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EXEMPT FROM FEES PER
GOVERNMENT CODE §6103

8 *Attorneys for Petitioners and Plaintiffs John Tos et al.*

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF SACRAMENTO**

12 JOHN TOS *et al.*,
Petitioners and Plaintiffs
13 vs.
14 STATE OF CALIFORNIA *et al.*,
Respondents and Defendants

No. 34-2016-00204740
Assigned for all purposes to Hon. Richard K.
Sueyoshi, Department 28
PETITIONERS' AND PLAINTIFFS'
NOTICE OF MOTION AND MOTION TO
BIFURCATE FOR EARLY
DETERMINATION OF FIRST CAUSE OF
ACTION; SUPPORTING MEMORANDUM
OF POINTS AND AUTHORITIES

[C.C.P. §§ 598 and 1048(b)]

Date: February 16, 2018
Time: 10:00 AM
Department: 28
Judge: Hon. Richard K. Sueyoshi
Action filed: December 13, 2016
Trial Date: Not Yet Set

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21 To all parties to the above-entitled action and their counsel of record:

22 PLEASE TAKE NOTICE that on February 16, 2018 at 10:00 AM or as soon thereafter as
23 counsel may be heard in Department 28 of the above-entitled court, located at 720 Ninth Street, 4th
24 Floor, Sacramento, California, Petitioners and Plaintiffs John Tos *et al.* will move the Court to bifurcate
25 the above-entitled case pursuant to Code of Civil Procedure §§ 598 and 1048(b) to allow early trial and
26 determination of the First Cause of Action, for declaratory relief to determine the constitutionality and

1 validity of AB 1889 (2016 legislative session), enacting California Streets & Highways Code Section
2 2704.78.

3 This motion is sought on the grounds that early determination of the First Cause of Action will
4 promote the ends of justice and the efficiency and economy of the court because the issues involved in
5 the First Cause of Action are central to the viability of the case and may be determined purely as a matter
6 of law based on facts that are subject to the Court's judicial notice. They therefore need not await
7 preparation of an administrative record or the presentation of evidence on potentially disputed facts.

8 This motion is based on this notice, the attached supporting memorandum of points and
9 authorities, and on the pleadings and papers on file with the Court.

10 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this matter
11 by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the
12 department may be downloaded off the court's website. If the party does not have online access, they
13 may call the dedicated phone number for the department as referenced in the local telephone directory
14 between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the
15 tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the
16 hearing, no hearing will be held.

17 Dated: January 18, 2018

18 Michael J. Brady
19 Stuart M. Flashman

Attorneys for Petitioners and Plaintiffs

20 by: 
21 Stuart M. Flashman

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Petitioners and Plaintiffs John Tos *et al.* (“Petitioners”) move the Court to bifurcate this case to allow an early hearing and determination of the First Cause of Action, for declaratory relief, of their Second Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (“SAP”) to determine the constitutionality and validity of AB 1889, a bill enacted during the 2016 legislative session. Petitioners have alleged that AB 1889 attempts to materially alter the provisions of a general obligation bond Measure, Proposition 1A (“Prop. 1A” or “Measure”), that had been approved by California voters in the 2008 November general election. (SAP ¶¶ 29, 84.)

Prop. 1A provided for the issuance of up to \$9.95 billion of general obligation bonds, of which \$9 billion were intended to assist in the construction of a California high-speed rail system. (SAP ¶ 29.) Petitioners have further alleged that Prop. 1A, as approved by the voters, included numerous provisions included to allay voters’ concern that their money might be wasted on constructing an unusable “stranded asset.” (SAP ¶¶ 30-35.) Petitioners further allege that those provisions were placed in the Measure by the Legislature to induce California voters to approve the Measure. (SAP ¶¶ 32-35.)

At the very end of the 2016 legislative session, the Legislature enacted, and the Governor signed, AB 1889, enacting Streets & Highways Code § 2704.78. (SAP ¶ 62.) Petitioners allege that AB 1889 attempts to materially alter provisions of Prop. 1A, provisions placed in the Measure by the Legislature to induce voters to approve it. (SAP ¶¶ 30-35, 61, 84.) Petitioners allege that in enacting AB 1889, the Legislature violated Article XVI, Section 1 of the California Constitution by failing to place AB 1889 on the ballot to obtain its approval by the voters. (SAP ¶85.) Petitioners allege that, as a consequence, AB 1889 is invalid and void, and cannot be relied upon to justify the commitment or expenditure of Prop. 1A funds. (SAP ¶¶ 85, 96-98.)

Petitioners seek an early determination of the First Cause of Action because Respondent California High-Speed Rail Authority (“Authority”) has already begun to expend Prop. 1A bond funds

1 on construction in reliance on AB 1889, expenditures which, if AB 1889 is invalid, constitute illegal and
2 wasteful expenditure of public funds.

3 While other causes of action in the SAP could also eventually halt those expenditures, those
4 causes of action involve production of an extensive administrative record or the presentation of evidence
5 and a potential bench trial on disputed facts, while determination of the First Cause of Action can be done
6 relatively quickly purely as matter of law based solely on documents and facts subject to judicial notice.
7 Determination of the First Cause of Action will facilitate and speed the determination of the remaining
8 causes of action by narrowing the issues involved.

9 BACKGROUND

10 I. THE HIGH-SPEED RAIL PROJECT AND ITS BOND MEASURE.

11 In 1996, the State of California (“State”) created the Authority and charged it with developing
12 and implementing an intercity high-speed rail service integrated with the State’s existing intercity rail and
13 bus network. (Public Utilities Code § 185030; SAP ¶ 28.) In 2008, the Legislature placed on the ballot a
14 \$9.95 billion general obligation bond act, the “Safe Reliable High-Speed Passenger Train Bond Act of
15 the 21st Century,” denominated on the November ballot as Proposition 1A (“Prop. 1A” or “Measure”) to
16 provide partial funding towards planning and constructing that high-speed rail system. (SAP ¶ 29.)

17 Aware that voters’ might be skeptical of approving such a large outlay of public tax dollars, the
18 Legislature placed in the Measure numerous provisions intended to allay those concerns. (See, SAP ¶¶
19 32-35 [description of included provisions].) They included both procedural requirements to be met before
20 funds could be expended on construction (Streets & Highways Code § 2704.08¹), and substantive
21 requirements for the system to be constructed with the bond funds. (§ 2704.09.) In *Calif. High-Speed*
22 *Rail Auth. v. Sup. Ct.* (“*Cal. HSR Auth.*”) (2014) 228 Cal.App.4th 676, 706, the Court of Appeal referred
23 to those provisions as a “financial straitjacket” intended “to ensure the financial viability of the project.”
24 (See also, SAP ¶¶ 31-33 [Legislature and Governor were concerned about voters’ reluctance to approve
25 the bond measure and included assurances in the measure intended to assuage voter concerns].)

26 ¹ Unless otherwise indicated, all statutory references are to the Streets & Highways Code.

1 Among the requirements included within § 2704.08 were provisions that the basic construction
2 unit for the system would be a “usable segment” containing at least two stations, and that when
3 construction of a usable segment was complete, it would be “suitable and ready for high-speed train
4 operation.” (SAP ¶¶ 34, 35.) In November 2008, the voters approved the Measure, making it part of the
5 State’s statutes. (SAP ¶ 1; Streets & Highways Code, Section 9, Chapter 20, §§ 2704 – 2704.21; see also,
6 generally, *Cal. HSR Auth., supra*, 229 Cal.App.4th at pp. 684-690.)

7 **II. THE AUTHORITY’S PRELIMINARY FUNDING PLAN**

8 In November 2011, the Authority approved a first, “Preliminary” Funding Plan for what it termed
9 its Initial Operating Segment (“IOS”), along with its Draft 2012 Business Plan. (*Cal. HSR Auth., supra*,
10 228 Cal.App.4th at p. 690.) In April 2012, it approved a Final Revised 2012 Business Plan, which
11 defined the IOS as a 300-mile segment extending from Merced through the Central Valley, across the
12 Tehachapi Mountains, and into the San Fernando Valley. (*Id.* at pp. 690-691.) In July 2012, the
13 Legislature, based on the Authority’s Final Revised Business Plan and Preliminary Funding Plan,
14 approved appropriations of Prop. 1A bond funds; for construction of not only an initial 129-mile section
15 of the IOS, but also in the two “bookend” segments of the Phase I, San Francisco – Los Angeles, Project:
16 one at its northern end, along the San Francisco Peninsula between San Francisco and San Jose, and the
17 other at its southern end in Los Angeles County. (*Id.* at pp. 691-692.)

18 While the money had been appropriated, it could not be committed or spent until the Authority
19 had prepared second “Final” Funding Plans, along with independent consultant reports, for the segments
20 involved. (SAP ¶ 33; § 2704.08(d); *see also, Cal. HSR Auth., supra*, 229 Cal.App.4th at pp. 710-711,
21 713.) Perhaps because of the stringent requirements the voters had set for such Funding Plans in Prop.
22 1A, no such plans were prepared between 2012 and 2016.

23 **III. THE LEGISLATURE’S ENACTMENT OF AB 1889.**

24 During the 2016 legislative session, a bill proposed by Assembly Member Mullin, who
25 represents part of the area in the northern “bookend” along the San Francisco Peninsula, was amended to
26

1 address the difficulty in approving a Final Funding Plan. (SAP ¶¶ 55-59.) As enacted, AB 1889²
2 provides that a corridor/usable segment would be considered suitable and ready for high-speed train
3 operation if either, a) upon completion of the project’s construction, high-speed rail trains could operate
4 immediately, or b) they would be able to operate after additional planned investments had been made to
5 corridor/usable segment. (SAP ¶¶ 59-62.)

6 While several of the petitioners herein raised objections to the Legislature and the Governor that
7 the bill was an unconstitutional attempt to unilaterally modify the terms of a voter-approved bond
8 measure, the bill was given final approval and was signed by the Governor. (SAP ¶¶ 61-62.)

9 **IV. THE FINAL FUNDING PLANS AND AB 1889.**

10 On December 13, 2016, the Board considered and gave its approval to two Final Funding Plans.
11 (SAP ¶ 72.) Preparation of these plans had obviously begun prior to their being posted on the Authority’s
12 website on or about December 8, 2016, however the exact time is unknown, other than that it was after
13 AB 1889 had been enacted. (SAP ¶¶ 63, 64.) One Funding Plan (“Peninsula Corridor Funding Plan”)
14 provided \$600 million of Prop. 1A HSR construction funds towards the electrification of a portion of the
15 northern bookend segment (“Peninsula Corridor Segment”). The electrified segment would be used by
16 Caltrain, a local conventional rail commuter line. Eventually, after major future investments and
17 additional construction, it might also be usable by high-speed rail trains. (SAP ¶¶ 44-47, 70.)

18 The second Final Funding Plan (“Central Valley Funding Plan”) provided \$2.4 billion of Prop.
19 1A HSR construction funds towards construction of a “Central Valley Segment.” That segment would
20 only extend approximately 106 miles, between Madera and Shafter. (SAP ¶ 40.) While it would be
21 electrified and would contain two stations (Kings/Tulare and Fresno), it would not be suitable and ready
22 for high-speed train operation, nor would it carry any high-speed train service. (SAP ¶ 67.) Rather, it
23 would serve as a test track for high-speed rail cars if/when they were later purchased.³ (SAP ¶¶ 41-43,

24 _____
25 ² The bill’s codified provisions are contained in § 2704.78.

26 ³ The Final Funding Plan for the Central Valley Segment did not include funds for the purchase of
27 any rolling stock to run on the segment. (SAP ¶ 41.)

1 65-69.) In the meantime, with additional expenditures, it *might* be usable by Amtrak for its conventional
2 rail San Joaquin service. (SAP ¶ 42.)

3 On January 3, 2017, Respondent Jeff Morales, Chief Executive officer of the Authority
4 (“CEO”),⁴ gave final approval to the two Final Finding Plans and transmitted them to Respondent
5 Michael Cohen (“Cohen”), the Director of the California Department of Finance, for his review and
6 approval. (SAP ¶ 72.)

7 Cohen gave his final approval to the Central Valley Funding Plan on March 3, 2017. (SAP ¶ 73.)
8 With that approval, Respondent and Defendant State of California proceeded to sell \$1.25 billion of Prop.
9 1A bonds for use towards construction of the Central Valley Segment. (SAP ¶ 74.) Those funds are
10 currently being expended towards the construction of that segment. (SAP ¶ 75.)

11 **V. THE CURRENT LITIGATION**

12 Petitioners⁵ filed their initial complaint, for declaratory and injunctive relief, on December 13,
13 2016 – the same day that the Authority’s Board of Directors (“Board”) gave its final approval to the two
14 Final Funding Plans. (SAP ¶ 72.) The initial complaint named only the Authority and its Board as
15 defendants.

16 After an initial amendment to address Defendants’ objections, the Authority demurred to the first
17 amended complaint, and the demurrer was granted with leave to amend. On May 25, 2017, Petitioners
18 filed their SAP. The SAP added two causes of action in mandamus – one directed at the Authority and
19 its Board and Chief Executive Officer; the other, at the Director of the Department of Finance. It
20 continued to include causes of action for declaratory relief (C.C.P. § 1060) – naming both the Authority
21 and the State of California (“State”) as defendants – and for injunctive relief (C.C.P. § 526a). In response
22 to Respondents’ counsel’s notification that they intended to demur, Petitioners dismissed the Authority’s
23 Chief Executive Officer and all Board members in their personal capacities. Petitioners also dismissed

24 ⁴ Mr. Morales has since resigned from this position, and has been substituted for as a party by Mr.
25 Thomas Fellenz, the interim CEO.

26 ⁵ The initial complaint included one plaintiff who removed himself from the case prior to the filing
27 of the SAP.

1 the Second Cause of Action, under C.C.P. § 526a, to the extent it claimed Board members were liable for
2 repayment of improperly expended funds.

3 Nevertheless, both the Authority and the State filed demurrers; the former to the claim for
4 injunctive relief and the latter to the claim for declaratory relief. The Authority also filed a motion to
5 strike aimed at the injunctive relief claims. Those motions are currently pending, with a hearing on
6 February 16th in this department. No challenges were raised to the mandamus claims, nor did the
7 Authority challenge the claim for declaratory relief.

8 ARGUMENT

9 I. BIFURCATION SHOULD BE GRANTED TO EXPEDITE THE 10 DETERMINATION OF THE DECLARATORY RELIEF CLAIM .

11 Under Code of Civil Procedure § 1048(b):

12 The court, in furtherance of convenience or to avoid prejudice, or when separate
13 trials will be conducive to expedition and economy, may order a separate trial of
14 any cause of action, including a cause of action asserted in a cross-complaint, or of
15 any separate issue or of any number of causes of action or issues, preserving the
16 right of trial by jury required by the Constitution or a statute of this state or of the
17 United States. (See also, Code of Civil Procedure § 598 [allowing certain issues to
18 be tried before others to promote the economy or efficiency of handling the
19 litigation].)

20 The court has considerable, although not unlimited, discretion in determining whether to order
21 bifurcation.⁶ (*Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (“Alcoa”) (2017) 12
22 Cal.App.5th 252, 353.)

23 Here, three types of issues are before the court. The First Cause of Action, for declaratory relief,
24 focuses on the purely legal issue of whether the enactment of SB 1889 ran afoul of Article XVI Section 1
25 of the California Constitution by essentially enacting a partial repeal of a voter-approved bond measure.
26 (*See, e.g., Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 695.)

27 The Second Cause of Action seeks injunctive relief under Code of Civil Procedure § 526a for
28 illegal or wasteful expenditures of public funds. That cause of action involves both legal allegations,
29

30 ⁶ For example, bifurcation may not prejudice a party’s right to a jury trial. (*Id.*)

1 some of which are premised on the First Cause of Action, and factual allegations, some of which may be
2 disputed by the Defendants/Respondents.

3 The Third and Fourth Causes of Action are both for mandamus; the Third against the Authority
4 for Traditional Mandamus over its approval of two final funding plans, and the Fourth against the
5 Director of Finance for Administrative Mandamus over his accepting those funding plans, thereby
6 allowing the commitment and expenditure of bond funds on construction. Both of these causes of action
7 would be determined based on the Court's review of the respective administrative records, neither of
8 which has yet been prepared.

9 A. BIFURCATION WOULD PROMOTE ECONOMY AND EXPEDITE
10 DETERMINATION OF THE CASE.

11 While the issue of the constitutionality of SB 1889 is central to the First Cause of Action, it is
12 also integrally involved in the other causes of action. If the Court were to find that SB 1889 was
13 constitutional, there would be no basis for finding the expenditure of bond funds was either illegal or
14 wasteful; nor would there be a basis for challenging the Authority's or the Director of Finances approvals
15 for the two Final Funding Plans. Conversely, if the Court found that the enactment of SB 1889 violated
16 Article XVI Section 1 of the California Constitution, it would almost be a foregone conclusion that
17 expenditures necessarily relying on that statute were illegal and might also be wasteful. Similarly, if SB
18 1889 was found unconstitutional, it would remove a foundational legal underpinning for the Authority's
19 and the Director of Finance's approvals of the Final Funding Plans, making it very likely that those
20 actions were improper. In short, determination of the First Cause of Action would greatly narrow the
21 range of issue that the Court would have to address in the remaining causes of action, thereby reducing
22 their complexity and speeding their determination.

23 B. THERE ARE NO STRONG ARGUMENTS TO BE MADE AGAINST
24 BIFURCATION.

25 Unlike *Alcoa, supra*, there are no issues in this cases that might require a jury trial. Thus there is
26 no risk of jeopardizing the rights of Respondents/Defendants. Nor is there any obvious reason that
27 hearing and deciding the declaratory relief action first would prejudice Respondents/Defendants in the

1 determination of the other issues involved. The same issue of constitutionality is present in all of the
2 remaining causes of action, and would have to be determined in any case. (See, SAP ¶¶ 69, 71, 76, 96-
3 100, 110, 113, 120.) Indeed, Petitioners are at a loss to identify any way in which the proposed
4 bifurcation would prejudice Respondents'/Defendants' interests in this litigation, other than by not
5 allowing them to continue to delay a determination and thereby continue to expend bond fund.

6 **CONCLUSION**


7 Code of Civil Procedure § 1048(b), as well as § 598, allow the Court a wide range of discretion to
8 manage the trial of causes of action and issues to the benefit of the Court's expeditious and efficient
9 handling of litigation. The bifurcation proposed in this motion would both speed and simplify the
10 litigation of this case, without prejudicing any party's interests. Petitioners therefore respectfully request
11 that the motion be granted.

12 Dated: January 18, 2018

13 Respectfully submitted,

14 Michael J. Brady
15 Stuart M. Flashman

16 Attorneys for Petitioners and Plaintiffs

17 by: 
18 Stuart M. Flashman

PROOF OF SERVICE BY MAIL AND ELECTRONIC MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above-titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On January 19, 2018, I served the within PETITIONERS' AND PLAINTIFFS' NOTICE OF MOTION AND MOTION TO BIFURCATE FOR EARLY DETERMINATION OF FIRST CAUSE OF ACTION; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES on counsel for the Respondents and Defendants by placing a true copy thereof enclosed in a sealed envelope with first class mail postage thereon fully prepaid and depositing it in a U.S. Post Office mailbox at Oakland, California addressed as follows:

Sharon O'Grady, Deputy Attorney General
Tamar Pachtar, Deputy Attorney General
Office of California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
Sharon.OGrady@doj.ca.gov
Tamar.Pachtar@doj.ca.gov

In addition, on the above-same day, I also served the above-same document, converted into a pdf file, on the above-same parties via electronic service as an e-mail attachment sent to the e-mail addresses shown above from my e-mail account at stu@stuflash.com.

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on January 19, 2018.



Stuart M. Flashman