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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SACRAMENTO

15 **JOHN TOS, AARON FUKADA; AND  
16 COUNTY OF KINGS, A POLITICAL  
SUBDIVISION OF THE STATE OF  
17 CALIFORNIA,**

18 Plaintiffs,

19 v.

20 **CALIFORNIA HIGH SPEED RAIL  
21 AUTHORITY, CHIEF EXECUTIVE  
OFFICER, ROELOF VAN ARK;  
GOVERNOR JERRY BROWN; SENATOR  
22 MARK LENO, CHAIRMAN, JOINT  
LEGISLATIVE BUDGET COMMITTEE;  
23 STATE TREASURER, BILL LOCKYER;  
DIRECTOR OF FINANCE, ANA  
24 MATOSANTOS; SECRETARY (ACTING)  
OF BUSINESS, TRANSPORTATION AND  
25 HOUSING, TRACI STEVENS; STATE  
CONTROLLER, JOHN CHIANG; AND  
26 DOES I-V, INCLUSIVE,**

27 Defendants.  
28

Case No. 34-2011-00113919

**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF DEMURRER TO FIRST  
AMENDED COMPLAINT**

Date: June 15, 2012

Reservation No.: 1660513

Time: 9:00 a.m.

Dept: 54

Judge: Hon. Shelleyanne W.L. Chang

Trial Date: None Set

Action Filed: November 14, 2011

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1 INTRODUCTION

2 Plaintiffs seek to block construction of the first segment of California’s high-speed rail  
3 project with this purported taxpayer lawsuit to enjoin a hypothetical waste of public funds. The  
4 lawsuit alleges that the proposed high-speed rail project between Merced and Bakersfield (Central  
5 Valley HSR project) violates Proposition 1A, and therefore it would be a waste of public funds  
6 within the meaning of Code of Civil Procedure section 526a if bond money is spent to construct  
7 the project.

8 Defendants demur to the first amended complaint (FAC) and ask the Court to sustain the  
9 demurrer without leave to amend because the FAC does not plead a justiceable controversy.  
10 Plaintiffs have not, and as a matter of law cannot, allege facts demonstrating an expenditure of  
11 bond money is *either occurring or will imminently occur* within the meaning of Code of Civil  
12 Procedure section 526a. For the same reason, plaintiffs do not have standing to pursue their  
13 claims because they are not injured, and there is no actual, rather than hypothetical, controversy  
14 that requires adjudication by this Court. Like two earlier unsuccessful suits brought by plaintiffs’  
15 counsel, this effort to block high-speed rail fails because it is speculative, and alleges legally  
16 impossible violations of law.<sup>1</sup>

17 In order to plead waste under Section 526a, plaintiffs must allege specific facts  
18 demonstrating that some illegal expenditure or injury to the public fisc has or will immediately  
19 occur. Plaintiffs’ speculation that the California High-Speed Rail Authority (Authority) intends  
20 to or will spend bond money to construct the Central Valley HSR project cannot survive the plain  
21 language of Proposition 1A.

22 Proposition 1A created a unique legislative process for approving and releasing bond  
23 money to build the high-speed rail system, which is the “waste” the plaintiffs seek to enjoin. This

24 <sup>1</sup> Plaintiffs’ counsel has brought two previous actions in this Court against the California  
25 High-Speed Rail Authority challenging the legality of the Authority’s plans, both of which failed  
26 on the pleadings. (See Request for Judicial Notice (RNJ), Exhs. 1 (Order) and 2 (Order).) In the  
27 most recent, *Morris Brown v. Peninsula Joint Powers Board et al.*, Case No. 34-2010-00075672,  
28 the Authority demurred on the same grounds it asserts here and the Court sustained the demurrer  
without leave to amend. (RNJ, Exh. 2, p. 1-2.) The demurrer in this case should be sustained for  
the same reasons the *Morris* demurrer was sustained—the claim of illegal spending pursuant to  
Code of Civil Procedure section 526a is “speculative and not justiciable.” (*Id.*, p. 3.)

1 suit is speculative because it ignores that the Authority's power to spend bond money is qualified  
2 by a statutorily mandated process of independent discretionary approvals in Proposition 1A. For  
3 the Authority to obtain any ability to spend bond money to construct high-speed rail, a legislative  
4 appropriation process must occur, and the Director of Finance has to exercise her discretion and  
5 find that a plan to construct high-speed rail is likely to be successfully implemented as proposed  
6 by the Authority. Until these statutory preconditions are satisfied, including the requirement that  
7 funds are appropriated, the Authority lacks any power, actual or imminent, to spend bond money.

8 Defendants further demur on the ground that plaintiffs cannot state a cause of action against  
9 the individual defendants because Code of Civil Procedure section 526a cannot be used to  
10 interfere with the exercise of their legislative and executive discretion. Proposition 1A, the law  
11 adopted to fund California's high-speed rail system, gives the Legislature and Governor  
12 discretion through the legislative appropriation process to determine whether or not the  
13 Authority's plans to spend money to construct high-speed rail are appropriate. Proposition 1A  
14 gives the Director of Finance the power to approve the Authority's plans. Where, as here, the  
15 ability to allege specific facts demonstrating a waste of public funds is lacking, Section 526a does  
16 not authorize the courts to intrude on the exercise of this discretion of these defendants.

17 Finally, defendants demur on the ground that plaintiffs cannot state a cause of action  
18 against the individual defendants because they have no legal authority to spend bond money to  
19 construct the high-speed rail system. Therefore, as a matter of law, plaintiffs cannot state claims  
20 against them for waste of public funds within the meaning of Section 526a.

21 Because this suit is demonstrably without either legal or factual support, like the  
22 unsuccessful suits before it, this case should not survive beyond this first demurrer.

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1 STATEMENT OF FACTS<sup>2</sup>

2 I. THE REQUIREMENTS OF THE HSR BOND ACT

3 In 2008, California voters passed Proposition 1A which authorized construction of an  
4 electric high-speed rail system in California. (FAC, ¶ 5.)<sup>3</sup> (Stats. 2008, ch. 267 [A.B. 3034], § 9,  
5 (hereafter, the HSR Bond Act.)

6 The HSR Bond Act permits the Authority to use bond money for capital costs (Sts. & Hy.  
7 Code, § 2704.04, subd. (b)(1)(B))<sup>4</sup> associated with the development of the high-speed train  
8 system (defined in section 2704.01 subdivision (e)) "or any portion thereof." (§ 2704.04, subd.  
9 (c).) The HSR Bond Act envisions that the high-speed train system will be built over time, and  
10 that funding plans for system development will be in increments of Corridors or Usable Segments  
11 thereof. (§ 2704.04, subd. (a) [bond funds are to initiate construction]; § 2704.01, subs. (f) and  
12 (g) [defining Corridor and Usable Segment]; § 2704.08, subs. (c) and (d) [providing that scope  
13 of funding plans extends to a Corridor and Usable Segment].)

14 Because the HSR Bond Act provides that bond proceeds can be used for any portion of the  
15 system the Authority need not request an appropriation or assemble the funds to build an entire  
16 Corridor or Usable Segment (§ 2704.04, subd. (c)), but it must identify a Corridor or Usable  
17 Segment when it develops a Funding Plan requesting an initial appropriation to fund capital costs

18 \_\_\_\_\_  
19 <sup>2</sup> This statement of facts is based on the: (i) factual allegations of the FAC, which are  
20 properly assumed as true for purposes of this demurrer; and (ii) matters which are subject to  
21 judicial notice. The allegations consist mostly of contentions and conclusions that must be  
22 disregarded for purposes of demurrer. Specifically, the court does not assume the truth of  
23 contentions, deductions or conclusions of law in testing the legal sufficiency of a complaint.  
(*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Additionally, any  
24 allegations that are contrary to law or to a fact of which judicial notice may be taken should be  
25 treated as a nullity, including facts impossible in law. (*Interinsurance Exchange v. Arula* (1995)  
26 33 Cal.App.4th 1140, 1143; *Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 354.)

27 <sup>3</sup> Proposition 1A amended sections of the Public Utilities Code and added Chapter 20  
28 (commencing with Section 2704) to Division 3 of the Streets and Highways Code related to  
financing a high-speed passenger train system by providing funds through the issuance and sale  
of state bonds. The chaptered version of the statute, containing both the Public Utilities and  
Streets and Highway Code provisions that comprise Proposition 1A, is attached to defendants'  
RJN as Exhibit 3.)

<sup>4</sup> Subsequent statutory references are to the Streets and Highways Code unless otherwise  
indicated.

1 for any portion of the system. (§ 2704.08, subd. (c) [any request for an appropriation of funds for  
2 eligible capital costs on a Corridor or Usable Segment must be preceded by a detailed Funding  
3 Plan for that Corridor or Usable Segment]; § 2704.08(f) [the Authority selects Corridors or  
4 Usable Segments subject to certain criteria].) Bond money may not be used for more than 50  
5 percent of the total cost of construction of a Corridor or Usable Segment designated by the  
6 Authority. (§ 2704.08, subd. (a).)

7 The HSR Bond Act does not confer on any of the defendants unilateral authority to spend  
8 bond money. Instead, it imposes a series of legislative and executive checks and balances. Not  
9 until all statutory preconditions are satisfied can the Authority spend bond money for construction  
10 or real property and equipment acquisition for any Corridor or Usable Segment of the high-speed  
11 rail system. (§ 2704.08, subds. (c) and (d).)

12 Specifically, before the Authority can spend bond money to construct high-speed rail, the  
13 HSR Bond Act requires that the following preconditions be satisfied:

14 (1) the Authority must approve and submit a detailed funding plan (Initial Funding  
15 Plan) to the Director of Finance, the peer review group established pursuant to Public  
16 Utilities Code section 185035, and the transportation and fiscal committees of both  
17 houses of the Legislature for evaluation at least 90 days prior to requesting an  
18 appropriation of bond proceeds for capital costs (§ 2704.08, subd. (c)(1); Pub. Util.  
19 Code, § 185035, subd. (e));

20 (2) the Authority must submit to the Legislature and the Governor a request to  
21 appropriate bond proceeds for any eligible capital costs (§ 2704.08, subd. (c)(1));

22 (3) the Legislature and the Governor must appropriate bond funds in the annual  
23 Budget Act according to the request supported by an Initial Funding Plan (§ 2704.04,  
24 subd. (b)(1)), and subject to such conditions and criteria the Legislature may impose  
25 at the time of appropriation by statute (§ 2704.06);

26 (4) prior to spending any bond funds for construction or acquisition of real property  
27 or equipment on a Corridor or Usable Segment, the Authority must approve and  
28 submit a second detailed funding plan (Second Funding Plan), and one or more  
reports by independent financial experts concerning the viability of that plan, to the  
Director of Finance and the Chairperson of the Joint Legislative Budget Committee (§  
2704.08, subd. (d)(1) & (d)(2)); and

(5) the Director of Finance has 60 days to review the Second Funding Plan and expert  
reports and, after receiving any communication from the Joint Legislative Budget  
Committee, to find that the Second Funding Plan is likely to be successfully  
implemented as proposed. (§ 2704.08, subd. (d).)



1 **II. THE AUTHORITY'S INITIAL FUNDING PLAN**

2 On November 3, 2011, the Authority passed a resolution identifying two Usable Segments  
3 for construction. (FAC, ¶ 10, p. 4:20-24; see RJN, Exh. 4 [Agenda Item # 4 -- Selection of  
4 Usable Segment(s) for Construction and Resolution # HSRA 11-22 related thereto].)<sup>5</sup> The same  
5 day, the Authority passed another resolution approving and submitting to the Director of Finance,  
6 the peer review committee and the legislative committees an Initial Funding Plan relating to the  
7 Usable Segments. (RJN, Exh. 5 [Agenda Item # 4 -- Approval of Funding Plan for Submission,  
8 including attached Funding Plan, and Resolution # HSRA 11-23 related thereto].) The Initial  
9 Funding Plan addressed topics including identification of sources of funds for construction of the  
10 Initial Construction Segment between Merced and Bakersfield. (*Id.*; see fn. 5, *infra.*)

11 **III. THE FIRST AMENDED COMPLAINT**

12 The FAC asserts six causes of action under Section 526a for waste. (FAC, ¶ 2 [all the  
13 claims are brought under Section 526a].) The first three claims seek judicial declarations that use  
14 of bond money to construct the Central Valley HSR project violates provisions of the HSR Bond  
15 Act (FAC, ¶¶ 13-30), the fourth claim seeks an injunction prohibiting the spending of bond  
16 money to construct the project as a result of the violations set forth in the first three causes of  
17 action (FAC, ¶¶ 31-36), and the fifth claim seeks a writ of mandate ordering the defendants to  
18 comply with the HSR Bond Act, and prohibiting them from releasing bond money to construct  
19 the project, as a result of the violations alleged in the first three causes of action. (FAC, ¶¶ 37-  
20 40).<sup>6</sup>

21 <sup>5</sup> The first Usable Segment (also referred to interchangeably as "Initial Operating Section-  
22 North" or "IOS-North") is a portion of the Phase I Corridor between San Jose and Bakersfield  
23 including a San Jose station and a Bakersfield station. (RJN, Exh. 4.) The second Usable  
24 Segment is a portion of the Phase I Corridor (also referred to interchangeably as Initial Operating  
25 Section-South or "IOS-South") between Merced and San Fernando Valley including a Merced  
26 and San Fernando Valley station. (*Id.*) Identifying these Usable Segments that encompass the  
27 stretch of rail between Merced and Bakersfield in the Central Valley permits the Authority  
28 maximum planning flexibility, while still permitting it to access federal grant money available  
only to construct a section between Merced and Bakersfield (also referred to as the "Initial  
Construction Section" or "ICS"). (*Id.*)

<sup>6</sup> The sixth cause of action is not a waste claim; it is a claim for attorney fees under a  
"private attorney general theory." (FAC, ¶¶ 41-45; see Code Civ. Proc., § 1021.5).

1 Plaintiffs are Jon Tos, Aaron Fukuda and the County of Kings. Tos and Fukuda are alleged  
2 to be residents of the County of Kings and taxpayers, and sue pursuant to Section 526a. (FAC, ¶¶  
3 1, 2, 12.) The County of Kings is not alleged to be a taxpayer. (FAC, ¶ 12.) It sues based on an  
4 alleged beneficial interest in the suit. It alleges that it is interested because Tos and Fukuda are its  
5 residents, and because the Central Valley HSR project conflicts with unspecified “plans, policies  
6 and regulations,” will decrease taxpayer property values, and will interrupt County emergency  
7 services by causing road closures.<sup>7</sup> (*Id.*)

8 As the factual basis of FAC’s first through third claims for declaratory relief, the FAC  
9 alleges that the Authority intends to build a non-electric segment (the Central Valley HSR  
10 project) preliminary to construction of an electric high-speed rail system in violation of the HSR  
11 Bond Act. (FAC, ¶¶ 6, 7-9; see also 22.) The FAC also alleges that defendants “have evidenced  
12 an intent to violate” the HSR Bond Act by: (1) representing to voters that the entire rail system  
13 would be completed by 2020, but planning a system that will not be completed until 2032; (2)  
14 planning for trains that will run at speeds of less than 220 mph; (3) planning that passengers  
15 arriving in San Jose from Los Angeles/Anaheim will have to change trains for a continuing trip to  
16 San Francisco; and (4) approving a “Usable Segment” and “Funding Plan” for the Central Valley  
17 HSR project on November 3, 2011, without completing project level environmental clearances.  
18 (FAC, ¶ 10.)

19 The FAC alleges additional facts in support of the second and third claims for declaratory  
20 relief. The FAC alleges in the second cause of action that the Central Valley HSR project is not  
21 eligible to receive bond money “IF an operating subsidy will be provided by local, state, or  
22 federal government.” (FAC, ¶ 17, emphasis in FAC; see also ¶ 18 (“when (and if) defendants’  
23 rail system becomes operational . . . it will require a local, state, or federal operating subsidy”).)  
24 The FAC alleges in the third cause of action that the “Initial Funding Plan” approved on  
25

26 <sup>7</sup> County of Kings lacks standing to sue under Section 526a because it is not a taxpayer  
27 entitled to sue for waste. (See FAC, ¶ 12; Code Civ. Proc., § 526a [taxpayer action may be  
28 brought “either by a citizen resident therein, or by a corporation, who is assessed for and is liable  
to pay, or, within one year before the commencement of the action, has paid, a tax therein.”].)

1 November 3, 2011 violates the HSR Bond Act because there is insufficient funding in place to  
2 construct an entire "Usable Segment." (FAC, ¶¶ 24-30.)

3 Finally, the FAC alleges that because the Authority plans to start construction of the Central  
4 Valley HSR project in September 2012, defendants' use of bond funds to construct the project is  
5 "imminent." (FAC, ¶¶ 11, 33; see also ¶ 14 (alleging the "imminent planned release and  
6 expenditure of billions of dollars by defendants") and ¶ 38 (alleging that defendants "are  
7 imminently planning to violate Prop 1A").<sup>8</sup>

## 8 ARGUMENT

### 9 I. ALL SIX CAUSES OF ACTION IN THE FIRST AMENDED COMPLAINT FAIL TO 10 ALLEGE FACTS SUFFICIENT TO BRING SUIT UNDER CODE OF CIVIL PROCEDURE SECTION 526A

#### 11 A. A Cause of Action for Waste Requires Allegations of Facts Demonstrating 12 an Actual or Imminent Illegal Expenditure of Public Funds

13 Under Section 526a, a taxpayer may maintain "[a]n action to obtain a judgment, restraining  
14 and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other  
15 property of a county, town, city or city and county of the State . . . ." <sup>9</sup> (Code Civ. Proc., § 526a.)

16 <sup>8</sup> In *Morris v. Peninsula Joint Powers Board et al.* (see fn 1, *infra*), the *Morris* plaintiffs  
17 sought two judicial declarations that are virtually the same as second and third declarations  
18 plaintiffs seek here. (RJN, Exh. 2, Order, p. 1-2.) In *Morris*, plaintiffs sought a declaration that  
19 "no construction on any corridor, or usable segment thereof, may commence by, or on behalf of  
20 the Authority, unless adequate funds are in place to ensure completion of that corridor or usable  
21 segment thereof . . ." (in this suit, see FAC, ¶¶ 24-30), and they sought a declaration that  
22 "granting of a guarantee by the State with regard to annual operating revenues/profits of the  
23 Authority would constitute a state subsidy under Prop. 1A/AB 3034 and would be prohibited by  
24 said provisions" (in this suit, see FAC, ¶¶ 17-18). (*Id.*) The only difference between *Morris* and  
25 the allegations here with regard to whether the Authority can imminently spend bond money to  
26 construct any part of the rail system is that the Authority has now submitted an Initial Funding  
27 Plan for the Central Valley HSR project to the Legislature, peer review group and the Director of  
28 Finance. However, as set forth above, there are multiple requirements that must be met before the  
Authority can spend bond money which have not and may never occur rendering this suit  
"speculative and not justiciable." (*Id.*, Order, p. 3.)

<sup>9</sup> Code of Civil Procedure section 526a provides in pertinent part:

An action to obtain a judgment, restraining and preventing any illegal  
expenditure of, waste of, or injury to, the estate, funds, or other property of a  
county, town, city or city and county of the state, may be maintained against any  
officer thereof, or any agent, or other person, acting in its behalf, either by a citizen  
resident therein, or by a corporation, who is assessed for and is liable to pay, or,  
within one year before the commencement of the action, has paid, a tax therein.

1 “The primary purpose of this statute . . . is to ‘enable a large body of the citizenry to challenge  
2 governmental action which would otherwise go unchallenged in the courts because of the  
3 standing requirement.’” (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268.) Consistent with “the  
4 policy of liberally construing section 526a to foster its remedial purpose, our courts have  
5 permitted taxpayer suits for declaratory relief, damages and mandamus.” (*Van Atta v. Scott*  
6 (1980) 27 Cal.3d 424, 449-450.) In this case the plaintiffs have asserted Section 526a as a basis  
7 for declaratory, injunctive and mandamus relief. (FAC, ¶¶ 1, 2, 12.)

8         Nonetheless, the gravamen of any taxpayer action is still “an illegal expenditure of public  
9 money.” (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29; see also *Fiske v.*  
10 *Gillespie* (1988) 200 Cal.App.3d 1243, 1245, 1246 [Section 526a does not authorize general  
11 challenge with no reference to specific application of statute; actual expenditure or threat of  
12 expenditure of public funds is required].) To maintain a taxpayer action, the plaintiff must allege  
13 “an actual or threatened expenditure of public funds.” (*Waste Management of Alameda County,*  
14 *Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240 [*Waste Management*] [emphasis  
15 added], disapproved on other grounds in *Save the Plastic Bag Coalition v. City of Manhattan*  
16 *Beach* (2011) 52 Cal.4th 155.) “General allegations, innuendo, and legal conclusions are not  
17 sufficient [citation]; rather, the plaintiff must cite specific facts and reasons for a belief that some  
18 illegal expenditure or injury to the public fisc is occurring or will occur.” (*Ibid.*) In *Connerly v.*  
19 *Schwarzenegger* (2007) 146 Cal.App.4th 739, the court further explained that the goal of Code of  
20 Civil Procedure section 526a is to allow “prompt action to “prevent irremediable public injury”  
21 [citation], i.e., the unlawful or illegal expenditure of public funds [citation].” (*Id.* at p. 749.) That  
22 was the rationale behind the holding in *Waste Management* that a plaintiff must cite facts showing  
23 an illegal injury is occurring or about to occur. (*Id.*)

24         **B. Plaintiffs Fail to Allege Specific Facts Supporting Their Contention That**  
25         **an Illegal Expenditure of Public Funds is About to Occur**

26         Code of Civil Procedure section 526a is the only alleged basis for this action, but plaintiffs  
27 allege no specific facts showing that the Authority has, or imminently will, obtain permission to  
28 spend bond funds for the construction of the Central Valley HSR project without satisfying all of

1 the statutory preconditions necessary to its authority to commit bond proceeds for real property or  
2 equipment acquisition or construction. Instead, plaintiffs only allege the conclusion that an illegal  
3 expenditure of funds is imminent. (FAC, ¶¶ 11, 14, 38.) Such conclusory allegations are  
4 insufficient to allege a cause of action upon which relief may be granted.

5 Here, as in *Beresford Neighborhood Assoc. v. City of San Mateo* (1989) 207 Cal.App.3d  
6 1180, the requirements of the HSR Bond Act directly contradict any contention that an illegal  
7 expenditure of public funds will imminently occur. In *Beresford*, the City of San Mateo's  
8 demurrer to the complaint was sustained without leave to amend because the City's ordinance at  
9 issue negated the plaintiff's allegation that the City had failed to perform a mandatory duty,  
10 because there was no mandatory duty:

11 Subparagraph (b) alleges that the city is *required* under its municipal code to  
12 employ bidding procedures in connection with the proposed transfer of the site.  
13 Contrary to appellants' assertion, a demurrer does not admit conclusions of law.  
14 [Citation.] The city asked the trial court to take judicial notice of section 3.60.090  
15 of its municipal code, which indicates that the city's use of bidding procedures is  
16 *discretionary*. For purposes of a demurrer, a court may consider matters that are  
17 subject to judicial notice. [Citations.] Appellants have alleged no facts tending to  
18 show that failure to follow bidding procedures in this case was an abuse of  
19 discretion. Accordingly, the claim in subparagraph (b) was properly dismissed for  
20 failure to state facts sufficient to constitute a cause of action.

21 (*Beresford Neighborhood Assoc. v. City of San Mateo, supra*, 207 Cal.App.3d at pp. 1190-1191,  
22 emphasis added.) Similarly here, the HSR Bond Act negates the claim of imminent expenditure  
23 of funds on the Central Valley HSR project because it does not give the Authority the power to  
24 commit bond proceeds until all statutory preconditions are met.

25 In the absence of specific, factual allegations or evidence indicating that the Authority  
26 *intends to spend bond money* on the Central Valley HSR project in violation of these statutory  
27 requirements, it must be presumed that government agencies will act in accordance with the law.  
28 (*Connerly v. Schwarzenegger, supra*, 146 Cal.App.4th at p. 742.) That is, the court must  
conclude that an agency without legal authority to spend bond money will not spend bond  
money.<sup>10</sup>

<sup>10</sup> Recent events demonstrate how the statutory contingencies on the Authority's ability to  
(continued...)

1 In *Connerly*, a taxpayer challenged a statute on constitutional grounds and sought to  
2 enjoin state officials from enforcing it. (*Connerly v. Schwarzenegger, supra*, 146 Cal.App.4th at  
3 p. 742.) The court first noted that the statute at issue had been invalidated in another court  
4 challenge. (*Id.* at p. 747.) The *Connerly* plaintiff, nonetheless, sought an order enjoining state  
5 officials from enforcing the unconstitutional law, claiming that the costs of such unconstitutional  
6 enforcement would constitute public waste under Section 526a. (*Id.* at pp. 749-751.) The court  
7 refused to grant the order, and directed dismissal of the action. (*Ibid.*) The court found that the  
8 plaintiff could not state a claim for waste on the basis of “speculation that defendants *might* try to  
9 enforce a statute that has already been declared unconstitutional.” (*Id.* at p. 750 [emphasis in  
10 original].) The court noted, “There is a presumption that state officers will obey and follow the  
11 law.” (*Id.* at p. 751.) In the absence of a specific allegation demonstrating an intent to ignore the  
12 law, no order was justified. (*Ibid.*)

13 Similarly, the requirements of the HSR Bond Act that leave the Authority without power to  
14 spend bond money until specific preconditions are met preclude plaintiffs from alleging that an  
15 illegal expenditure of bond money is about to occur.<sup>11</sup> The Authority has approved and submitted  
16 an Initial Funding Plan for evaluation (see RJN, Exh. 5), but this is only one of five preconditions  
17 which must take place before the Authority has legal authority to spend to construct the Central  
18 Valley HSR project. There remain four additional preconditions that must be met before bond  
19 funds can be spent. The Authority must submit a request to the Legislature and Governor to

20 (...continued)

21 commit bond proceeds might prevent it from doing so. On January 3, 2012, well after the filing  
22 of the original complaint, the peer review group (established pursuant to Public Utilities Code  
23 section 185035 to evaluate the Authority’s Funding Plan and to report findings and conclusions to  
24 the Legislature) issued its report. (RJN, Exh. 6.) The report concluded that the Authority’s Initial  
25 Funding Plan for the Central Valley HSR project is not financially feasible, is based on an  
26 incomplete business model, and the Authority has inadequate management resources. (*Id.* at p. 4  
27 and 7.) How this report might influence the Legislature and the Governor’s decision to  
28 appropriate funds is not yet clear.

<sup>11</sup> The Initial Funding Plan states that the Authority “plans to commence construction  
activities for the ICS [the Central Valley HSR project] by late 2012” (RJN, Exh. 5, attached  
Initial Funding Plan, p. 5]), but this is an expression of intent or aspiration that is not inconsistent  
with and cannot be construed to trump satisfaction of the statutory preconditions for committing  
bond proceeds in the HSR Bond Act.

1 appropriate bond funds, the Legislature must appropriate bond funds, the Authority must approve  
2 and submit a Second Funding Plan, and the Director of Finance must approve the Second  
3 Funding Plan. Until all these preconditions are satisfied, the Authority does not have legal  
4 authority to spend bond funds to construct any Corridor or Usable Segment. In the absence of  
5 factual allegations demonstrating how the Authority might spend bond money without first  
6 satisfying these preconditions, plaintiffs' claims are speculative, and they cannot allege a viable  
7 taxpayer cause of action for waste pursuant to Section 526a.

8 For the same reasons that each of the FAC's causes of action does not allege facts sufficient  
9 to maintain a suit under Section 526a, plaintiffs do not have standing to assert the claims for  
10 violation of Section 526a because they are not injured. (See *Friendly Village Community Assn.,*  
11 *Inc. v. Silva & Hill Co.* (1973) 31 Cal.App.3d 220, 225 [plaintiff must have an actual and  
12 substantial interest and stand to be benefited or injured by a judgment in order to state a claim for  
13 relief]; *Zetterberg v. California State Department of Health* (1975) 43 Cal.App.3d 657, 665  
14 [declaratory relief claims should be dismissed if plaintiffs lack standing].) Similarly, the FAC's  
15 six claims also fail because they do not allege an actual case or controversy that is ripe for court  
16 review. (*Zetterberg v. California State Department of Health, supra*, 43 Cal.App.3d 657, 661  
17 [controversy must be of a character that admit of specific and conclusive relief, as distinguished  
18 from an advisory opinion or hypothetical set of facts]; *Wilson v. Transit Auth.* (1962) 199  
19 Cal.App.2d 716, 722-24 [a complaint for declaratory relief that fails to allege the existence of an  
20 actual controversy fails to state facts sufficient to constitute a cause of action].)<sup>12</sup>

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23 <sup>12</sup> In addition, the second claim for declaratory relief further fails to state a claim for relief  
24 because it plainly seeks an advisory opinion based upon obviously speculative and hypothetical  
25 facts. The second claim alleges: "Prop. 1A makes the Central Valley ineligible to receive any  
26 Prop 1A fund *if* an operating subsidy will be provided . . ." and "*when (an if)* defendants' rail  
27 system becomes operational . . . it will require a local, state, or federal operating subsidy." (FAC,  
28 ¶¶ 17 and 18, emphasis added.) There is no allegation in the FAC indicating any basis on which  
plaintiffs may conclude now that an operational subsidy will be required to operate the Central  
Valley HSR project in the future. Thus, the second cause of action as drafted fails to allege a  
claim for relief as a matter of law.

1 Accordingly, because plaintiffs cannot amend their pleading to allege an actual or imminent  
2 illegal expenditure of public funds, this demurrer should be sustained as to the entire complaint  
3 without leave to amend. (See *CAMSI IV v. Hunter Technology Corporation* (1991) 230  
4 Cal.App.3d 1525, 1539, quoting 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 945, p. 379  
5 [“But in any event no abuse of discretion should be found where there is no material dispute as to  
6 the facts, the applicable law is clear, and under the facts and the law the plaintiff cannot prevail:  
7 In such a case, “[o]bviously, no amendment would change the result.”].)

8 **II. ALL SIX CAUSES OF ACTION IN THE FIRST AMENDED COMPLAINT FAIL TO STATE**  
9 **CLAIMS FOR RELIEF AGAINST THE INDIVIDUAL DEFENDANTS BECAUSE SECTION**  
10 **526A CANNOT BE USED TO CHALLENGE THEIR EXERCISE OF LEGISLATIVE AND**  
11 **EXECUTIVE DISCRETION**

12 Even if plaintiffs could allege an actual or threatened expenditure of public funds, the first  
13 through sixth causes of action cannot be brought against the individual defendants because  
14 Section 526a cannot be used to challenge their exercise of legislative and executive discretion.  
15 (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349,  
16 356-358 [reviewing cases]; *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 706-707;  
17 see FAC, ¶ 3 [these defendants are sued because they have a “voice and decision-making  
18 authority” on whether bonds “should be allowed to be used” for the Central Valley HSR project].)

19 “Waste” as used in section 526a means more than an alleged mistake by public  
20 officials in matters involving the exercise of judgment or wide discretion. To hold  
21 otherwise would invite constant harassment of city and county officers by disgruntled  
22 citizens and could seriously hamper our representative form of government at the  
23 local level. Thus, the courts should not take judicial cognizance of disputes which are  
24 primarily political in nature, nor should they attempt to enjoin every expenditure  
25 which does not meet with a taxpayer’s approval.

26 (*City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 555, quoted with approval in  
27 *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138-1139; *Harman v. City and County of*  
28 *San Francisco* (1972) 7 Cal.3d 150, 160-61 [a taxpayer may sue a governmental body in cases  
involving fraud, collusion, ultra vires, or failure to perform a duty specifically enjoined].)

Although this limitation on taxpayer suits is well-established, plaintiffs’ suit transgresses  
that limitation by suing the individual defendants based on their “decision-making authority” thus  
invading the domain of legislative and executive discretion. (See *Harman v. City and County of*



1 *San Francisco, supra*, 7 Cal.3d 150, 160-61; *Sundance v. Municipal Court, supra*, 42 Cal.3d  
2 1101, 1139 [the court should not interfere with the County's legislative judgment].) The roles  
3 played by the Authority's Chief Executive Officer, Governor, Treasurer, Director of Finance,  
4 Acting Secretary and Controller in the administration of Proposition 1A are part of a statutory  
5 process that regulates and, if the Authority is successful, results in permission to spend  
6 appropriated money upon the approval of a Second Funding Plan by the Director of Finance.  
7 (See Pub. Util. Code, § 185035 [Treasurer, Controller, Director of Finance and Secretary are  
8 authorized to designate representatives to *independent* peer review group to evaluate the  
9 Authority's plans and to report its findings and conclusions to the *Legislature*]; § 2704.08, subd.  
10 (c)(1) [Legislature and Governor through the appropriation process are authorized to appropriate  
11 bond proceeds to construct high-speed rail in consultation with the Director of Finance]; §  
12 2704.08, subd. (d) [Director of Finance, is authorized to review and approve Second Funding  
13 Plans].) Because the role of these defendants in the HSR Bond Act is part of a unique legislative  
14 and executive review process for the construction of the high-speed rail system, their exercise of  
15 discretion as part of this process cannot be restrained by judicial fiat. (*Humane Society, supra*,  
16 152 Cal.App.4th at pp. 356-358; *Harman, supra*, at p. 160-61.)

17 This limitation on actions brought pursuant to Section 526a was recognized in *Sklar v.*  
18 *Franchise Tax Board* (1986) 185 Cal.App.3d 616, in which a group of taxpayers attempted to  
19 obtain mandamus to compel the State Franchise Tax Board to adopt certain specific procedures to  
20 control the use of alcohol entertainment expense as a business deduction on state income tax  
21 returns. (*Id.* at p. 618.) The plaintiffs alleged that they brought their suit for the purpose of  
22 compelling the Board to collect "income taxes lawfully due the State that have eluded collection  
23 because of the Board's total failure to enforce provisions of the tax statutes." (*Id.*) The prayer  
24 requested a writ compelling the Board to collect taxes without allowing a deduction except under  
25 extraordinary circumstances, to create a tax form to implement the new tax scheme, and to adopt  
26 rules and regulations to carry out the new scheme. (*Id.* at p. 620.) The court held that a demurrer  
27 to the complaint was properly sustained because:

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1 Mandamus will not lie to compel a legislative body to perform legislative acts in a  
2 particular manner. [Citations.] Were it otherwise, courts would be involved in an  
attempt to exercise legislative function, which . . . is expressly forbidden . . .

3 (*Id.* at p. 624.)

4 Therefore, plaintiffs' claims against these individual defendants fail to state claims for  
5 relief, and they must be dismissed. Because plaintiffs cannot amend their complaint to allege  
6 claims against them, these defendants' demurrer should be sustained without leave to amend.

7 (See *CAMSI IV v. Hunter Technology Corporation*, *supra*, 230 Cal.App.3d at p. 1539.)

8 **III. ALL SIX CAUSES OF ACTION IN THE FIRST AMENDED COMPLAINT FURTHER FAIL**  
9 **TO STATE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BECAUSE THEY LACK**  
10 **ANY STATUTORY AUTHORITY TO SPEND BOND MONEY TO CONSTRUCT THE**  
11 **CENTRAL VALLEY HSR PROJECT**

12 Finally, even if a cause of action for waste under Section 526a could be stated against the  
13 Authority, none can be pled against the individual defendants because only the Authority has the  
14 power to spend bond money to construct the Central Valley HSR project as a matter of law.

15 Plaintiffs cannot maintain causes of action for waste under Section 526a against the  
16 individual defendants because they lack statutory authority to spend bond funds. By law, only the  
17 Authority has the power to develop a high-speed rail system. (Pub. Util. Code, § 185032 ["The  
18 authorization and responsibility for planning, construction, and operation of high-speed passenger  
19 train service at speeds exceeding 125 miles per hour in this state is exclusively granted to the  
20 authority"].) Under the HSR Bond Act, only the Authority has the power to commit bond  
21 proceeds to pay for capital costs. (§ 2704.08, subd. (d) ["the *authority* may enter into  
22 commitments to expend bond funds"], emphasis added.) Therefore, the individual defendants,  
23 having no statutory authority to spend bond money, cannot be restrained from any of the conduct  
24 alleged to be waste in violation of Section 526a.

25 **CONCLUSION**

26 For the reasons set forth above, defendants respectfully request that their demurrer to the  
27 first amended complaint be sustained in its entirety without leave to amend.  
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Dated: January 19, 2012

Respectfully Submitted,  
  
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