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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

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

No. 34-2016-00204740
Assigned for all purposes to Hon. Shelleyanne W.L. Chang, Dept. 24

PETITIONERS' AND PLAINTIFFS' OPPOSITION TO RESPONDENT AND DEFENDANT STATE OF CALIFORNIA'S DEMURRER TO SECOND AMENDED PETITION AND COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

CALIFORNIA STATUTES

INTRODUCTION

Respondent and Defendant State of California ("State") has demurred to the First Cause of Action, which seeks declaratory relief under Code of Civil Procedure § 1060, in Petitioners' and Plaintiffs' Second Amended Petition and Complaint ("SAP"). The State claims that it is not a proper party to the cause of action and that the facts stated therein fail to state a cause of action against it. However, as support, the State can only cite dicta and citations taken out of their proper context. In reality, the State is a proper party and the demurrer should be overruled.

BACKGROUND

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

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

Aware that voters' might be skeptical of approving such a large outlay of public tax dollars, the Legislature placed numerous provisions in the Measure to allay those concerns. (See, SAP ¶¶ 32-35 [description of included provisions].) They included both procedural requirements to be met before funds could be expended on construction (Streets & Highways Code § 2704.08[1]), and substantive requirements on the system to be constructed with the bond funds. (§ 2704.09.) In *Calif. High-Speed Rail Auth. v. Sup. Ct. ("Cal. HSR Auth.")* (2014) 228 Cal.App.4th 676, 706, the court of appeal referred to those provisions as a "financial straitjacket" intended "to ensure the financial viability of the project." (*See also,* SAP ¶¶ 31-33 [Legislature and Governor were

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

concerned about voters' reluctance to approve the bond measure and included assurances in the Measure intended to assuage voter concerns].)

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

II. THE AUTHORITY'S PRELIMINARY FUNDING PLAN

In November 2011, the Authority approved a first, "Preliminary" Funding Plan under § 2704.08(c) for what it termed its Initial Operating Segment ("IOS"), along with its Draft 2012 Business Plan. In April 2012, it approved a Final Revised 2012 Business Plan, which defined the IOS as a 300-mile segment extending from Merced through the Central Valley, across the Tehachapi Mountains, and into the San Fernando Valley. (*Cal. HSR Auth., supra*, 229 Cal.App.4th at pp. 690-691.) In July 2012, the Legislature, based on the Authority's Final Revised Business Plan and Preliminary Funding Plan, approved appropriations of Prop. 1A bond funds for construction of not only an initial 129-mile section of the IOS, but also within two "bookend" segments of the Phase I, San Francisco – Los Angeles, Project: one at its northern end, along the San Francisco Peninsula between San Francisco and San Jose, and the other at its southern end in Los Angeles County. (*Id.* at pp. 691-692.)

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

III. THE ENACTMENT OF AB 1889.

During the 2016 legislative session, a bill proposed by Assembly Member Mullin, who represents part of the area in the northern "bookend" along the San Francisco Peninsula, was amended to address the difficulty in approving a Final Funding Plan. (SAP ¶¶ 55-59.) As enacted, AB 1889[2] provides that a corridor/usable segment would be considered suitable and ready for high-speed train operation if either, a) upon completion of the project's construction, high-speed rail trains could operate immediately, or b) they would be able to operate after additional planned investments had been made to corridor/usable segment. (SAP ¶¶ 59-62.)

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

IV. THE FINAL FUNDING PLANS AND AB 1889.

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

The second Final Funding Plan provided $2.4 billion of Prop. 1A HSR construction funds towards construction of a "Central Valley Segment." That segment would only extend approximately 106 miles, between Madera and Shafter. (SAP ¶ 40.) While it would be electrified and would contain two stations (Kings/Tulare and Fresno), it would not be suitable and ready for

[2] The bill's codified provisions are contained in § 2704.78.

high-speed train operation, nor would it carry any high-speed train service. (SAP ¶ 67.) Rather, it would serve as a test track for high-speed rail cars if/when they were later purchased.[3] (SAP ¶¶ 41-43, 65-69.) In the meantime, with additional expenditures, it *might* be usable by Amtrak for its conventional rail San Joaquin service. (SAP ¶ 42.)

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

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

THE CURRENT LITIGATION

Petitioners and Plaintiffs John Tos et al. (hereinafter, "Petitioners)[5] filed their initial complaint, for declaratory and injunctive relief, on December 13, 2016 – the same day that the Authority's Board of Directors ("Board") gave its final approval to the two Final Funding Plans. (SAP ¶ 72.) The initial complaint named only the Authority and its Board as defendants.

The summons and complaint were served on the Authority and its Board by mail with a Notice and Acknowledgement of Receipt ("NAR") mailed on December 16th. The NAR was signed by the Authority's Chief Counsel on January 5, 2017, nineteen days later. Almost a full thirty days after that, counsel for the Authority notified counsel for Petitioners that the Authority

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

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

[5] The initial complaint included one plaintiff who subsequently removed himself from the case prior to the filing of the SAP.

intended to demur, based on the action being unripe. In response, Petitioners filed a First Amended Complaint, naming the same parties and again asserting claims for declaratory and injunctive relief. Counsel for the Authority again indicated it would demur, asserting that the claims were still unripe, and that the Second Cause of Action, for injunctive relief under C.C.P. § 526a, was in reality a challenge to the funding plans that could only be asserted through mandamus. On May 5, 2017, the Court granted the demurrer with leave to amend.

In granting the demurrer to the First Cause of Action based on ripeness, the Court included a dictum on an issue that had neither been asserted nor briefed in the demurrer – that no claim of facial unconstitutionality could be brought against the Authority – only an "as applied" challenge, and that challenge could only be brought through mandamus. In reviewing the court's ruling on the demurrer, Petitioners realized that that the Court's dictum might have been based, at least in part, on the fact that the declaratory relief claim was directed at the Authority and its Board. The Court may have felt that the Authority could only properly be named in an "as applied" challenge, and that such a challenge could only be brought through mandamus. However, Petitioners also realized that the State, which enacted AB 1889 and was involved in several ways in its application, was a proper party-defendant to a facial declaratory relief challenge to that statute's constitutionality and amended accordingly.

On May 25, 2017, Petitioners filed their SAP. It was served on the Authority and its Board, as well as the newly-added Respondent/Defendant State of California, on May 30, 2017. The other respondents/defendants, the Authority's Chief Executive Officer and the Director of the California Department of Finance, were served shortly thereafter. Somewhat later, Petitioners voluntarily dismissed all Board members in their individual capacities (but not in their official capacities).

In response to the Authority's indication that it intended to file yet another demurrer, Petitioners, in the interest of moving the case forward, voluntarily dismissed various claims in the

SAP that the Authority's counsel had indicated it intended to challenge by demurrer.[6] The Authority nonetheless filed a demurrer and Motion to Strike directed at the Second Cause of Action. The State of California demurred to the First Cause of Action, claiming misjoinder. Respondent Fellenz also demurrer for misjoinder. He has subsequently been voluntarily dismissed by Petitioners, rendering his demurrer moot.

STANDARD OF REVIEW

A demurrer tests whether the complaint, or one or more of its causes of action, states facts sufficient to support a cause of action. (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.) The complaint's allegations are given a reasonable interpretation, and all material facts that are properly pled are treated as admitted. (*Id.*)

> If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. '*[W]e are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory.* (*Id.* [emphasis added].)

While a demurrer may be granted for misjoinder, if the complaint alleges facts sufficient to support the party's joinder, the demurrer should be overruled. A party is properly joined to a complaint or cause of action if it has an interest in the claims being litigated – i.e., it may be affected by the outcome of the case. (*See, e.g., McKesson v. Donaghue* (1944) 23 Cal.2d 821, 824.) In particular, a party may be joined as a defendant or respondent if any right to relief is asserted against them. (C.C.P. § 379; *Colusa Air Pollution Control Dist. v. Superior Court* (1991) 226 Cal.App.3d 880, 885-886.)

[6] Authority's counsel has indicated that Respondents dispute the validity of the Court's acceptance of Petitioners' Request for Dismissal.

ARGUMENT

I. THE DEMURRER TO THE FIRST CAUSE OF ACTION SHOULD BE OVERRULED.

The First Cause of Action is a claim for declaratory relief under Code of Civil Procedure § 1060 alleging that AB 1889 is unconstitutional on its face. The State claims it should be dismissed from that cause of action because is not a proper party and "has no responsibility for implementing the Bond Act in general, or for complying with section 2704.08, subdivision (d) funding plan requirements in particular." (Respondent and Defendant State of California's Demurrer and Supporting Memorandum of Points and Authorities ["State Demurrer"] at p. 12:18-19.) The State goes on to argue that, because the State, as an entity, has no responsibility for implementing AB 1889, " …it has no rights or duties that can be declared in this action." (*Id.* at l. 25.) Indeed, the State claims it " …has no legal interest in the constitutionality of its statutes." (*Id.* at l. 24.) Instead, the State asserts that any claim regarding AB 1889's unconstitutionality must be directed at the Authority. (*Id.* at l. 17.) The State, however, is wrong in its assertions. Petitioners have properly pled a claim for declaratory relief against the State, as well as against the Authority. The demurrer must therefore be overruled.

A. PETITIONERS HAVE PROPERLY PLED A CAUSE OF ACTION FOR DECLARATORY RELIEF AGAINST BOTH THE STATE AND THE AUTHORITY.

A claim for declaratory relief may be raised by a person interested in a written instrument, or who desires a declaration of his rights or duties with respect to another, when there is an actual controversy relating to the respective rights and duties of the parties involved, including a determination of any question of construction or validity arising under such instrument. (C.C.P. § 1060.) In such a case, the court may make a binding declaration of such rights or duties, regardless of whether any other relief is or could be claimed. (*Id.*)

A major purpose of an action for declaratory relief is to settle a dispute, such as over the interpretation or application of a statute or policy, and thereby avoid a multitude of suits challenging specific actions. (*Venice Town Council v. City of Los Angeles* (1996) 47 Cal.App.4th

1547, 1566-1567.) While there is overlap between such declaratory relief and a petition for writ of mandate challenging a particular action, the gravamen and reach of a declaratory relief action is different and considerably broader. (*Id.*)

As is obvious from Section 1060, a claim for declaratory relief needs only an actual controversy – i.e., an active dispute between the parties – where the court's interposition can settle the dispute. It need not involve issuance of a writ, an injunction, or "any other relief." Thus, contrary to the State's claim, the State need not "carry out" any relief. This Court's issuance of its declaration, settling the dispute and defining the parties' respective rights and duties, is sufficient. For the State, those duties would include ensuring that its agencies and officers follow the Court's binding declaration.

The State asserts that the SAP's only factual allegations about it are contained in paragraphs 10 and 11.[7] (State Demurrer at pp. 10-11.) The State is wrong. In Paragraph 82, Petitioners assert that Prop. 1A, as approved by the voters, is binding on the State and all its agencies. In paragraph 87, Petitioners allege, based on information and belief, that the State asserts that AB 1889 and § 2704.78[8] are valid legislative enactments, and hence can be relied upon by its agencies and officers. Further, it is clear from the allegations in the SAP that the California Director of Finance, the Authority, the Legislature (and specifically its Joint Legislative Budget Committee) and the Governor all share that position. (See, SAP ¶¶ 62, 71, 72, 73, 74, 86, 89, 94.) The SAP also asserts that Petitioners believe, by contrast, that AB 1889 and § 2704.78 are unconstitutional and therefore may not be relied upon. (SAP ¶¶ 84, 85, 88.) These allegations adequately allege an actual controversy between Petitioners, on the one hand, and the State, the Authority, and various other components of the State on the other. Based on the allegations of the complaint, there is a sufficient basis for the Court to issue a binding declaratory judgment on the

[7] In fact, in the SAP, the allegations it quotes are in paragraphs 18 and 19.

[8] In the SAP, a typographical error identifies it at that point at § 27045.78.

issue presented, the facial validity of AB 1889 and § 2704.78 and the rights and duties that ensue from that determination.

B. THE STATE HAS A SUFFICIENT INTEREST IN THE CONSTITUTIONALITY OF AB 1889 AND § 2704.78 TO BE NAMED AS A DEFENDANT.

The State argues that it has no interest in the controversy involved here. "The State itself has no legal interest in the constitutionality of its statutes, …" (State Demurrer, p. 12:24.) The State cites to *Serrano v. Priest* (1976) 18 Cal.3d 728, 752 and *State v. Superior Court* (1974) 12 Cal.3d 237, 255 as support. The citation to *Serrano* is a dictum taken out of context, and *State v. Superior Court* is easily distinguished.

In *Serrano*, the State had not been named as a party. (*Id.* at p. 735 fn. 2, 3.) The trial court had specifically denied a request by the defendants that the Governor and the Legislature be joined as indispensible parties. (*Id*.) On appeal, the defendants argued that the failure to join the Governor and Legislature as indispensible parties rendered the court's judgment defective. (*Id.* at pp. 750-751.) The Supreme Court rejected that argument, finding that neither party was indispensible, as the State's interests were adequately represented by the named defendants. (*Id.* at p. 752.) In passing, the court commented, in a dictum, that the State might not even have a sufficient interest to be named at all. (*Id.*) However, the court went on to say that while the Governor and Legislature, the only parties whose joinder was at issue, might be considered capable of being parties, they were certainly not indispensible parties. (*Id.* at pp. 752-753; *see also*, *American Indian Model Schools v. Oakland Unified School District* (2014) 227 Cal.App.4th 258, 297 [discussion of cases where the State was a party].)

The other case directly cited by the State, *State v. Superior Court* (1974) 12 Cal.3d 237, 255, is no more helpful to the State's position. In that case, which turned on the application of the Coastal Zone Conservation Act to a particular property and the Coastal Commission's rejection of an application for a development permit, the State had been named as a party, but "the petition contains no allegations establishing any right to declaratory relief against the state (as distinguished from the Commission acting as its agent) … ." (*Id.* at p. 255.) Here, by contrast, the

SAP, in Paragraphs 87 and 88, lays out an actual controversy between Petitioners and the State over the validity of AB 1889 and § 2704.78. That controversy, which continues to be active, is a sufficient basis for the Court to entertain an action for declaratory relief.

As for the State's assertion that it has no legal interest in the validity of its laws, in *Perry v. Brown* (2011) 52 Cal.4th 1116, the California Supreme Court, commenting on the divergent position state officials sometimes take over the interpretation of statutes, stated in no uncertain terms that:

> … each government defendant could accurately be described as asserting *the state's interest in the validity and proper application and interpretation of a duly enacted state law*. *(Id.* at p. 1155 [emphasis added].)

So likewise here, the State, as well as agencies such as the Authority and officials such as the Director of Finance, has an interest in the validity and proper application and interpretation of a duly enacted state law. Indeed, there are a host of cases where the State of California has been duly named as a defendant in a declaratory relief action concerning the validity/constitutionality of a statute. Recent examples include: *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327 [facial challenge to statute requiring public school teacher to pay half the cost in less than fully successful challenge to disciplinary action]; *City of Cerritos et al. v. State of California* (2015) 239 Cal.App.4th 1020 [facial challenge to constitutionality of statutes dissolving redevelopment agencies]; *Law Schools Admissions Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265 [challenge to constitutionality of statute involving law school admissions procedures]; *U.D. Registry v. State of California* (2008) 144 Cal.App.4th 405 [facial and as-applied challenge to constitutionality of state credit reporting law]; *City & County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030 [facial challenge to constitutionality of state initiative]; *see also, Chilton v. Contra Costa Community College Dist.* (1976) 798, 809 [attempt to litigate constitutionality of loyalty oath statute fails for failure to name the State of California as a defendant]; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 809 [State not indispensible party when action is not a challenge to the statute underlying the action]. Given the

purpose of declaratory relief in avoiding the necessity of a multitude of suits, it is often appropriate to name as defendant the party that will be most widely affected by the Court's declaration. As is often the case, here that party is the State.

CONCLUSION

Certainly, the Authority has an interest in arguing the facial validity of AB 1889 and § 2704.78. Petitioners have no problem in including it as a defendant in the First Cause of Action. However, the State also has an interest. Indeed, its interest is considerably broader than the Authority's, as it involves not only the Authority but also the Director of the California Department of Finance and the Joint Legislative Budget Committee, which must review the Final Funding Plans to which AB 1889 would apply. Indeed, it even arguably involves the California State Treasurer, who would issue the Prop. 1A bonds for sale under the assumption that the bond proceeds would be available for commitment and use in construction. For all the above reasons, the State's demurrer should be overruled and it should be ordered to answer the SAP.

Dated: July 26, 2017

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