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LEGAL PROCESS #6

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8 JOHN TOS, AARON FUKUDA,
8 AND COUNTY OF KINGS
9

10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **IN AND FOR THE COUNTY OF SACRAMENTO**

12 JOHN TOS, AARON FUKUDA, and COUNTY
13 OF KINGS,
13 Plaintiffs
14 v.
14 CALIFORNIA HIGH SPEED RAIL Authority *et*
15 *al.*,
15 Defendants

No. 34-2011-00113919 filed 11/14/2011
Judge Assigned for All Purposes:
HONORABLE MICHAEL P. KENNY
Department: 31 (to be handled as writ)
PLAINTIFFS' RESPONSE TO
DEFENDANTS' OBJECTIONS TO
ARGUMENT AND EVIDENCE

Date: November 8, 2013
Time: 9:00 AM
Dept. 31
Judge: Hon. Michael P. Kenny

BY FAX

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20 Plaintiffs John Tos, Aaron Fukuda, and County of Kings ("Plaintiffs") hereby respond to
21 Defendants/Respondents' Objections to Argument and Evidence Filed in Conjunction with
22 Plaintiffs/Petitioners' Reply Brief on the Remedies Issues ("Defendants' Objections")¹.

23 As already explained in Plaintiffs' Objections and Opposition to Defendants' Special
24 Application to Strike, Plaintiffs' Reply Brief on Remedies ("Plaintiffs' Reply") did not raise any
25 new issues not already addressed in Plaintiffs' Opening Brief on Remedies. Rather, Plaintiffs'

26 ¹ Defendants' Objections are merely a slightly rewritten and reorganized version of Defendants'
27 previously submitted Special Application to Strike. Plaintiffs' response is likewise adapted from
28 their opposition to that application.

1 Reply properly addressed and refuted the points raised in Defendants/Respondents'
2 Memorandum of Points and Authorities in Opposition to Plaintiffs/Petitioners' Request for
3 Remedies ("Defendants' Opposition"). Contrary to Defendants' objections, these were not new
4 points first raised in the reply brief. (*See, e.g., Balboa Ins. Co. v. Aguire* (1983) 1249
5 Cal.App.3d 1002, 1010.) Rather, they were, "merely elaboration of issues raised" in Plaintiffs'
6 opening brief or rebuttals to Defendants' opposition brief. (*See, Reichardt v. Hoffman* (1997) 52
7 Cal.App.4th 754 764 [contrasting genuinely new points raised in a reply with permissible
8 elaboration or rebuttal arguments].) It is obviously entirely permissible for a reply brief to
9 respond to arguments raised in the opposition brief. Otherwise, what would be the point of
10 having a reply brief? If Defendants have more to say on the arguments made in Plaintiffs' reply
11 brief, they are welcome to express it at the hearing. Again, that is an entirely normal procedure.
12 Further, Defendants' citations are to appellate cases. In such cases, the issues to be addressed in
13 the appeal were presumably raised and addressed in the trial court. What Defendants' cited
14 cases find objectionable is to raise new issues for the first time in the appellate reply brief. (*See,*
Neighbours v. Buzz Oates Enterprises (1990) 217 Cal.App.3d 325, 335, fn. 8 [quoted in
Reichardt, supra, 52 Cal.App.4th at 764].)

15 Plaintiffs have also already addressed Defendants' complaint that Plaintiffs are unfairly
16 introducing new evidence with their reply brief. *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th
17 349, 362, cited by Defendants, was a motion for summary judgment under Code of Civil
18 Procedure §437. A motion for summary judgment asserts that the case can be decided based
19 purely on undisputed facts. (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 722.)
20 Part of the opposing party's explicit burden is to show that the facts presented along with the
21 moving party's opening brief are subject to dispute. (*Id.*) Adding new facts in the reply brief
22 gives the opposing party no opportunity to dispute them and disrupts the entire summary
23 judgment framework. The situation here is quite different.

24 The only new evidence presented accompanying Plaintiffs' Reply is evidence to rebut the
25 evidence presented by Defendants. Nevertheless, in the interest of fairness, Plaintiffs are still
26 willing to allow Defendants to submit a short (5 pages or less) sur-reply brief limited to the
27 specific topic of the evidence first submitted by Plaintiffs in the declarations accompanying
28 Plaintiffs' Reply. Plaintiffs would only ask that it either be submitted prior to Friday's hearing,

1 so that Plaintiffs can respond at the hearing, or that Plaintiffs be allowed to file a short post-
2 hearing response.

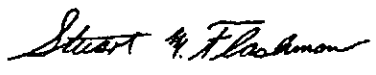
3 **RESPONSES TO OBJECTIONS TO SUFFICIENCY OF EVIDENCE**

4 Material Objected To	Response to Objection
5 Warren Decl., ¶¶ 5-10 and Exh. A-G	6 The contracts in question are highly complex and 7 technical documents well beyond the scope of 8 common experience to a trier of fact. The expert 9 opinions provided would be helpful to the trier of 10 fact in deciphering what the contract is saying. The 11 opinions provided elucidate the content of the 12 contract. They do <u>not</u> attempt to interpret contract 13 terms that might be found ambiguous.
14 Warren Decl., ¶11 and Exh. A-D	15 The expert opinion provided synthesizes information 16 contained in the contracts with that contained in the 17 FRA grant agreement and its attachments. It is not 18 an interpretation of contract provisions, but the type 19 of analysis of financial data commonly done by an 20 expert in financial matters such as Mr. Warren.
21 Warren Decl., ¶12 and Exh. B-C & 22 E-F	23 The expert opinion does not interpret contractual 24 provisions, but merely synthesizes information 25 contained in the various agreements referenced, all 26 of which are official documents obtained from 27 Respondent.
28 Warren Decl., Exh. G	29 This document, while no longer entirely in effect, is 30 relevant in that it demonstrates the intent of U.S. Department of Transportation, the grantor of both the ARRA and the FY 2010 grant (and the continuing intent for the FY 2010 grant) that all grant funds be fully matched by contemporaneous expenditure of state funds. The only available state funds at this point are the Proposition 1A bond funds.
Wespi Decl., ¶5 and Exh. B	Defendants' objections are unsupported by any competent evidence. The factual statements made in the objections are inadmissible hearsay.
Wespi Decl., ¶6 and Exh. C	Defendants' objections are inaccurate and invalid. Ms. Wespi's statements are supported by the evidence of admissions contained in Respondent's staff report of September 10, 2013. While the amounts of bond funds committed to the two contracts are only estimates, one presumes they are approximately correct, and the authorization of Respondent to enter into the two contracts supports

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	the reasonable inference that the contract, if not already executed, will be executed shortly. There is no competent evidence to support the assertion that the two contracts will be paid solely out of federal funds.
Flashman Decl., ¶¶ 1-5.	The statement of Senator Leno, made during Senate debate of AB 1029, indicates the intent of the legislature that the two appropriations, one of federal funds and one of Proposition 1A bond funds, made for the FY 2012-2013, were intended to be used to provide matching state and federal contributions towards the construction of the Central Valley High-Speed Rail Project.

Dated: November 5, 2013

Respectfully submitted,
Michael P. Brady
Stuart M. Flashman
Attorneys for Plaintiffs John Tos,
Aaron Fukuda, and County of Kings
By: 
Stuart M. Flashman

PROOF OF SERVICE BY MAIL, FACSIMILE, 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 November 5, 2013, I served the within PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO ARGUMENT AND EVIDENCE on the parties listed below by placing a true copies thereof enclosed in sealed envelopes with first class mail postage thereon fully prepaid, in a U.S. mailbox at Oakland, California addressed as follows:

Michele Inan, Deputy Attorney General
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In addition, on the above-same day, I also sent electronic copies of the above-same documents, converted to "pdf" format, as e-mail attachments, to the above-same parties at the e-mail addresses shown above, as well as delivering them by facsimile to the fax numbers shown above.

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 November 5, 2013.



Stuart M. Flashman