KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
S. MICHELE INAN
Deputy Attorney General
State Bar No. 119205
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5474
Fax: (415) 703-5480
E-mail: Michele.Inan@doj.ca.gov
*Attorneys for Defendants California High-Speed Rail Authority, Chief Executive Officer Roelof van Ark, Governor Edmund G. Brown Jr., State Treasurer Bill Lockyer, Director of Finance Ana Matosantos, Acting Secretary of Business, Transportation and Housing Traci Stevens, and State Controller John Chiang*

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By: L. WHITFIELD
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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| **JOHN TOS, AARON FUKADA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA,**<br>Plaintiffs,<br>v.<br>**CALIFORNIA HIGH SPEED RAIL AUTHORITY, CHIEF EXECUTIVE OFFICER, ROELOF VAN ARK; GOVERNOR JERRY BROWN; SENATOR MARK LENO, CHAIRMAN, JOINT LEGISLATIVE BUDGET COMMITTEE; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATASANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, TRACI STEVENS; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,**<br>Defendants. | Case No. 34-2011-00113919<br><br>**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT**<br><br>Date: June 15, 2012<br>Reservation No.: 1660513<br>Time: 9:00 a.m.<br>Dept: 54<br>Judge: Hon. Shelleyanne W.L. Chang<br><br>Trial Date: None Set<br>Action Filed: November 14, 2011 |



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## INTRODUCTION

Plaintiffs cannot overcome defendants' demurrer because they cannot allege specific facts demonstrating that an illegal expenditure or injury to the public fisc has or will imminently occur. There is a unique set of statutory approvals in Proposition 1A that the California High-Speed Rail Authority (Authority) must obtain before it can spend any state money to construct high-speed rail in California. Plaintiffs do not and cannot allege that the Authority has obtained these approvals. As a result, the complaint is insufficient to demonstrate that plaintiffs have standing to sue, that the claims alleged are ripe, or that the allegations plead sufficient facts to state valid causes of action for waste under Code of Civil Procedure section 526a (Section 526a). For all these reasons, the demurrer should be sustained without leave to amend.

Plaintiffs argue that the high-speed rail project is too large, costly and fraught with financial risk to wait for all the required statutory approvals to be obtained; they claim that project planning that violates Proposition 1A is moving forward and not likely to change; and they claim a legislative appropriation to fund construction work is likely to occur soon. These arguments only highlight the speculative nature of plaintiffs' claims. In fact, it is unknown and unknowable at this time whether the Authority will ever receive *all* the required approvals necessary for spending to begin on construction of high-speed rail in the Central Valley – including a legislative appropriation to begin construction and approval of a second funding plan. These approvals may or may not be forthcoming. The statutory approvals were designed to allow the Legislature and executive officers and agencies to decide, in the first instance, whether the Authority's plan is compliant and should be funded. Until their review is complete, there is no live controversy for judicial resolution.

It cannot be overstated that plaintiffs make *no* claim that any spending to construct the rail system has taken place or will imminently occur without the required legislative and executive approvals in hand. This defect renders the complaint speculative and non-justiciable as a matter of law. To adjudicate waste claims now, without any certainty that spending of state funds to construct high-speed rail in the Central Valley will ever be authorized, could result in an impermissible advisory opinion which may be mooted by subsequent developments. Because the

complaint filed on November 14, 2011, does not properly allege facts establishing standing, ripeness, or a cognizable claim, the case is not justiciable and – as in *Morris Brown v. Peninsula Joint Powers Board, et al.*, Case No. 34-2010-00075672 – defendants' demurrer must be sustained without leave to amend.

## ARGUMENT

### I. PLAINTIFFS' CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS MUST BE DISMISSED BECAUSE THESE DEFENDANTS LACK SPENDING AUTHORITY AS A MATTER OF LAW

The individual defendants cannot be sued for waste in the absence of allegations that they are authorized to spend state money to construct the high-speed rail system. Even assuming that the Authority had obtained all legislative and executive approvals required to begin construction of the system, the individual defendants could not spend one cent of state money to begin construction of high-speed rail. Only the Authority and no one else is authorized to spend state funds to construct high-speed rail. (Pub. Util. Code, § 185032 [authority to construct is exclusively granted to the Authority].) Further, because plaintiffs sue the individual defendants to control the exercise of their statutory authority to consider, approve or fund the Authority's planning decisions (see First Amended Complaint, ¶ 3), plaintiffs' claims invade these defendants' exercise of executive and legislative discretion, which cannot be the basis of a cognizable waste claim. As the court stated in *City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 555, waste claims involving a public official's exercise of discretion and judgment are primarily political in nature and outside the scope of a judicially cognizable waste dispute.

Plaintiffs cite *Serrano v. Priest* (1971) 5 Cal.3d 584 and *Stanson v. Mott* (1976) 17 Cal.3d 206 for the uncontroversial proposition that state officials may be sued under Section 526a. (Pltfs' Opp. at p. 9:11-16.) In those cases, the state defendants had legal authority to spend state money; but in this case the state defendants lack this threshold authority to commit state funds to construct high-speed rail. (See *Serrano v. Priest*, *supra*, at pp. 589, 591 [county and state officials sued because they were charged with spending to finance the California public school system].) In *Stanson*, *supra*, plaintiff filed a taxpayer suit against the Director of the California

Department of Parks and Recreation alleging that the Director *authorized the expenditure* of more than $5,000 of public funds to promote the passage of a bond act. (*Stanson v. Mott, supra*, at p. 209.) There was no question in *Stanson*, as there is here, about whether the Director was in fact authorized to spend money; the only issue was whether the spending itself was within legal bounds. (*Id.* at p. 213.) That being the case, *Stanson* stated that, if the Director "did indeed authorize the improper expenditure of public funds," plaintiff would be entitled to a declaratory judgment, and to injunctive relief, if he could establish that similar expenses are threatened in the future. (*Id.* at p. 222-223.) *Stanson* does not support the contention that the individual defendants are proper defendants in this action.

Plaintiffs ask in their opposition how they can possibly obtain declaratory, injunctive, and mandamus relief without suing the individual defendants. (See Pltfs' Opp. at p. 10, fn. 8.) The answer is that, upon receipt of all the executive and legislative approvals necessary to begin construction of high-speed rail required by Proposition 1A, the Authority and/or "any officer thereof, or any agent, or other person, acting in its behalf" may be sued to obtain the relief plaintiffs seek. (Code Civ. Proc., § 526a.)

The individual defendants must be dismissed.

## II. PLAINTIFFS LACK STANDING, THEIR CLAIMS ARE NOT RIPE, AND THEY CANNOT STATE A COGNIZABLE CLAIM BECAUSE, AS A MATTER OF LAW, THERE IS NO ACTUAL OR IMMINENT EXPENDITURE OF STATE FUNDS

Defendants do not dispute that plaintiffs are taxpayers who may bring an action to prevent illegal spending within the meaning of Section 526a. But, for the plaintiffs to have standing to sue, and for their claims to be ripe, the claims "must involve an actual or threatened expenditure of public funds," by citation to "specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240 [internal citations omitted].) Without these mandatory predicate allegations of specific facts demonstrating that an illegal expenditure has occurred or will imminently occur, plaintiffs have not "otherwise attempted to state taxpayer standing within the meaning of *Code of Civil Procedure section 526a*." (*Id.* at p. 1240 [emphasis in original].)

It is not enough to assert as plaintiffs do that "defendants are refusing to follow the law and [that plaintiffs'] claims are backed up by the State Auditor, the LAO, and the Peer Review Group." (Pltfs' Opp. at p. 9, fn. 7.) Nor is it sufficient to assert that "where the potential public harm is unprecedented and events are moving swiftly," "a reasonable likelihood of occurrence [of spending] should suffice." (*Id.* at p. 10, fn. 9.) The statutory authorizations required by Proposition 1A were enacted precisely to restrict the Authority's power to spend state funds until the authorizations are all in hand. As a matter of law, there can be no threat of spending until the Authority has obtained all the required approvals, none of which are alleged. Therefore, plaintiffs lack standing to sue, their claims are not ripe, and the complaint fails to state claims for relief as a matter of law.

Plaintiffs argue that their allegation that they are taxpayers seeking declaratory relief to prevent an illegal expenditure under Section 526a "automatically satisfies" any case or controversy requirements, citing *Van Atta v. Scott* (1980) 27 Cal.3d 424. (Pltfs' Opp. at pp. 8:16-23, 10:13-16.) Plaintiffs rely on dicta in footnote 28 of *Van Atta* which states that "[s]ince section 526a authorizes taxpayer suits for declaratory relief, the further contention that *this suit* lacks justiciability because plaintiffs have not satisfied the 'actual controversy' requirements of Code of Civil Procedure section 1060 must also fail." 27 Cal.3d at p. 450, fn. 28 [emphasis added].) Plaintiffs misread *Van Atta*.

*Van Atta* does not relieve plaintiffs here of the requirement that they specifically allege that spending has occurred or will imminently occur in order to allege a cognizable waste claim. In *Van Atta*, plaintiffs filed a taxpayer action attacking statutes providing for pretrial release (Pen. Code, § 1318 et seq.) that were being employed by San Francisco's police and courts in setting bail. (27 Cal.3d at p. 433.) The plaintiffs alleged that public officers were *already* implementing the statute; thus the court stated that no further allegations of case or controversy were required to state a claim for declaratory relief. (See also *Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1246 [holding that plaintiff's taxpayer action did not present a justiciable controversy, distinguishing *Van Atta*, because the action did not allege implementation of a statute]; *Cornblum v. Board of Supervisors of San Diego County* (1980) 110 Cal.App.3d 976, 979 [stating that the

propriety of plaintiffs' taxpayer action depends on plaintiffs' fitness to raise the issue and the amenability of the issue raised to judicial redress].) Here, in contrast to *Van Atta*, there is no allegation that defendants *are* either spending money to construct high-speed rail or that they will imminently do so, nor could the complaint so allege because the statutory approvals are lacking. *Van Atta* does not assist plaintiffs in arguing that they have alleged justiciable claims for relief.

Plaintiffs also argue that, even in the absence of the statutory approvals, their claims have "sufficiently congealed to the point of concreteness," citing *Hayward Area Planning Assn. v. Alameda County Transportation Authority* (1999) 72 Cal.App.4th 95. (Pltfs' Opp. at pp. 10:11-13:14.) Plaintiffs misread *Hayward Area Planning Assn.*

In *Hayward Area Planning Assn.*, plaintiffs alleged that defendants violated the Bay Area County Traffic and Transportation Act *by using* funds generated from a voter-approved sales and use tax (Measure B) to implement a highway extension project that contained a route or alignment different from the one presented to the voters. (72 Cal.App.4th at pp. 98, 101, 104 [describing allegations].) Plaintiffs also alleged that defendants had disavowed any intention of constructing the project along the voter-approved alignment and were moving ahead with plans to construct a different alignment. (*Id.* at pp. 101, 104.) Under these facts, the court stated:

> Absent judicial action, respondents have given every intention that they will, in effect, continue to exercise the very power that appellants claim that they do not have and proceed with the putative power. Dismissing this appeal would require the parties to make the identical arguments at a later stage of these proceedings, after an expenditure of large sums of public money on a highly controversial project, the legality of which is still in question . . . Based on all of these factors, we conclude the issues raised in this controversy have " 'sufficiently congealed' " to the point of concreteness to justify review.

(*Id.* at p. 104.)

*Hayward Area Planning Assn.* is easily distinguishable from this case. In *Hayward Area Planning Assn.*, defendants had statutory authority to use the sales and tax revenues to implement construction projects authorized by Measure B and were in fact using the funds to plan an arguably illegal realignment. Here, there are no comparable allegations that defendants have authority to or *are using* state funds to construct high-speed rail, or that such use of state funds is imminent or threatened. Further, as stated previously, there can be no such allegations in the

absence of the approvals required by Proposition 1A, and these approvals remain outstanding. Accordingly, *Hayward Area Planning Assn.* cannot be a basis for finding that plaintiffs' waste claims are ripe for adjudication.

Finally, plaintiffs' assert that court review must take place *before* events move past the point where they cannot be unwound. (See Pltfs' Opp. at p. 13:3-13.) Plaintiffs' fear and speculation, however, is not a substitute for standing, ripeness, or a cognizable claim. The assertion that *if* $1 billion of state bonds are sold to finance construction of high-speed rail and *if* a court subsequently determines that the Authority cannot lawfully spend bond funds, there will be resulting state liability to bondholders for the next 30 years (see *id.* at p. 13:4-9) presumes without any factual foundation that the State will sell Proposition 1A bonds before all statutory approvals are in place. Likewise, the assertion that defendants are spending Proposition 1A funds for project engineering design and environmental work (see *id.* at p. 13:9-13) which will be wasteful *if* a court subsequently determines that spending to construct high-speed rail violates Proposition 1A erroneously assumes that project planning cannot be adjusted to accommodate court rulings related to the project. The assertions are not a substitute for the required allegations that spending has or will imminently occur.

The complaint fails to allege facts sufficient to bring an action under Section 526a.

## III. PLAINTIFFS CANNOT AMEND THEIR COMPLAINT TO PROPERLY ALLEGE A CLAIM

Plaintiffs cannot amend their complaint to try to allege actual or imminent spending by including facts that have transpired since the filing of their original complaint. Allegations establishing a court's jurisdiction are determined based on facts as they existed at the time the complaint is filed, and such allegations could not have been made either when this action was filed in November 2011, or now.

Justiciability in taxpayer actions encompasses both concepts of standing to sue and ripeness which must be present when the complaint is filed. (See *Cornblum v. Board of Supervisors of San Diego County, supra,* 110 Cal.App.3d 976, 981 [discussing considerations of justiciablity in a taxpayer action including lack of standing and requests for an advisory opinion].) A litigant's standing to sue is a threshold issue to be resolved before the reaching the merits. (*Troyk v.*

*Farmers Group, Inc.* (2009) 171 CalApp.4th 1305, 1354; see *Californians for Disability Rights v. Mervyn's,* LLC (2006) 39 Cal.4th 223, 233 [noting that standing raises a jurisdictional challenge].) Standing must exist at all times until judgment is entered and not just *on the date the complaint is filed.* (*Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 11.)

Accordingly, plaintiffs cannot amend their complaint to include facts that have transpired since the filing of their original complaint on November 14, 2011 to try to cure its defects.

**CONCLUSION**

For these reasons, defendants respectfully request that the Court sustain their demurrer to plaintiffs' first amended complaint without leave to amend and enter judgment dismissing the action with prejudice.

Dated: June 8, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

S. MICHELE INAN
Deputy Attorney General
*Attorneys for Defendants California High-Speed Rail Authority, Chief Executive Officer Roelof van Ark, Governor Edmund G. Brown Jr., State Treasurer Bill Lockyer, Director of Finance Ana Matosantos, Acting Secretary of Business, Transportation and Housing Traci Stevens, and State Controller John Chiang*

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Tos, et al. v. California High Speed Rail Authority, et al.**
No.: **34-2011-00113919**

I declare:

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

On June 8, 2012, I served the attached

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT; and**

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE**

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 8, 2012, at San Francisco, California.

| Sandy Shum | |
|---|---|
| Declarant | Signature |

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