims determined in the writ proceedings in a civil proceeding for declaratory and injunctive relief." (Obj., p. 2.) Essentially, this is an argument that the doctrines of res judicata or collateral estoppel bar plaintiffs' actions as brought under Section 526a of the Code of Civil Procedure ("526a action"). For the reasons set forth below, that argument is unavailing.

In order for the outcome of the writ proceedings to have preclusive effect on the plaintiffs' 526a action, the Court would first have to find that the doctrines of res judicata or collateral estoppel apply. For res judicata, the Court would have to find that the writ proceedings involve issues that are identical to the issues presented in the 526a action. (See *People v. Barragan* (2004) 32 Cal.4th 236, 253.) Additionally, the Court would have to determine that application of this doctrine would not result in an injustice and that barring relitigation of these issues would serve the public interest. (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902.)

Similarly, in order to find that collateral estoppel applies, the Court would have to find that the issues involved in plaintiffs' 526a proceedings are identical to the issues presented and litigated in plaintiffs' writ proceedings trial brief and that the issues therein were actually litigated and necessarily determined in the writ proceedings. (See *Daar & Newman v. VRL Intern.* (2005) 129 Cal.App.4th 482, 489.) Collateral estoppel will not, however, apply to issues raised in the earlier proceedings that are not litigated or necessarily decided therein. (*Id.*) Furthermore, in order for the issue to be "identical," it must involve identical factual allegations. (See *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 512.)

As explained in Part II of plaintiffs' trial brief, the 526a action will involve factual information that was not available to the Authority at the time of the events at issue in the writ proceeding. Thus, the information is not a part of the administrative record. For example, the 526a action will include information about the current situation of the Authority's access to

funding sources and its progress on obtaining environmental clearances, which was not available in November, 2011, and April, 2012. Although the Authority argues that this evidence is not admissible in the 526a action, it cites no authority in support of this contention. Instead, the Authority asserts that the 526a action is merely auxiliary to plaintiffs' writ proceeding. However, as a 526a action is a "civil action" under the Code of Civil Procedure, whereas a writ action is one of the "special proceedings of a civil nature," this argument lacks merit. (See Code Civ. Proc., §§ 526a and 1085.) Accordingly, a decision on the merits of plaintiffs' writ proceeding will not have a preclusive effect on the 526s action as the determination of the issues involved therein will involve different factual allegations than those available in the writ proceedings. (See *Hernandez, supra,* 46 Cal.4th at 512.)

Moreover, as explained above, in order for either res judicata or collateral estoppel to bar plaintiffs' 526a action, plaintiffs 526a action would need to litigate the issues actually litigated in plaintiffs' writ actions. Again, as explained in plaintiffs' trial brief, that is not the case. Instead, as plaintiffs made clear in Part II of their trial brief, the 526a action seeks to challenge the Authority's execution of its *mandatory* duties as required under Proposition 1A, not the "quasi-judicial" actions already undertaken by the Authority. Thus, a determination of plaintiffs' writ action would not preclude litigation of the 526a action as the issues presented and litigated in the two actions are different.

Finally, res judicata and collateral estoppel will not bar relitigation of matters where the second action is subject to a lower standard of proof than the first action. (*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 933.) Here, the "second" action would be plaintiffs' 526a action, which is subject to the standard of preponderance of the evidence. (See Evid. Code § 115 (preponderance of evidence is the standard unless otherwise provided by law).) The "first" action is plaintiffs' writ action, in which the defendants will contend that plaintiffs must prove that the Authority's decision and factual determinations were not an abuse of discretion. (*Cal. Ass'n of Med. Prods. Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 302.) If the challenged agency decision required an interpretation of statutes or regulations, the defendants contend that the agency's interpretations are entitled to great weight and will be upheld unless found to be

clearly erroneous. (*Cal. Correctional Peace Officers' Ass'n. v. State* (2010) 181 Cal.App.4th 1454, 1460.) Defendants will contend that a high degree of deference to the Authority's statutory interpretations and factual findings in the writ proceeding must be given, but plaintiffs' burden (preponderance of the evidence) in the 526a action is undoubtedly lower. Consequently, a determination in the writ proceeding will not preclude a contrary ruling in plaintiffs' 526a action.

For these reasons, neither the doctrine of res judicata nor collateral estoppel should prevent the Court from considering the merits of plaintiffs' 526a action, even if considered after the Court rules on the merits of plaintiffs' writ proceedings.

III.

DEFENDANTS PROFESS A PROFOUNDLY CYNICAL VIEW OF THE LAW AND ITS REQUIREMENTS; A VIEW CONDEMNED BY THE SUPREME COURT AND BY THE CONSTITUTION OF CALIFORNIA

Part I of plaintiffs' opening brief goes into great detail concerning the legislative history leading up to AB 3034 and Proposition 1A. Nothing is clearer than the fact that the Legislature and the drafters of Proposition 1A desired that stringent safeguards be placed around this project and that numerous restrictions, prohibitions, and detailed requirements be carried out before construction could commence or before money could be expended or used. There was great concern about cost overruns and the risk of an uncompleted project and an abandoned project, with all the collateral damage ensuing therefrom. This would explain such important safeguards and restrictions as the following:

(1) That, with respect to the usable segment selected by the Authority, all project level environmental clearances must be completed prior even to the submission of the funding plan to the Legislature (November 2011), and certainly before any construction of the usable segment commences;

(2) The requirement that the Authority must select the usable segment that will first be built;

(3) The requirement that all the funds necessary to complete the usable segment selected by the Authority and necessary to complete that usable segment must be in place, committed, or secured before construction can commence;

(4) The requirement that the usable segment selected by the Authority cannot require a subsidy for operating costs;

(5) The requirement that, with respect to the usable segment, ridership must be sufficient to produce a profit, when considered with revenues and operating costs; and

(6) The requirement that the passenger must be able to board the train in Los Angeles and arrive in San Francisco two hours and 40 minutes later.

There were various other promises and mandatory duties in Proposition 1A, but the above could probably be viewed as the most central because they pertain to the feasibility of the project and its potential for success. No allowance or discretion was given to the Authority to violate or modify these requirements. Proposition 1A was a voter-approved initiative, placed before the voters by the Legislature. There is no provision in Proposition 1A allowing the Legislature to change it for any reason. As Sections XV and XVI of plaintiffs' opening brief, Part II, demonstrate, the Legislature cannot amend or modify these requirements, and to do so would be unconstitutional since a voter-enacted initiative can only be changed by another vote of the people on a new initiative, and not by an ordinary statute enacted by the Legislature.

Therefore, these safeguards, requirements, and prohibitions have immense importance to this case. And yet, the defendants would relegate them to a second-rate position. Defendants characterize these safeguards and requirements and prohibitions as "reporting" requirements or "notice" requirements for the benefit of the Legislature alone – just informational items for the Authority to relay to the Legislature, with the Legislature's being free to ignore them, waive any defects in them, etc. This is the extraordinary argument made by the defendants in their respondents' brief (see pages 19-22). Defendants expand on the argument as follows: There may have been defects/violations of Proposition 1A by the Authority with respect to these various restrictions; but the Legislature on July 6, 2012, appropriated the funds for the Central Valley and the bookends (SB 1029) and by doing so, the Legislature waived all the defects. When that occurred, no one had a remedy. Defendants contend the plaintiffs in this case are not "beneficiaries" of these requirements of Proposition 1A – only the Legislature is a beneficiary. If the Legislature chooses to ignore these requirements, they are entitled to do so and their

appropriation of the funds indicates that they have ignored and waived these mandatory duties under Proposition 1A. Then, as set forth above, defendants close by saying no one has a remedy for such conduct, because no one can force the Legislature to appropriate money or prohibit the Legislature from appropriating money. They also argue that no actual injury was done to the plaintiffs, and therefore, they had no right to seek a remedy. Of course, this latter position is absolutely wrong since C.C.P. § 526(a), a 100-year-old statute, provides all taxpayers in California with a remedy for illegal expenditures, namely, the right to bring a taxpayer lawsuit, which is exactly what is before the Court at the present time. So, defendants absolutely misrepresent the law in that respect.[1]

Defendants also fail to understand the Constitution and the Supreme Court cases construing the Constitution: see Sections XV and XVI of plaintiffs' opening brief, Part II, which sets forth the rule that the Legislature cannot amend or change Proposition 1A. The defendants baldly make exactly that prohibited argument, saying that the Legislature cannot only do this (approve of violations of Proposition 1A), but also that no one has a remedy if the Legislature does so by appropriating funds for the project.

Defendants are absolutely wrong and cynical in making such an argument: It may be true that the plaintiffs cannot prevent the Legislature from appropriating funds; but C.C.P. § 526(a) does provide a remedy and does impose a consequence for violation of Proposition 1A. A violation of that proposition provides that any funds appropriated by the Legislature cannot be used by the Authority to construct the project. That is the whole focus of this litigation. Plaintiffs would certainly describe a prohibition on use of bond funds as a "consequence" of violation of Proposition 1A by the Authority and by the Legislature. It is a long-recognized remedy.

Furthermore, in Section XVI of plaintiffs' opening brief, Part II, plaintiffs have argued

[1] See Section IV of plaintiffs' opening brief, Part II, discussing C.C.P. 526(a), the broadly interpreted taxpayer standing statute, and cases cited in Section IV. These cases demonstrate that no tangible or actual injury must be shown by the taxpayer plaintiff. Furthermore, Judge Hight of the Sacramento Superior Court found that all plaintiffs do have standing. That ruling has never been challenged by the defendants and, therefore, stands as final. This is a conclusive determination, that if a violation of Proposition 1A and resulting illegal expenditure occurs, plaintiffs have the right to sue to prevent same. Section IV also demonstrates that suit can not only be brought against the Authority, but also against the individual defendants for authorizing or approving such illegal expenditures.

that the Legislature in appropriating funds on July 6, 2012, for the Central Valley Project and for the bookend, has violated Proposition 1A, has sought to amend and modify Proposition 1A, that all of this is prohibited by the Constitution and by controlling Supreme Court authority, and that accordingly, the appropriation statute, SB 1029, is unconstitutional. This argument is not addressed by the defendants in their respondents' brief, although we do note, with interest, that although defendants purport to object to all of plaintiffs' opening brief, Part II, defendants "pick and choose" among the arguments and violations raised in Part II. Even if they were permitted to do this (which they are not), their failure to respond to Sections XV and XVI is an absolute waiver of their right to challenge the following: the illegality of the Authority's action in changing the framework of Proposition 1A, thereby violating the intent of the voters, and the illegality of the Legislature's action in approving the Authority's illegal acts, by passing SB 1029, which is unconstitutional. The story of this violation is set forth eloquently in Exhibit A, the Declaration of Quentin Kopp, former Chairman of the Authority during all the critical time leading up to the passage of Proposition 1A. He says two important things: (1) the Authority in April 2012 completely changed the framework of the project, thereby violating Proposition 1A; (2) the Legislature followed by approving what the Authority had done thereby seeking to modify or amend Proposition 1A which does not permit what the Legislature purported to authorize. The defendants completely fail to respond to this central allegation, that the intent of the voters has been violated. Waiver prevents the defendants from making such a challenge once the trial commences.

In summary, the defendants are remarkably cynical in their view of the law: the voters can pass an initiative, which is entitled to supreme respect under the rules of statutory interpretation.[2] Defendants take the position that the Legislature can modify, change, or amend the intent of the voters; can allow violations of Proposition 1A; and that there is no consequence and no remedy for anyone, once that is done. This may be the way things are handled in certain parts of the world, but not in California. It is amazing that the defendants would make such assertions, but this betrays the desperate position in which they find themselves.

[2] See Section XV, plaintiffs' opening brief, Part II.

IV.

THE DEFENDANTS PROVIDE NO ANSWER TO THE INADEQUATE FUNDING PROBLEM, PERHAPS THE MOST SIGNIFICANT PROPOSITION 1A VIOLATION OF ALL

As plaintiffs' opening brief, Part I, demonstrates, the safeguards, restrictions, requirements, and prohibitions placed in Proposition 1A were driven by the [then] Legislature's serious concern about financial risk to the State. The concern of the Schwarzenegger administration is set forth, a concern about public works projects in general and their notorious record for huge cost overruns [witness the Bay Bridge which is currently nine times higher than the original estimate!]. The Legislature wanted to prevent this. This is why the budget plan during the Schwarzenegger administration required that the funding be in place for the usable segment selected by the Authority – enough funding to assure that that usable segment would be completed. No provision was made for funding only a "portion" of a usable segment, leading the ability to complete the remainder of the usable segment in doubt or non-existent. This is completely consistent with the overarching desire of the Legislature TO AVOID FINANCIAL RISK TO THE STATE.

And, as the Declaration of Quentin Kopp points out (Exhibit A to plaintiffs' opening brief, Part II), this requirement was paramount: The project was to be built in pieces called usable segments; they were the building blocks; the funds were to be in place to assure completion of a usable segment before construction could start; once that usable segment was completed, the Authority could accumulate funds for the next usable segment and proceed to build that one.

The funding problem for the Authority may be stated simply as follows: They selected the usable segment running from Merced to the San Fernando Valley; the cost is $31.5 billion; they have only $6.1 billion on hand ($3.3 billion from the Federal Government and $2.8 billion from Proposition 1A, if they can obtain it). Therefore, at present, they only have 20% of what they need to complete the usable segment. They cannot get any more out of Proposition 1A unless "matching funds" are provided by the Federal Government; but, since the funding plan of November, 2011, and since the revised business plan of April, 2012, (which incorporates the funding plan), a dramatic new development has taken place: the Federal Government has cutoff

California from all future high speed rail funding! Without this funding, no more money can be withdrawn from Proposition 1A, even if the Authority were to be able to surmount the 10 violations of the initiative that are alleged in this lawsuit.

Huge new sums of federal money are required, and this is admitted by the Authority. The defendants' brief, footnote 7, admits that historically, the Federal Government has supplied 50 to 80% of funding for such transportation projects [citing language from the business plan, AR203]. With a cutoff of all future federal funding, how can the Authority possibly surmount the requirement that funding for the usable segment must be in place, committed, or secured? The defendants also admit that if there is no further federal money, no additional bond funds can be taken from Proposition 1A. See respondents' brief, page 7. In footnote 7, the defendants list the "potential" source of future funding, including local and private sources. But as plaintiffs' opening brief, Part I and Part II (Section XI) demonstrate, since Proposition 1A was passed in 2008, there has been ZERO interest from local sources or from private investors. Indeed, see the Declaration and Supplemental Declaration of Michael Brownrigg (Exhibits I and O) corroborating this fact indicating that in the state in which the project finds itself, no reasonable private investor in the world would invest in this project because it is a major money loser, and government guarantees of revenues are absolutely forbidden, deterring any private investor from getting involved.

Proposition 1A requires the Authority to identify potential sources of funding. Obviously, if the sources of funding are speculative or uncertain, Proposition 1A cannot be satisfied. The words speculative and uncertain are exactly the words used by the Legislative Analyst's Office in analyzing the funding plan of November, 2011, and in repeating that analysis after the revised business plan (incorporating the funding plan) came out in April, 2012.

The LAO report of November 29, 2011, (shortly after the funding plan was issued) stated as follows:

> Availability of Funding to Complete a Usable Segment HIGHLY UNCERTAIN. The possible future sources of funding necessary to complete Phase I that are identified in the draft business plan are HIGHLY SPECULATIVE. In addition, Congress has approved no funding for high speed rail project for the next year. As a result, it

> is HIGHLY UNCERTAIN if funding to complete the high speed rail system WILL EVER MATERIALIZE. [Emphasis supplied]

Then, after the April, 2012, revised business plan (incorporating the November, 2011, funding plan) was released, the LAO issued an even more detailed report on the funding problems:

> "However, the HSRA only has secured about $9,000,000,000 in voter approved bond funds and $3.5 billion in federal funds. Thus, the availability of FUTURE FUNDING to construct the system is HIGHLY UNCERTAIN . . . specifically, funding for the project remains HIGHLY SPECULATIVE and important details had not been sorted out . . . specifically, we find that (1) most of the funding for the project remains HIGHLY SPECULATIVE, including the possible use of cap and trade revenues and (2) important details regarding the very recent significant changes in the scope and delivery of the project had not been sorted out . . . most of the future funding remains SPECULATIVE, future funds NOT IDENTIFIED. The future sources of funding to construct Phase I blended are HIGHLY SPECULATIVE (. . . given the Federal Government's current financial situation, and the current focus in Washington on reducing federal spending, it is UNCERTAIN IF ANY FURTHER FUNDING for the high speed rail program will become available. In other words, it remains UNCERTAIN at this time whether or not the State will receive the NECESSARY FUNDS to complete the project." (LAO Report, page 7; emphasis applied).

Given the cutoff in federal funds, meaning that no further Proposition 1A bond funds can be withdrawn, and given the total absence of local and private investor interest, given the LAO's conclusion that aspirational hopes for future federal and other funding are highly speculative and highly uncertain, it can scarcely be said that the safeguards and requirements of Proposition 1A, with respect to funding, have been satisfied.

So what is the Authority to do? It turns to the "aspirational" hope that money potentially will come from cap and trade auction revenues. This is dealt with in plaintiffs' opening brief, Part II, Section XI. Not only is the Authority not eligible to receive cap and trade revenues, but recently, the Legislature itself enacted Assembly Bill 1497, cutting off the High Speed Rail Authority, at least for two years, from receiving any cap and trade revenues (with no guarantees whatsoever after the two-year period). Therefore, cap and trade revenues must also be classified as highly speculative or uncertain, failing to meet the Proposition 1A test. This is emphasized in

a recent article commenting on the present State budget.[3] This article appears in the web, alongside the details of AB 1497, which cut off cap and trade revenues for two years from the High Speed Rail Authority. Mr. Knight, on page 2, states the following:

> The CHSRA has additional plans for two other sources of financing, but both of these have limitations. The more tentative plan is to use auction revenues from the State's AB 32 cap and trade mechanism as a 'backstop' in case of insufficient federal funding. However, California's unpartisan Legislative Analyst's Office has pointed out that these revenues are legally restricted to projects that reduce greenhouse gas emissions prior to 2020, which CA HSR does not. Lawmakers will also have to justify why CA HSR is a better use of auction revenues than other much more cost-effective ways to reduce greenhouse gas emissions. But, if AB 32 revenues are made available for HSR and diverted from other sources, then the HSR project forces a trade-off between it and those other services. The second more feasible plan is to rely on private sector investment. However, as we explain below, it appears that the CHSRA is substantially underestimating operating costs and because of this, the discounted cash flow over the life of the HSR system will be much lower than the $13,000,000,000 CHSRA expects. This means that the private sector will be highly unlikely to invest even the already modest currently projected figures.

As far as whether the HSR project is a "prudent" [bang for your buck] investment for cap and trade revenues, see the Declaration of Wendell Cox, Exhibit B to plaintiff's opening brief, Part II, in which Mr. Cox explains that the cost per ton for greenhouse gas removal with the HSR project is in the range of $10,000, compared to the United Nations' recommendation that the cost should be only in the range of $50 to $100! Therefore, the reality of the situation is that ultimately hundreds of other industries/sources will be better candidates than high speed rail for greenhouse gas revenues.

Additionally, the State Auditor, on January 24, 2012, (after the November, 2011, funding plan was released and submitted) sent a letter to the Governor stating the following:

> Although the Authority has implemented some of the recommendation we made in our prior report, SIGNIFICANT PROBLEMS persist. For example, the program's overall financial situation HAS BECOME INCREASINGLY RISKY. This is, in part, because the Authority has not provided viable funding alternatives in the event its planned funding does not materialize.

[3] California's High Speed Rail Realities: Briefly Assessing the Project's Construction Costs, Debt Prospects and Funding"; Chris Knight, June 5, 2012, published in *California Commonsense*.

> In its 2012 draft business plan, the Authority more than doubles its previous cost estimates for Phase I of the program, to between $98.1 billion and $117.6 billion. OF THIS AMOUNT, THE AUTHORITY HAS SECURED ONLY APPROXIMATELY $12.5 BILLION TO DATE. Furthermore, the Authority's 2012 draft business plan STILL LACKS KEY DETAILS about the program's costs and revenues.
>
> . . . the Authority has failed to provide sufficient detail as to how it intends to obtain these funds and did not report viable alternative funding options if it does not receive them, despite our prior recommendations AS WELL AS STATE LAW REQUIRING IT TO DO SO before spending some of the 2011 Budget Act appropriation. . . . . Moreover, the Authority has not received ANY COMMITMENTS for funding from POTENTIAL INVESTORS, but projects that it will secure private sector investments of almost $11,000,000,000 over four years beginning in 2023.[4]

The Peer Review Group also spoke out in March 2012 (after the funding plan was released and after the draft business plan was released):

Some concerns from earlier reports by this group remain. "There is still no source of federal or private funding to finance construction beyond the work in the Central Valley . . ."[5]

And again, the Peer Review Group, in a separate communication, stated the following:

> As stated in our response to the funding plan, the LACK OF COMMITTED FINANCING for segments beyond the initial construction (ICS), particularly in light of concerns over the independent utility of the proposed ICS, is the MOST SERIOUS ISSUE in the draft 2012 business plan.[6]

Appendix A to the Auditor's report dealt with scope and methodology of the auditor: This Appendix A indicated that the Auditor had examined the compliance of the Authority with requirements for Chapter 38, statutes of 2011, that the Authority develop and publish alternative funding scenarios taking into consideration the possibility that the High Speed Rail program might not receive federal funding or delayed funding and planned sources.

Then, the Auditor indicated that, with respect to the status of recommendation number one, the Authority had stated that it was in the process of hiring a financial consultant to assist it in developing alternative funding scenarios and that it planned to provide a full set of funding

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[4] State Auditor's report, January 14, 2012; letter to Governor Brown (part of Audit 2012-304; High Speed Rail Authority follow-up); Chapter 1 – The High Speed Rail Authority Funding Situation Has Become Increasingly Risky

[5] Letter from Peer Review Group, May 18, 2012

[6] Peer Review Group letter, March 12, 2012

scenarios in its one year response. Comment: This has never been done.

In January 2013, the Auditor followed up as to whether its prior recommendations had then been implemented, and stated that they had not been fully implemented after one year:

> [The Authority] risks delays OR AN INCOMPLETE SYSTEM because of inadequate planning, weak oversight, and lax contract management."

Then the Auditor comments that despite its recommendations, the Authority remains stubborn: "Contrary to the California State Auditor's determination, the auditee [the Authority] believes it has fully implemented the recommendation." The Auditor then concludes: "Assessment – auditee did not address all aspects of the recommendation."

Page 4 of this January 3, 2012, letter also states the following:

> Lacking this [a dedicated fuel tax or some other form of added use charge that would not aggravate the existing State budget deficit], the project as it is currently planned is not financially feasible.

Much of the information in this section is being furnished to the Court to "update" the inadequate funding argument. Part I of plaintiffs' opening brief was limited in scope (either to the funding situation as of November 2011, or, at the latest, April, 2012). But these time limitations do not apply to the 526(a) part of the case, and much of the above information brings the Court up-to-date, demonstrating the funding situation is now MUCH WORSE than it was a year ago. The most significant deterioration is with the total cutoff of federal funding. With the Authority looking for 50 to 80% of project costs to come from the Federal Government[7] there is literally no hope that by the time construction is anticipated to start, the strict funding requirements of Proposition 1A will be, or can be, met.

The Authority retorts that it has enough ($6,000,000,000) to build a "portion" of the usable segment and it "promises" or certifies that it will complete the balance of the usable segment, including electrifying it (all at the cost of $31,000,000,000). This is exactly the type of situation the Legislature profoundly wished to avoid – the risk of an uncompleted projected, or an abandoned project, with all the collateral damage that ensues.

[7] Defendants' respondents' brief, footnote 7

V.

THE DEFENDANTS INTEND TO COMMIT A MAJOR VIOLATION OF THE ENVIRONMENTAL COMPLIANCE REQUIREMENTS OF PROPOSITION 1A (UPDATED INFORMATION)

The major treatment of the environmental compliance issue is in Part I of the plaintiffs' opening brief. The issue will also be dealt with in depth in plaintiffs' closing brief, Part I.

As we stated in our opening brief, Part II, the writ claims and the 526(a) claims are different and cover different periods of time. The writ claims are probably limited to a time period not extending beyond April, 2012, the date of the revised business plan, which incorporated the November, 2011, funding plan. The conduct of the Authority is to be judged by what was before it during that particular time. On the other hand, the 526(a) claim has no such limitation, and the Court can consider developments after April, 2012 as to whether Proposition 1A has been violated in the 10 respects alleged by plaintiffs, including failure to comply with the environmental safeguards and requirements.

As set forth in Part I of plaintiffs' opening brief and closing brief, the environmental certification requirement applied to the usable segment selected by the Authority, meaning the IOS South running from Merced to the San Fernando Valley. The requirements are not limited to the ICS, the much smaller [approximately] 130 mile section.

Proposition 1A furthermore requires that the environmental compliance be completed at a much earlier date. Proposition 1A requires that the Authority must have completed all project level environmental clearances before it even submits its funding plan to the Legislature, which occurred in November, 2011, a year and a half ago. Proposition 1A requires that the Authority must certify that it has done this. The Authority gives no legally appropriate excuse for its blatant ignoring of this requirement. Instead of certifying that it had completed all project level environmental clearances before the funding plan was submitted (in November, 2011), the Authority conjures its own preferred certification, saying that it "will" complete all project level environmental clearances before the commencement of construction. Proposition 1A, of course, requires much more, but the Authority chooses to ignore that. For that reason alone, the writ should issue.

But let us assume, just for the sake of argument, that the Authority is correct and that the project level environmental clearances do not have to be completed until a time before construction commences. Such an approach will not avail the Authority. It still has major non-compliance issues that will not be resolved before the announced date for the commencement of construction.

Plaintiffs' opening brief, Part II, contains the Declaration of Jason W. Holder, an eminently qualified environmental attorney who has been deeply involved in high speed rail environmental issues. Mr. Holder filed a lengthy Declaration (Exhibit M, plaintiffs' opening brief, Part II) supported by numerous exhibits, attesting to the facts set forth in Mr. Holder's Declaration. That Declaration states the following: "The ICS Construction Schedule indicates the Authority expects to certify the F-B Section FEIR in September 2013." (Exhibit M, page 7, paragraph 17)

The Declaration also states that the Authority intends to issue the Notice to Proceed ("NTP") in July 2013 and that the NTP "authorizes [CP1] construction and other activities." (Exhibit M, pages 7-8, paragraph 19)

Even if we assume that Proposition 1A allows the Authority to certify that it will obtain all environmental clearances for the ICS before it commences construction (Proposition 1A does not allow this, being much more stringent in its requirements), and even if we assume that the term "environmental clearances" can be read narrowly to mean that the certification applies only to EIRs (again, this is not true – it is much broader), the Authority's plans for actual start of construction violates its own certification, promising that all project level environmental clearances will be completed before construction starts.

According to the ICS Construction Schedule, the Authority does not expect to certify the F-B Section EIR until September 2013 (Holder Declaration, Exhibit M, page 7, lines 11-13; see also Exhibit 12 to Holder Declaration). Yet, according to the first amended Popoff Declaration, the Authority intends to authorize the commencement of ICS construction activities in July, 2013. (Holder Declaration, Exhibit M, page 8, lines 1-4; see also Exhibit 14 to Holder Declaration.) Authorizing construction of the first part of the ICS before the F-B EIR is certified would clearly

violate the express terms of the Authority's own certification, which states that all project level environmental clearances will be completed before the commencement of construction.

Therefore, even under the Authority's interpretations, it plans and intends to violate the environmental requirements of Proposition 1A. The writ should issue, and the use of any Proposition 1A funds should be precluded under the 526(a) claim because of these violations.

VI.

ISSUES CONCERNING SUBSIDY, REVENUES, OPERATING AND MAINTENANCE COSTS, AND RIDERSHIP INVOLVE FACTUAL QUESTIONS TO BE RESOLVED IN THE 526(A) PART OF THE CASE; THE EVIDENCE OVERWHELMINGLY SUPPORTS PLAINTIFFS' POSITION ON THESE ISSUES

Fundamental to the operation of the High Speed Rail Project is whether it is feasible. This involves complex factual disputes which will be resolved by the hearing of oral and documentary evidence. Because factual disputes were involved, these issues are not properly contained in the writ portion of the case. Instead, they belong in the 526(a) part of the case.

Contrary to the Authority's contentions that in order for plaintiffs' to prevail, the Authority's decisions on these issues must be found to be arbitrary, capricious, or completely lacking in evidentiary support, this will not be the standard of proof or the burden of proof. Those concepts are sometimes used in Mandamus/prohibition claims (although even in the Mandamus area, this case presents some unusual issues, with the defendants admitting that all that need be shown is that their actions were "unlawful[8]" or "invalid[9]"). All that plaintiffs' need do is prove by a PREPONDERANCE OF THE EVIDENCE that the ridership studies prepared by the Authority do not support their claims; that the projected operating and maintenance costs are totally at odds with railroad operations all over the world; and that the projected revenues are "stuck" at the Authority's projected figures, with no hope of going up. All of this will produce a

[8] See respondents' brief, page 17, line 20.

[9] *Id.*, page 17, line 27. Therefore, the present does present some unique issues on standards of proof and burden of proof in mandamus actions: in the mandamus claim, if plaintiffs prove a violation of Proposition 1A, would not that proof and "unlawful" or "invalid" act have been committed, and would not that require the relief accordingly afforded by mandamus to be granted? Is it even necessary to analyze "arbitrary and capricious" standard or the "giving deference to the agency" standard or the "discretion" standard? Even if deference is granted to the public entity making decisions, no government agency has "discretion" to violate the law which, after all, is the essence of plaintiffs' claims in this case.

prohibited subsidy for operating costs. And what is the burden of proof on that issue (subsidy)? As indicated in plaintiffs' opening brief, Part II, Section VI, plaintiffs contend that the burden of proving that there will not be a subsidy for operating costs (the statutory language) rests upon the defendants in this case. In any event, the evidence supporting the proposition that there will assuredly be a subsidy for operating costs (as there is for almost all railroads throughout the world) is overwhelming.[10]

Defendants make very little, if any, response to plaintiffs' discussion of these issues in plaintiffs' opening brief, Part II, together with numerous declarations with details on ridership, costs, revenues, and prohibited subsidies. Despite their disdain for declarations, it is interesting to note that defendants do produce an attorney declaration to support their argument that the decision in the *Atherton v. High Speed Rail Authority* case supports their position in the present case. As the Supplemental Declaration of William Warren (Exhibit P to this closing brief, Part II) illustrates, the *Atherton* case has no bearing on this case. As a procedural matter, the *Atherton* decision is now on appeal, depriving the Superior Court decision of finality, and precluding reliance upon it by the defendants. Secondly, none of the present plaintiffs were parties to the *Atherton* case and, therefore, neither collateral estoppel nor res judicata will apply. Thirdly, the issues involved in the *Atherton* case and the present case are entirely different. *Atherton* was a CEQA case, and the present lawsuit concerns mandamus, 526(a), C.C.P., and declaratory relief. The issues are entirely different, the proof standards, and the burden of proof, and the evidence are entirely different. In CEQA, the issue is whether the decision by the agency is completely lacking in evidentiary support. The proof standards in the present case, even the mandamus part, are completely different. Therefore, the *Atherton* case is not relevant to this proceeding; plaintiffs, as part of their closing brief, will also be objecting to the defendants' request for judicial notice of the *Atherton* case, and will seek to have the Court preclude any effort to introduce it as evidence.[11]

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[10] "California's High Speed Rail Realities: Briefly Assessing the Project's Construction Costs, Debt Prospects and Funding," Chris Knight , *California Common Sense*, July 5, 2012, page 5, footnote 18, stating as follows, "Although some claims may be accurate, CHSRA's calculations of profitability are based on limited research. Other studies have shown that nearly all rail systems in the globe benefit from subsidies which will overstate profits."

[11] Attorney Flashman has on file in this plaintiffs' closing brief his objection to the defendants' Request for Judicial

Ridership:

As the Warren Supplemental Declaration points out, and as discussed in detail in Section VII of plaintiffs' opening brief, Part II, the Authority purports to support its ridership data with two surveys. One was done in 2005 and is totally out of date and has nothing to do with the IOS/usable segment as now contemplated. A small 2011 survey was heavily flawed in its sampling. This survey only collected information on prior trips, and did not ask questions about preferences for future trips. Therefore, the current survey lacks reliable data upon which to make future ridership projections. The Warren Declaration also refers to the original Grindley Declaration (Exhibit C, plaintiffs' opening brief, Part II) indicating that this 2011 survey contemplates passengers traveling by car or bus from Northern California to Merced, from there by train to the Los Angeles Basin, and then passengers traveling by bus and Metrolink from the San Fernando Valley to Los Angeles Union Station. Those surveyed were told nothing about the blended system. All of this raises serious questions about reliability: What passenger desiring to travel from Northern California to Los Angeles would take this tortuous path to Union Station? And, as set forth above, 15 to 20% of the expected passengers would be coming from Northern California, driving automobiles to Merced or traveling by bus, and changing trains ultimately in Los Angeles County to Metrolink or another bus. This failure to consider the convenience that auto drivers desire (including having their own car when they reach the Los Angeles area and being able to go to their direct destination throughout Los Angeles County) is a major consideration, treated at length by Wendell Cox in his Declaration (Exhibit B, plaintiffs' opening brief, Part II) and in the 2013 Due Diligence Report which he authored. All of this casts serious doubt on the veracity of the claim by the Authority that ridership on the San Joaquin line will go up from 1,000,000 (the present Amtrak figures) to 8,000,000. There is absolutely no credible evidence to support this inflated claim.[12] As the supplemental Declaration of Warren further

Notice which seeks to have the Court take judicial notice of numerous of the documents in the *Atherton* case.

[12] "It is true that given a very high ridership volume, a rail system can have lower ticket prices and will be profitable. But this is not the case with CA HSR. In fact, the CHSRA's ridership projections are significantly lower than those of the international case study systems. When the system is fully mature in 2040, the CHSRA estimates that CA HSR will have half of the market penetration levels of French HSR and 23% less market penetration than Spanish HSR. This raises the question of how the CHSRA can charge less than half as much as European HSR, have much less market penetration, and still be profitable. We can only conclude that somewhere in the process of the bottom-

indicates, the Authority contemplates doubling the fare in the Central Valley compared to what Amtrak is now charging; this would normally be a strong negative factor concerning whether there will be a ridership increase, since what passenger is prepared to pay 100% more when the trip still involves multiple modes of transport? There simply is no survey data exploring how many people would use their cars or buses to get to Merced and then use buses or Metrolink to get from the San Fernando Valley to Union Station. The survey data is woefully inadequate, and therefore, the ridership figures must be rejected. For a much more detailed discussion, see Section VII of plaintiffs' opening brief, Part II, including the many declarations which attest to the inaccuracy of the ridership data and the surveys relied upon by defendants.

Subsidy:

For purposes of argument, plaintiffs have accepted the Authority's projected revenues of 23¢ per passenger mile. The important point is that there is no room for upward movement concerning those revenues because of the competitive factors (airlines and the attraction of Californians for their automobiles). And, the Authority's fares are already over $80, almost twice what they promised the voters, another depressing factor on projected revenues.

Costs:

The key factor is operating and maintenance costs. The Authority has announced that costs will be approximately 10¢ per passenger mile. This, on its face, as the opening brief, Part II, demonstrates, defies belief. The worldwide average cost is four times higher than that (40¢). The American average is even higher than that, with Acela[13] being six times higher at 60¢ per passenger mile. We have asked this rhetorical question: If California High Speed Rail is going to be required to pay all the same expenses (labor, taxes, maintenance, etc.) that other railroads pay, how can their costs possibly be six times lower than other American railroads?

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up bottling of costs, the rail agency has significantly underestimated the operating cost structure of the HSR system. There are even reasons to think that the CHSRA's ridership estimates are significantly overstated to begin with. Evidence from U.S. and international rail systems suggest that actual ridership is almost always far below what agencies originally expect. In other words, higher operating costs may be compounded by lower than expected ridership." Curtis Knight

[13] Even the Peer Review Group noticed the huge disparity between Acela's cost and the Authority's cost and pointed this out, but this is ignored by the Authority – one of many crucial studies deliberately ignored by the Authority because they cast doubt on the reliability of the Authority's analysis.

As the Warren Supplemental Declaration indicates, on May 2, 2012, the LAO issued its report, finding the comparison between the Authority's cost projections and the worldwide and American cost projections irreconcilable. Even the LAO came up with a figure of 30¢ per passenger mile, three times higher than the Authority's for operating costs, thereby assuring that a subsidy would be required. This is still below the worldwide average and substantially below the American average for costs, even with the LAO obviously giving the Authority the benefit of the doubt on costs. Even the Authority's own ridership Peer Review Group felt that the cost figure would be 100% higher than what the Authority estimated.

The entire subject of the economics of this project, the ridership, revenues, costs, and whether a subsidy will be required will be explored in depth during the trial, with several outstanding and credible expert witnesses presented by plaintiffs, demonstrating that by a heavy preponderance of the evidence, a subsidy for operating costs will most assuredly be required. This, of course, is a fundamental violation of Proposition 1A and the intent of the voters; it is also a violation of the Legislature's intent and goals in protecting the State from financial risk. It is difficult to image a more precisely focused protection than for the Legislature to absolutely prohibit subsidy for operating costs. No amount of clever bookkeeping or accounting practices has been demonstrated by the Authority to avoid that absolute prohibition. Prohibiting a government subsidy for a railroad in today's world may be considered to be harsh, but there is no question that California has done exactly that, and the law must be observed.

VII.

THE AUTHORITY HAS NOT DEMONSTRATED THAT IT CAN COMPLY WITH THE MANDATORY DUTY UNDER PROPOSITION 1A THAT THE LOS ANGELES TO SAN FRANCISCO TRAVELER WILL MAKE THE JOURNEY IN 2 HOURS, 40 MINUTES, OR LESS

The issue discussed in this section is commonly called "trip time." It concerns the mandatory duty under Proposition 1A that the Los Angeles to San Francisco passenger (or vice versa) will make the trip in 2 hours and 40 minutes or less. This is obviously an important part of the Proposition 1A scheme, since most train passengers would consider time of the journey central to their choice of whether to use rails for transportation rather than airlines.

Proposition 1A was passed by the voters on November 4, 2008. It envisioned a genuine high speed rail system throughout the State. During the three and a half years while this concept of a genuine high speed rail system prevailed, the "trip time" issue was studied. As the Supplemental Declaration of Kathy Hamilton demonstrates, Tony Daniels, an engineer for the Authority, said that the 2 hour and 40 minute travel time could be achieved – barely. When he made this prediction, it was based upon a four track dedicated system, no sharing of tracks with any other railroad, no interference whatsoever, and the employment of "aggressive" speeds.

But in April, 2012, the "revised" business plan was adopted, and instead of a genuine high speed rail system throughout the State, the State would now have the "blended" system. The blended system involved HSR's sharing track with conventional rail in the San Francisco Bay Area (San Francisco to San Jose) and certain features in Southern California that would not be genuine high speed rail. As the Declaration of Quentin Kopp (Exhibit A, plaintiffs' opening brief, Part II) demonstrates, the blended system completely changed the framework of the high speed rail system. Instead of concentrating the funding on the genuine high speed rail system, much of the funds would now be used for conventional rail and for the "sharing" arrangement, including infrastructure improvement for local and regional commuter rail. It would also make certain goals, including trip time, of Proposition 1A, unachievable.

For example: in the Bay Area, five rail operations will be sharing the same two track system: Caltrain Local, Caltrain Express, Caltrain Bullet, High Speed Rail, and Union Pacific Freight. Such an arrangement will inevitably cause delays and lower speed than if HSR had dedicated tracks for its exclusive use. Quentin Kopp also indicates that the blended system will allow far fewer HSR trains per hour, resulting in less ridership and lower revenues, assuring a subsidy. The situation in Southern California is full of unanswered questions, although currently Southern California rail services have announced that they are not even interested in being electrified, probably depriving them from the opportunity to receive any Proposition 1A money.

Therefore, on the trip time issue, the creation of the blended system on its face must have some effect, and a negative effect, on the ability to meet the mandatory trip time requirements. And again, even under the non-blended system, one of the chief officials of the Authority

(Tony Daniels) said that it would be difficult to achieve the 2 hour and 40 minute mandatory time.

Documentation and improper conduct by the Authority:

Kathy Hamilton filed an original declaration with the plaintiffs' opening brief (Exhibit L). Ms. Hamilton has also filed a supplemental declaration with this plaintiffs' closing brief, Part II. This deals with the unacceptable behavior of the Authority concerning documents supporting their work. One would think that with a complicated subject, such as whether you can get from Los Angeles to San Francisco in 2 hours and 40 minutes, there would be reams of supporting documents and studies. As Ms. Hamilton's original Declaration indicate, when she made a request for such documents, the official custodial of records for the Authority, announced simply that there "were none," and that everything was based upon the oral assurances of engineers, based upon their "skill and optimism." This is rather extraordinary for a $200,000,000,000 project, whose engineers and consultants and employees have already been paid three-quarters of a billion dollars for "planning" activities.

And, as the Supplemental Declaration of Ms. Hamilton indicates, they did have such documentation, although they refused to furnish it. (Supplemental Declaration of Kathy Hamilton attached hereto as Exhibit Q.)

The most striking thing that Ms. Hamilton has recently discovered consists of several memoranda on the trip time issue that the Authority finally (with resistance) produced and these show inconsistencies in the trip time requirement. For example, Proposition 1A requires that the trip from San Francisco Transbay Terminal to San Jose be made in 30 minutes. The earliest memo indicated that this would not be met, and that the trip time would take 32 minutes. It appears that this memo was, in fact, changed with no explanation, with later documentation indicating 30 minutes and with no explanation for the change.

But the Authority is right on one point: It does have some documents, but they are few and paltry on a subject that should have hundreds, perhaps thousands, of pages of records to support their conclusions.

Trip Time Issue on the Merits: The Vacca Declaration:

We now turn to the merits of the trip time issue. Surprisingly, the defendants have produced a Declaration of Frank Vacca who set up the simulations, allegedly to support the 2 hour and 40 minute trip time estimates. We say "surprisingly" because defendants' counsel has taken the position that he objects to the totality of plaintiffs' opening brief, Part II, on grounds that it is "premature." If so, why is she responding to the trip time issue, which was discussed in plaintiffs' opening brief, Part II? Frankly, her objection to Part II of the opening brief is a waiver of her right to rely upon the Vacca declaration and, indeed, a waiver of her right to challenge the arguments in plaintiffs' opening brief, Part II. It was a strategic mistake for her to employ this tactic, and we would ask the Court to apply the waiver doctrine.

But, out of an abundance of caution, and in the event the Court does not apply waiver to the defendants in this regard, we will respond to the merits. The response is principally based upon the detailed Supplemental Declaration of Paul Jones, a distinguished Ph.D. engineer, who also filed his original Declaration in Part II of plaintiffs' opening brief.

Mr. Jones has a distinguished engineering background. He has extensive high speed rail experience, having played an important role with the Spanish high speed rail system and the Korean high speed rail system. He has an in-depth knowledge of railroads in general. Not only has he analyzed Authority material in connection with his Declaration, but he also went down to the United States Geological Survey (USGS) in Menlo Park and purchased a topographical maps so that he could "track" the route that high speed rail would take between San Francisco and Los Angeles so that he would understand the technical challenges (Exhibit R, paragraph 3). He indicates that he agrees with Ms. Hamilton that the Authority has been quite reticent about sharing documentation with the public concerning this project and the trip time issue. He reviewed in detail the Vacca Declaration, which asserts that the 2 hour and 40 minute requirement can be achieved. He points out, however, that the Vacca Declaration and analysis included simulation or "pure runs" (not operational life experience) only and lacked much data and background information that would be necessary to reach the conclusions that Vacca reached.

In paragraph 6, he points out that he found most persuasive a 2009 workshop conducted

by Tony Daniels, who was program manager for CHSRA. This was done before the blended system was adopted. (Exhibit R, page 6.) He does indicate that the Tony Daniels' study examined terrain and the characteristics of train sets that might be used. Most importantly, the Daniels' study was premised upon the use of dedicated tracks exclusively for the use of high speed rail. This analysis was done before the blended system was adopted in April, 2012, and therefore, did not take into consideration any track sharing with other rail services. Even under those circumstances, Tony Daniels concluded that the 2 hour and 40 minute time requirement could be met, but that it "would not be easy." Again, this study was done before the blended system was adopted and assumed the entire route would be done on dedicated tracks, exclusively for the use of HSR; this means that there would be no interference or delays caused by track sharing on either the San Francisco Peninsula or in certain areas of Southern California.

In discussing the simulations used, Mr. Jones indicates that they do not reflect actual operating conditions, which often had impediments or interferences. Comment: It is almost as if the Authority just told the computer that it had to get from Los Angeles to San Francisco in 2 hours and 40 minutes and to find some way of doing so, but that there could be no interferences, no delays, no special curvatures requiring slowing down, etc. It appears to have been very much a "result oriented" study: just get us there within the required time, and we don't care how or even how unsafe it may be!

Jones points out that no "pads" or allowances for operational variation were used in this simulation [obviously, they should have been used to reflect real life experience], and that such pads normally add 3-7% to the simulated times. (Exhibit R, paragraph 8.) Comment: Since the Daniels' study was done with ideal and perfect assumptions (no shared track whatsoever), and even under those conditions, the travel time could "barely" be met, adding 3-7% to any artificial simulation would obviously make the 2 hour and 40 minute travel time impossible to achieve.

Jones points out the simulation employed by Vacca assumes trains operating at 220 miles per hour on SUSTAINED STEEP GRADES, although 150 miles per hour might be required as a "safety" measure.[14] This must be the most extraordinary part of the defendants' "expert"

[14] Tony Daniels's "operational study" in 2009 (unlike the Vacca simulation) was much more realistic, indicating

presentation: imagine a high speed train barreling down the Tehachapi Mountains at 220 miles per hour. Currently, the fastest train in the world only goes 199 miles an hour, but the trip time estimates of the defendants are based upon this assumption of 220 miles per hour! This cast great doubt on the credibility of the defendants' analysis.

Jones further points out that the defendants' trip time analysis will obviously require reduced speeds because of track sharing in certain areas.

Jones then commented on the mandatory 30-minute trip time between San Francisco and San Jose. Some memos from the Authority indicated that that could be achieved, the January 2013 memo, indicated that it could not. [Trip time could be achieved at 125 miles per hour, but not at 110 miles per hour.] Jones points out serious inconsistencies in the documentation, including one memorandum showing the trip between San Francisco and San Jose being run at 110 miles an hour, but the travel time listed (30 minutes) was obtained from the San Francisco to Los Angeles simulation running at 125 miles per hour, which would obviously produce a lower travel time. (Exhibit R, paragraph 11.)

Jones also points out that the February memoranda do not even identify the Transbay Terminal as the terminus in San Francisco, the implication being that the Caltrain terminus at 4th and King Street is used, which would also produce a lower travel time (Exhibit R, paragraph 12), violating Proposition 1A which requires the Transbay terminal as the terminus.

Jones indicates that with all these assumptions, the Authority's simulations really divorces itself from real life experience, from true operational considerations that must be taken into account regarding what actual passengers will experience.

In paragraph 14, Jones opines that it is simply impossible to make an accurate and objective engineering assessment of the simulation to support a claim that the 2 hour and 40 minute trip time can be achieved. And that any proper assessment has to have essential data about the length, grade, and curvature of the track structure simulated, and that this has not been provided by Vacca or any other source. Jones points out that the Authority used as its source environmental reports, but that these are lacking in civil engineering descriptions. (Exhibit R,

speeds coming down the mountain would probably have to be reduced to 140 miles per hour for safety reasons.

paragraph 14.)

A further defect is that the Authority did not provide technical characteristics of the train set to be used and that this is necessary for proper calculation concerning power, weight, number of driving axles, traction, motor size with torque and current at different speeds, weight on axels, and a curve of train resistance versus speed up to 220 miles per hour. All of this is essential data.

In this area, he concludes that it is impossible to confirm or deny that the trip time goal can be achieved without this essential information.

Jones emphasizes that what the Authority did was a "pure run" or simulation only; they did not consider any interference of any sort from Caltrain commuter train, from freight lines – none whatsoever. No pads or adjustments were made for operating uncertainty and delays. On the San Francisco to San Jose run, he also detected seven curves that were not taken into consideration by the Authority that would require speed reductions – some down to 72 miles an hour, others 79 miles an hour, and these would affect trip time adversely (adding six minutes). That would cause the 30-minute goal to be unachievable.

He indicates that another factor on the Caltrain corridor is that bypass tracks between eight and 18 miles long are provided to allow HSR to overtake Caltrain; that HSR can go at 110 miles an hour on the bypass track, but has to go at a slower speed otherwise, and that the trip could only be made in 35 minutes.

Jones discovered on the route through the Pacheco Pass that curves existed that were not considered by the Authority that would require speed reductions; he also notes that the simulations used by the Authority envisioned the train going through stations at 220 miles per hour, which poses a serious safety hazard and this was not taken into consideration in calculating travel time.

He goes into detail (section E of Declaration) as to the trip through the Tehachapi Mountains; he finds incredulous that the train could start the ascent and would be going 150 miles per hour when reaching the summit[15] (because of the weight of the train, etc.). Jones not only

[15] The defendants also miscalculated the height of the summit, shortening it by 1,000 feet. This obviously has a negative effect upon the real travel time, increasing it.

studied the geological maps of the Tehachapi Mountains, but he also studied the Union Pacific route, which is in the same area; noted that it had tortuous curves and other design issues, and that this gives a good overview of what the Authority could face. He points out that the uniform grade throughout the 15-mile mountain range would be 4% and that this is too great to maintain any sustained speed on the ascent. This obviously affects the travel time. He also noted one Union Pacific curve that requires a 360 degree loop and numerous curves requiring speeds to be lowered to 20 miles per hour.

Dramatically, he again points out that the simulations envision the trains going down the slope of the Tehachapi Mountains for 20 miles at 220 miles per hour; but there is no operational data that this speed is possible from the safety point of view, that the Authority itself indicates that a reduction to 150 miles per hour might be needed for safety purposes [but such a reduction to 150 miles per hour is not factored into the simulation, because to do so would increase travel time; that traveling down the mountain at 220 miles per hour can result in wheel slippage; that Tony Daniels, himself, indicated that 140 miles per hour might be required for safety reasons.

Jones notes that the Authority counts on "regenerative braking" to take care of the speed problem, which is hazardous, and that certain braking technology has not even been developed to take care of such extreme speeds. Commenting on the Authority's "aspirational" hope for improved technology, Jones states the following: "To pass this problem off as a call for advances in train technology is hardly a solution. The "state of the art" in railroad technology as in other technical fields is what has been done, not what one thinks can be done." (Exhibit R, section F.)

He concludes that the Authority has not released any documents, simulations, operation plans, or string diagrams supporting a 2 hour and 40 minute trip time.

China Experience:

Starting with paragraph 18, Mr. Jones discusses the recent experience in China with high rates of speed. In July, 2011, there was a terrible high speed rail crash in China (Wenzhou). Fifty-one people were killed. This was undoubtedly caused by the high rate of speed (217 miles an hour). As a result of this crash, speed reductions were imposed throughout China, with high speed rail not allowed to go faster than 186 miles per hour; a major scandal resulted, with claims

that those in charge of the railway knew of the danger before the crash. Safety considerations were therefore ignored. Comment: The same can certainly be said about the California High Speed Rail proposal. Mr. Jones indicates that computer simulations will not adequately address that problem (paragraph 21). Comment: After all, the Proposition 1A was called the "safe," reliable, etc. high speed train system when it was advertised to the people. As Mr. Jones says, "Vacca's memorandum . . . indicates that the CHSRA has not yet resolved how to transition from "is it possible" to "is it safe." All things are possible under a simulation, but the simulation can be structured so as to divorce the project from real life and operational experience, which is exactly the situation in the present case. Mr. Jones concludes that the 2 hour and 40 minute trip time on the route chosen by the Authority, and under the design chosen by the Authority, cannot be achieved, but that there are routes that could support this trip time, but the present route is not one of them. And that the blended system will not work to promote achieving the goals on trip time.

Summary:

As the plaintiffs' opening brief, Part II, demonstrates, many other experts agree with Mr. Jones that the 2 hour and 40 minute trip time goal is not achievable – especially given the complications that the blended system presents.

The Jones' supplemental declaration is particularly noteworthy for certain dramatic safety concerns that it raises and which, if addressed, will cause an increase in the travel time, making the 2 hour and 40 minute trip time goal unachievable.

Jones found especially persuasive the comparison between the 2009 Tony Daniels operational study (much more real life) and the "pure run" simulation run by Vacca. The Daniel study was done before the blended system was adopted. The blended system will obviously cause delays because of track share and other problems, and those will inevitably result in reduced travel time. But, the Authority actually found that the blended system would cause trip time to be eight minutes less than the Daniel system with totally dedicated exclusive tracks for HSR and with no impediments whatsoever. This fact alone renders the entire HSR Vacca analysis scientifically impossible to accept. It is a dramatic contrast, and the contrast is supported

by hard evidence.

Along the same vein, Tony Daniel recognized the danger in hurdling down the Tehachapi Mountains for 20 miles at 220 miles per hour. He said the speed would have to be reduced to 140 miles per hour for safety reasons, and this obviously was factored into the travel time. The Vacca study makes no such adjustment, has the train traveling at this incredible rate of speed (220 miles per hour) for the entire distance down the mountain. He also has the train "hurdling" up the mountain, with little discount for the weight of the train and the ascent of the grade also affecting travel time. All of this is completely divorced from reality.

Another factor to be noted is that there is no adjustment under the Vacca analysis for travel through urban versus rural areas. A sizeable portion of the terrain the route to be traveled by HSR is urban, and trains historically (and for safety reasons) go through urban areas at a slower speed than through open farmland and rural areas. But not this high speed train – it, again, barrels along at 220 miles per hour, regardless of urban versus rural, and maintains the same speed while beating through stations crowded with people, another safety concern. As the old expression goes, the Vacca Declaration seems to have originated in la-la land: trains traveling down 20 mile slopes at 220 miles per hour, depending on futuristic (not developed yet) braking systems to take care of inevitable slippage. There will undoubtedly be greater concerns than flippage – grave concerns about safety and the lives of the passengers, with the tragic Chinese experience having recently occurred, causing the Chinese government to materially reduce the speeds of trains.

The Vacca analysis punches into the computer simulation the time goal of 2 hours and 40 minutes, and then cares not what stands in the way of achieving that goal. This is no way to run a railroad. It is impossible for the defendants to demonstrate that the 2 hour and 40 minute trip time can be achieved.

VIII.

BY ITS OWN ADMISSIONS, THE AUTHORITY WILL VIOLATE PROPOSITION 1A BECAUSE IT WILL NOT COMPLETE THE PROJECT WITHIN THE TIME REQUIRED

Proposition 1A requires that the State High Speed Rail Project be completed in the year

2020. As Section X of plaintiffs' opening brief, Part II, indicates, the Authority's own business plan now indicates that the project will not be finished until 2028 at the earliest, and possibly as late as 2032 (see plaintiffs' opening brief, Part II, footnote 83.)

The Authority claims that this duty is "aspirational" only; plaintiffs contend that this is a mandatory duty which the Authority now admits will be violated. The language in the statute provides as follows:

> It is the intent of the Legislature that the entire high speed train system shall be constructed as quickly as possible in order to maximize ridership and the mobility of California, and that it be completed no later than 2020, and that all phases shall be built in a manner that yields maximum benefit consistent with available revenues.

As a matter of textural interpretation, the statute first expresses the Legislature's intent that the project shall be constructed as quickly as possible. Then the Legislature moves on to refine what it means, and says that it be completed no later than 2020. We submit that the word shall, used in the first phrase of the undertaking, reasonably should be inserted into the second phrase so that it reads: ". . . . and that it [shall] be completed no later than 2020 . . ."

The violation of this mandatory duty is important: A delay of more than a decade will cost Californians countless extra billions of dollars. This is exactly the type of problem the Legislature was seeking to prevent, and the completion date requirement was an important safeguard in the statutory scheme.

IX.

RECENT DEVELOPMENTS CORROBORATING PLAINTIFFS' ARGUMENT THAT THE INTENT OF THE VOTERS IN ENACTING PROPOSITION 1A HAS BEEN FRUSTRATED AND VIOLATED BY THE AUTHORITY. THIS WAS DONE INITIALLY BY THE AUTHORITY IN ADOPTING (APRIL 2012) THE "BLENDED SYSTEM," AND WAS THEN COMPOUNDED BY THE LEGISLATURE IN APPROVING THAT VIOLATION WHEN IT ENACTED SB 1029 IMPLEMENTING THE BLENDED SYSTEM. THIS ACTION WAS UNCONSTITUTIONAL SINCE THE LEGISLATURE CANNOT CHANGE, MODIFY, OR AMEND PROPOSITION 1A, A VOTER-APPROVED INITIATIVE

This argument, set forth in Sections XV and XVI of plaintiffs' opening brief, Part II, is not challenged by the defendants, although we do note that the defendants attempt to respond to at least some of plaintiffs' part II arguments in their respondents' brief.

Plaintiffs' argument is fundamental to the entire case and is supported and attested to by the Declaration of Quentin L. Kopp who was chairman of the Authority at the time that AB 3034 and Proposition 1A were being drafted and who remained as chairman for about a year and a half after Proposition 1A was passed by the voters. His Declaration (Exhibit A, plaintiffs' opening brief, Part II) demonstrates the following:

As time grew closer for the placing of the Proposition 1A initiative before the voters for approval, the Legislature became more and more concerned about cost overruns and protecting the State from financial risk. This led to the many safeguards, requirements, prohibitions, and restrictions placed by the Legislature in AB 3034 and in Proposition 1A. Chairman Kopp was well aware of these restrictions and safeguards, and, indeed, he testified before the most involved committee, Senate Transportation and Housing, on many occasions on these subjects. He fully intended, as chairman, to implement the intent of the Legislature in making sure these safeguards and requirements were fulfilled. He remained as chairman for 18 months after the passage of Proposition 1A and worked hard to implement it as the voters and the Legislature intended. The paramount intent of the proposition, according to Chairman Kopp, was to provide a genuine high speed rail system for California. The intent was to provide a fully electrified high speed rail system, with all the components necessary for a high speed rail system; it was not the intention to have a blended system or a phased system or to use Proposition 1A's limited bond funds for assistance to local or regional commuter/conventional rail systems; nor was it the intent of Proposition 1A to provide billions of dollars to build conventional rail sections "preliminary" to later changing them into fully electrified high speed rail segments.

Chairman Kopp goes on to say that this fundamental intent of the voters has been completely frustrated and undermined. First, the Authority (after Mr. Kopp was no longer chairman) found itself in serious financial difficulty. It would not be able to complete even Phase I and would not even be able to complete the first usable segment that the Authority had selected, and was required to select.[16] But the Authority did not want to give up on having access

[16] The entire statewide project is made up of Phase I and Phase II. Phase II has been virtually and completely ignored in all the controversy over the high speed rail project. It involves other and different areas of the State (such as San Diego, San Bernardino area, Sacramento, Oakland) and is almost as substantial as Phase I.

to the bond money. So, they adopted the so-called "blended plan" in April 2012. The blended plan departed from the original plan to have dedicated tracks, meaning tracks for the entire statewide high speed rail system that would only be used by high speed rail. Instead, in areas such as the San Francisco Peninsula and in various parts of Southern California, the HSR system would "share" trackage with local and regional conventional commuter train service, thereby reducing the overall cost. This was a dramatic change from the original concept. And, as Chairman Kopp indicates in his Declaration, this completely undermines Proposition 1A and the intent of the voters. Adoption of the blended system has a deleterious effect upon the ability of the project to achieve its goals: With shared tracks, speeds have to be reduced; fewer trains will be able to run, resulting in lower ridership and lower revenues; the "headway" between trains will be adversely affected (fewer trains per day); the trip from Los Angeles to San Francisco in two hours and 40 minutes will not be achievable; the promise that no change of trains will be necessary is undermined; safety problems are aggravated (possibility of collisions with shared tracks); bond money for genuine high speed rail is diverted substantially to non-high speed rail.

In July 2012, the Legislature itself seriously added to the problem by, in effect, approving the blended system, thereby further undermining Proposition 1A and frustrating voter intent. This was done in SB 1029 which appropriated money for the San Francisco Peninsula and parts of Southern California by giving Proposition 1A bond money ($1.1 billion) to those areas for the benefit of local commuter rail systems, not genuine high speed rail. Such a legislative effort is unconstitutional because it operates to change, amend, or modify Proposition 1A, which an ordinary statute cannot do (see Section XVI of plaintiffs' opening brief, Part II).

The Authority's financial situation has not changed; indeed, it has become much worse since April 2012, because the Federal Government has now totally cut off California from future federal funding, and California was at least 50-80% dependent on federal funding for the rest of this project. (See defendants' response brief, page 7, footnote 7).

Defendants pretend that the funding situation is "temporary" and that "someday" all of the aspects of the blended system will disappear and California will, indeed, have a genuine high speed rail system. This, of course, is pure speculation, highly uncertain – just as the LAO, the

State Auditor, and even the Peer Review Group found their funding plan to be.

For example, the defendants' plan to spend almost $3,000,000,000 (one-third of the amount in Proposition 1A) for a conventional rail system to start the "alleged" HSR project in the Central Valley. That is $3,000,000,000 that will never be recouped – $3,000,000,000 that will never be devoted to genuine high speed rail. Next, SB 1029 appropriates another $1.1 billion, depleting Proposition 1A to about one-half its original amount, and this money is also for conventional rail and local rail systems – another amount never to be recouped for use on genuine high speed rail.

This issue must be seriously faced, and it is not being addressed: This so-called blended system, which makes it impossible to achieve genuine high speed rail in California will never change. Defendants have no tangible evidence that this is only temporary and will magically disappear in the future with bushels of federal money raining down on California to build a genuine high speed rail system. Nor will the money come from private or local sources, which have shown zero interest in getting involved with this financial loser of a project.

Recent evidence from the Legislature itself supports the proposition that the blended system is not going to magically disappear, but is, in all probability, here forever, meaning that the goals and purposes of Proposition 1A will never be fulfilled. Attached hereto as Exhibit S a copy of SB 557, introduced by State Senator Jerry Hill (from the San Francisco Peninsula), and scheduled for hearing on April 23 before the Senate Transportation and Housing Committee, the committee that is deeply involved with high speed rail affairs. The legislative analysis of this bill indicates that there is no opposition. This bill indicates that of the money appropriated on July 6 2012, under SB 1029 (total amount $1.1 billion, with $600,000,000 going to the San Francisco Peninsula, and $500,000,000 going to Southern California), the money is required to be used for the following limited purposes:

- The money must be used to implement a two-track system only.
- The two-track system must be installed within the existing right-of-way between San Francisco and San Jose; this two-track system is to be used jointly by the High Speed Rail Authority and Caltrain, the local commuter train system.

This means that there will be no dedicated tracks for the high speed rail system on the San Francisco Peninsula; the trackage must be shared by the High Speed Rail Authority and Caltrain.[17] This, therefore, is the essence of the blended system, intended by this legislation to be embedded into the San Francisco Peninsula. As Chairman Kopp indicates, such a system of shared tracks, without dedicated tracks exclusively for the use of the high speed rail system, makes the entire system unfeasible and the goals of Proposition 1A unachievable.

In his opinion, this is the fundamental reason why the intent of Proposition 1A is not being implemented and why bond funds should not be allowed to be used for the construction of the Central Valley or the "bookends," as currently planned.

X.

PLAINTIFFS DISMISS AND REMOVE CLAIMS SEEKING TO ENJOIN OR PREVENT THE SALE/ISSUANCE OF PROPOSITION 1A BONDS

To eliminate any confusion, and to clarify what plaintiffs seek in the writ and in the 526(a) parts of the case, plaintiffs hereby represent that they will not be seeking to enjoin or prevent the issuance or sale of the Proposition 1A bond, contrary to the allegations in paragraph 89 of the Second Amended Complaint. A copy of the Judicial Council form requesting dismissal and attesting to this fact is attached hereto as Exhibit T.

This issue is therefore removed from this lawsuit.

XI.

THE AUTHORITY HAS ALREADY MADE ILLEGAL EXPENDITURES OF PROPOSITION 1A FUNDS

The Authority has already committed illegal expenditures of Proposition 1A funds. Defendants do not answer in their respondents' brief the first set of illegal expenditures set forth in Section XIII, plaintiffs' brief, Part II. Here is what the Authority did: when they published their funding plan in November, 2011, and submitted it to the Legislature, on its face it violated the requirements of Proposition 1A with respect to the environmental compliance requirements.

[17] The dramatic effect of the blended system means that FIVE train services have to share the same set of tracks: Caltrain Local, Caltrain Bullet, Caltrain Express, High Speed Rail, and Union Pacific Freight.

Proposition 1A required the Authority to certify at that time, (November, 2011, the date of the submission of the funding plan), that they had, as of then, (November, 2011), completed all project level environmental clearances for the usable segment. They had to certify to this. Again, the certification requirement did not allow the Authority to certify only that they would be in compliance as of the date the construction started; the compliance was required to have been completed as of November, 2011, the date the funding plan was submitted.

And yet, the Authority deliberately chose not to comply, and the language of the certification proves this, since it makes no representation that the project level environmental clearance had been completed as of November, 2011.

This flatly violates Proposition 1A. The Authority used and paid its own employees in connection with the preparation, promulgation and submission of the funding plan. Such payments would be illegal expenditure of Proposition 1A/public funds. See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269-70, directly so holding [Los Angeles County Sheriff's payment of compensation in connection with illegal act provided standing for plaintiffs to sue]; also see Second Amended Complaint, paragraph 17a. The defendants made no response to this argument.

The second group of illegal expenditures has to do with the bidding process. The Authority started submitting requests for proposals (RFPs) to contractors and subcontractors. These were naturally construction bids for the building of the Central Valley project. The Authority has now expended more than $1,000,000 in connection with the submission and preparation of these construction bids and has paid its employees accordingly. But these would likewise be classified as illegal expenditure of public funds/Proposition 1A funds because no such expenditures should have been undertaken for construction-related work in light of the violation of the environmental compliance requirements. Only when the environmental compliance requirements were satisfied could construction bids go out. These expenditures are all related to construction and/or capital expenditures for construction-related work within the meaning of § 2704.04(c).[18]

The third group of illegal expenditures has to do with a strange, and probably illegal,

[18] Also see Second Amended complaint, paragraph 17b

practice of the Authority in rewarding unsuccessful bidders. The Authority established a program whereby it undertook to pay $2,000,000 to contractors and subcontractors who were unsuccessful in the bidding process. The Authority represented that it did so in order to encourage more bids! These capital expenses, associated with construction-related work, are likewise illegal for the same reason set forth in this section of the brief and are in violation of § 2704.08(d). This strange process was approved by the Authority in Resolution CHSRA No. 12-04 (stipend, were blended). See AGOO1751-2. See Section XIII, plaintiffs' closing brief, Part II.

The defendants admit that under § 2704.04(c), prohibited costs include: "Acquisition and construction of tracks, structures, power systems, and stations . . ." But this is exactly what the winning bids must produce. The "rewards" to losing the contract must be classified as construction costs. The $2,000,000 is paid to all losing contractors, but is not paid to the winning bidders. Thus, this stipend effectively reduces the construction price since a stipend is not paid to the winning bidder. If the stipend had also been paid to the winning bidder, then the argument that this was a "planning function" [as the defendants contend] might be valid, but in the present case, the winning bidder does not receive the stipend and the cost of construction from this bidder is effectively reduced by the amount of the "unpaid" stipend, in this case, $2,000,000.

The Authority argues that payment of stipends to losing bidders "allows the Authority to use the engineering and design work in a response to guide future implementation of the train system and towards a core planning function." This is an absurd argument. The "design build" nature of the Central Valley contract means each bidder, as a cost of construction, decides how to build the project. It would be highly inefficient to say that in this case payment of $2,000,000 to each of the losing bidders is an effective planning method! Also, the "design build" nature of the bids effectively separates the planning expenses of the Authority from the construction costs being borne by the bidders.

Also to be noted is that the Authority's own website has a whole section of the site labeled "Construction." It is not labeled "planning," etc.

http://www.cahighspeedrail.ca.gov/construction.aspx

This section of the website deals with all the areas of construction bidding. The

Authority's argument that paying money stipends of $2,000,000 each to unsuccessful bidders, is not a construction cost is without merit.

XII.

CONTRARY TO DEFENDANTS' ASSERTIONS, THE INDIVIDUAL DEFENDANTS ARE SUBJECT TO THE WRIT AND 526(A) CLAIMS

Defendants continue to assert that the individual defendants are not subject to suit. But State officials may be sued in C.C.P. § 526(a) actions. See *Central Valley Chapter of Seventh Step Foundation, Inc. v. Younger* (1979) 95 Cal.3d 212. Furthermore,

> Although plaintiff parents bring this action against State as well as County officials, it has been held that State officials, too, may be sued under § 526(a). [Citing *Serrano v. Priest*, 5 Cal.3d 584, 618 (1971) footnote 38].

The Supreme Court in *Stanson v. Mott* (1976) 17 Cal.3d 206, 227-230, also stated the following:

> If the taxpayer can demonstrate that a State official did authorize the improper expenditure of public funds, the taxpayer will be entitled at least to a declaratory judgment to that effect. If he establishes that similar expenses are threatened in the future, he will also be entitled to injunctive relief. *Stanson*, *supra*, at page 223.

In the present case, to be noted is the fact that not only is the Authority sued, but also individual defendants, and according to the Supreme Court language, if they participate in authorizing the improper expenditure (which all of them did because of their unique role to play in implementing Proposition 1A) they are subject to a suit.

As far as the mandamus action is concerned, the defendants would be seeking to dismiss this lawsuit unless the individual defendants were sued. Plaintiffs seek to impose upon various individual defendants the obligation to comply with mandatory duties under Proposition 1A. The Court, therefore, must be apprised of the identity and role that each individual played in failing to carry out that mandatory duty.

Also see arguments and authority in plaintiffs' opening brief, part II, section IV.

XIII.

CONCLUSION

When, on July 6, 2012, the appropriation bill for the Central Valley Project and the bookends came before the State Senate for a vote, four Democrats voted against the appropriation. Two of these, Senator Alan Lowenthal and Senator Joe Simitian, had been chair and vice-chair of the Senate Transportation and Housing Committee, the committee most deeply involved in the development of AB 3034, Proposition 1A itself, the safeguards, restrictions, and requirements in the measure and, thereafter, in oversight after the voters approved Proposition 1A and as planning proceeded. Senators Lowenthal and Simitian served as chair and vice-chair of that Senate committee. For them to vote "no" after so many years of work they had performed in supporting the project (despite much criticism) is significant, because they had the deepest knowledge of the project and its possibilities of success or lack of success, of its feasibility or unfeasibility. No one spoke more eloquently on the floor of the Senate than Senator Simitian whose remarks we submit in closing this brief:

> Now I understand that whenever we tackle a project of this magnitude it requires us to take a leap of faith. But as the old adage would have it, look before you leap. And if you take a look, here's what you'll find with respect to the basic plan that's before us today.
>
> It's proposed that we spend $3.3B of federal funds and $2.7B of state funds for 130 miles of rail in the Central Valley. That is the core of the measure before us. That is 3/4 of the funding that's in the bill we'll be voting on today. So, if that's what you pay and that's what you get, it raises some obvious questions about where do we go from here. How do we do more? So here are those obvious questions and answers.
>
> Is there an additional commitment of federal funds? There is not. Is there an additional commitment of private funding? There is not. Is there a dedicated funding source we could look to in the coming years? There is not. The administration of course has suggested the possibility of using of cap and trade revenue, Madam President, in order to fund future expansion if necessary. But those are dollars we have yet to see, if and when we do see them our legislative analyst has already suggested they may not be lawfully or appropriated used for these purposes. And even if we do see them and can use them, then by definition it will have been at the expense of other programs and services where those dollars might have gone.

Now it's always possible, of course, that 2, 5, or 10 years from now additional federal funding will be forthcoming. But as the High Speed Rail Authority acknowledged in our hearing in December, it's hard to see that time over any reasonable horizon given the current lay of the land.

And, of course, we could go back to the voters with yet another $10B plan for more bonds for next steps, but I think it's more than a little unlikely that the taxpayers would be so inclined, and in fact the Authority has said they have no plans to do so.

Now all of this talk about where do all of the dollars come from is important, because if you can't find any more money, then you have to ask yourself: what is it you get for that $6B. And in transportation jargon, the question they ask is, "Well if we don't that we're going to have more money and we don't know if we can do more, what's the independent utility of the thing we're going to build?" I think plain folks would just say, "What's the stand-alone value of that investment?"

And so, when we asked the High Speed Rail Authority they told us, "Well, it's 130 miles of track." And we said, "Is it high-speed rail?" the answer was "no." Is it electrified? "No." Does it have positive train control? "No." Are you going to run high-speed rail cars on it? "No."

So we're getting an upgraded Amtrak in the Central Valley. For 6 billion dollars. All of our federal money and a quarter or more of our state money for a 130 miles of not-high-speed-rail and, oh, by the way, it's in a low ridership area. A place that the Authority and the Peer Review Group acknowledged is low ridership in the sense that it has about a million riders compared or contrasted with 28 million in the north and southern ends of the state.

So the question that we have before us today, Madam Chairman, President and members, is not "do you share the vision" but rather this: "is this a plan that is worthy of supporting?" We could talk about the management challenges we've seen over the last 4 years, but time does not permit. We could talk about the fact that the folks that were ask to implement this still don't have a management team in place, just hired their CEO, the third in three years, 3 weeks ago, don't have a COO, don't have a CFO, don't have a risk manager, and yet unappointed, untested and unproven we want to start down this $68.5B path without adequate oversight.

We could talk about the fact that the administration has already acknowledged that it wants CEQA exemptions or exceptions or modifications as the project goes 5-6-7-800 miles through the state. Providing presumably less protection for people, businesses, homes, farms, open space. We could talk about the fact that this isn't just a handful of critics in the legislature. The Legislative Analyst's Office, the Peer Review Group, the independent Inspector General, the State Auditor, and the Institute for Transportation Studies at Berkeley have all raised significant concerns. And even looking at this newly revised plan, the

> Legislative Analyst's Office said the risk is too great and recommends against proceeding with the plan.
>
> Now before I close, Madam President, and I just wanted to give you some reason for optimism on that front, there are a lot of good arguments on both sides of this debate, and I think after the last 4 years I've probably heard most if not all of them, but let me tell you the argument that I did not find particularly persuasive. I wasn't persuaded when folks said, "Joe, you know, this thing is going to pass. Eventually the votes will be there on the Floor. It's something leadership at several levels wants to see happen, and the smart thing to do would be to simply go along with the program." I'm betting that's the conversation that took place back in 1996 when the legislature went along with the program and approved the deregulation that I confronted as a new member in 2001, and it cost the state billions. Billions we are still paying as we sit or stand here today having this debate.
>
> I'm betting that in 1999, when the pension measure that we all know as SB 400 came to the floor for debate, we said, "ahh, just go along with the program." And here we are a decade later, trying to untangle the billions of dollars in costs that the governor has so rightfully and appropriately identified as requiring attention through his pension reform efforts.
>
> So I'm asking myself today, if the measure's going to pass, and if it's something that my leadership supports, is there some reason I shouldn't go along with the program? And I think the answer to that is that there are billions of reasons why none of us should simply go along with the program. Unless we are convinced in good faith, as many of my colleagues are, that this is the right plan, and that the plan will genuinely allow the state to realize the right vision.
>
> I wish I could come to that conclusion, Madam President. I certainly give thanks and respect both to the Chair of the budget committee and to the President pro tem who've been eminently fair about letting members have the opportunity to make their case on this issue.
>
> But regrettably, the only conclusion I can come to today is that this is the wrong plan in the wrong place at the wrong time. And I will be a "no" vote.

Senator Simitian was correct: this project did not turn out to be the project that was envisioned by the voters, and it has no hopes for adequate funding, saddling the State of California for decades with tens of billions of dollars in debt. It is therefore unfeasible; it is also illegal.

This Court should therefore hand down a judgment for declaratory relief, declaring that each of the 10 acts alleged by plaintiffs constitute a violation of Proposition 1A; because of that,

any bond money spent in the commencement of construction on the project would be an "illegal expenditure" under C.C.P. § 526(a) and that accordingly, any such use of bond funds is permitted and will be enjoined, if attempted.

Dated: April 26, 2013

/s/

MICHAEL J. BRADY
Attorney for Plaintiffs
JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA