MICHAEL J. BRADY (SBN 40693)
1001 MARSHALL STREET, STE. 500
Redwood City, CA 94063-2052
Telephone (650) 364-8200
Facsimile: (650) 780-1701
Email: mbrady@rmkb.com

LAW OFFICES OF STUART M. FLASHMAN
STUART M. FLASHMAN (SBN 148396)
5626 Ocean View Drive
Oakland, CA 94618-1533
TEL/FAX (510) 652-5373
Email: stu@stuflash.com

EXEMPT FROM FEES PER GOVERNMENT CODE §6103

Attorneys for Plaintiffs John Tos, Quentin Kopp, Town of Atherton, County of Kings, Morris Brown, Patricia Louise Hogan-Giorni, Anthony Wynne, Community Coalition on High-Speed Rail, Transportation Solutions Defense and Education Fund, and California Rail Foundation

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

JOHN TOS, QUENTIN KOPP, TOWN OF ATHERTON, a municipal corporation, COUNTY OF KINGS, a subdivision of the State of California, MORRIS BROWN, PATRICIA LOUISE HOGAN-GIORNI, ANTHONY WYNNE, COMMUNITY COALITION ON HIGH-SPEED RAIL, a California nonprofit corporation, TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND, a California nonprofit corporation, and CALIFORNIA RAIL FOUNDATION, a California nonprofit corporation,

Plaintiffs

vs.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, a public entity, BOARD OF DIRECTORS OF THE CALIFORNIA HIGH-SPEED RAIL AUTHORITY, and DOES 1-20 inclusive,

Defendants

No. 34-2016-00204740

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date:	April 19, 2017
Time:	11:00 AM (specially set)
Department:	54
Action filed:	December 13, 2016
Trial Date:	Not Yet Set

INTRODUCTION

Defendants California High-Speed Rail Authority ("CHSRA") and California High-Speed Rail Authority Board of Directors ("Board" and the foregoing, collectively, "Defendants") ask the Court to deny the motion for preliminary injunction and allow them to continue moving forward on expending Proposition 1A ("Prop. 1A") bond funds towards the construction of their Central Valley Segment. This in spite of the evidence before the Court that the expenditures would be in violation of Article XVI Section 1 of the California Constitution and would substantially deplete the limited supply of bond funds approved by the voters for construction of a Prop. 1A-compliant high-speed rail system.

Defendants argue that Plaintiffs have not shown that: 1) this will result in any irreparable harm to the Plaintiffs; 2) Plaintiffs are likely to prevail on the merits of their suit; and 3) the balance of harms favors the Plaintiffs. Defendants also demand that, if the Court grants an injunction, it require Plaintiffs to post a prohibitively expensive bond before the injunction issues, thus effectively making the relief unavailable.

Despite Defendants' labored efforts, the fact remains that the expenditures will be illegal. They will also cause irreparable harm to the Plaintiffs, and indeed to all Californians, by wastefully frittering away a limited and valuable public financial resource. Further, while it may be true that the expenditure, though illegal and wasteful, would temporarily create construction jobs, a similar number of jobs would be created by using the funds productively, as the voters intended, and Defendants' warnings of dire financial consequences from temporarily blocking the bond funds' use are nothing more than scare tactics intended to bully the Court into allowing Defendants to continue their illegal spending as long as possible. Finally, Defendants' demand for a bond ignores the fact that two of the plaintiffs are public entities and as such are statutorily exempt from any bond requirement.

ARGUMENT

I. DEFENDANTS HAVE NOT OVERCOME PLAINTIFFS' EVIDENCE OF IRREPARABLE HARM UNLESS THE INJUNCTION IS GRANTED.

Plaintiffs have already argued that Defendants' use of the bond funds, even on an interim basis, will cause irreparable harm because it will deplete a limited fund of public money available to assist in building a high-speed rail system *that complies with the bond measure*. While Plaintiffs would like to bring this litigation to a swift conclusion one way or the other, in the absence of a preliminary injunction it would be in Defendants' interest to draw out the litigation for as long as possible, in the meantime continuing to draw down the balance of Prop. 1A funds. As page 4 of Exhibit B to the Declaration of William Warren (labeled as 20 of 56) shows, beginning in July 2017 construction spending is projected to roughly double: from $60-80 million per month to $130-150 million per month. At that rate, the $7 billion of remaining bond funds would quickly begin to drain.

Defendants argue that an illegal expenditure is not, *per se*, sufficient to justify a preliminary injunction. They are, in general terms, correct. In most cases where lawsuits are filed under Section 526a, it is the activity being funded that is the object of the suit. (*See, e.g., Blair v. Pitchess* (1971) 5 Cal.3d 258 [action challenging use of sheriff to take disputed property, by force if necessary]; *Cohen v. Bd. of Supervisors* (1986) 178 Cal.App.3d 447 [seeking to block expenditures to enforce a permit for operating an "escort service"]; *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739 [seeking to block expenditures to enforce statute violating constitutional provision]; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069 [seeking to block enforcement of ordinance violating constitutional provisions]; *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 [seeking to block expenditures to collect taxes approved in violation of constitutional provision].) In none of these cases was the harm in the expenditure of funds itself, but in what the funds were being expended for. The actual expenditures were negligible in terms of harm to the public fisc.

Here, by contrast, the expenditure of funds *is* the harm sought to be prevented. (*See, e.g.*, *Heckmann v. Ahmanson* (1995) 168 Cal.App.3d 119, 136 [injunction necessary to prevent dissipation of fund].) While the expenditure of a small amount of funds out of the state treasury, or even a city's treasury, cannot be called a significant harm to taxpayers, the expenditure of many hundreds of millions of dollars out of a limited fund of taxpayer money would be significant; especially where the depletion of that fund runs counter to the purpose for which the funds were authorized – constructing a usable segment of high-speed rail. (See, First Amended Complaint ("FAC") ¶ 14 [alleging that Defendants will have misused, and wasted, the Prop. 1A funds]; see also, Exhibit C to Plaintiffs' Request for Judicial Notice in Opposition to Demurrer and Motion to Strike ("Plaintiffs' RJN Opposing Demurrer") [Governor's budget message emphasizing need to amend bond measure to ensure construction was not begun until sufficient funding had been secured "to provide service on that portion of the system ..."].)

Defendants also argue that the Prop. 1A funds will not be depleted, because the Central Valley Segment will be "a core component of the high-speed rail." (Def. P&A at p. 16:8-9 [quoting from the Central Valley Segment Funding Plan].) Yet a key requirement of Prop. 1A is that it be built in "usable segments," each of which would be "suitable and ready for high-speed train operation." Clearly, the voters' intent was that the system be built out of segments that could be fully funded and run successfully, independent of the construction of other segments. The segment Defendants propose to build after the Central Valley Segment, which supposedly would complete an operable high-speed rail segment, would cost far more than the Central Valley Segment, but is not funded. Defendants' plans would create exactly the kind of financially unviable project that the court acknowledged in *California High-Speed Rail Auth. v. Sup. Ct. ("Cal. HSR Auth.")* (2014) 228 Cal.App.4th 676 that Prop. 1A was specifically designed to avoid. (*Id.* at p. 706.)

Given the large amount of funds involved and the importance of the project as the voters approved it, the harm to the Plaintiffs herein cannot be considered insignificant, especially when

one of those plaintiffs, Kings County, is a county across which Defendants' proposed construction will proceed, and which will be damaged by that construction (see, FAC ¶ 7), while a project that resulted in a working, service-providing high-speed rail segment could, instead, provide benefit to the County.[1]

II. DEFENDANTS' LEGAL JUSTIFICATION FOR THEIR EXPENDITURES ARE UNPERSUASIVE.

Defendants make three arguments to justify their expenditure of Prop. 1A funds on a "usable segment" that will, at construction's end, not be suitable and ready for high-speed train operation. All three justifications fail.

A. "CONDITIONS AND CRITERIA" MAY NOT BE USED TO NEGATE PROMISES MADE TO THE VOTERS IN PROP. 1A.

Defendants first legal excuse hangs on a minor provision of Streets & Highways Code Section 2704.06, which allows the Legislature to impose "conditions and criteria" on an appropriation of bond funds. From this, they argue that the Legislature could use a new statute, enacted separately from and long after the appropriation, to modify the bond measure's conditions on that, and other future appropriations.[2]

There would be nothing inappropriate in adding conditions and criteria to an appropriation of bond funds. In fact, the Legislature did just that in adopting SB 1029 in 2012. Those provisions are quoted at length in *Cal. HSR Auth., supra,* 228 Cal.App.4th at p. 711. They require, among other things, that CHSRA prepare a Final Funding Plan before it encumbered any Prop. 1A funds towards construction on any "bookends" project. (*Id.*) However, such conditions and criteria were in addition to, not in derogation of, the voter-approved provisions of Prop. 1A. Unlike some other

[1] Plaintiff Town of Atherton would likewise be damaged by Defendants' illegal use of Prop. 1A funds, as the high-speed rail line is proposed to run through the center of that town, and Prop. 1A funds would be needed to prevent or mitigate damaging impacts from that construction.

[2] While the preliminary uncodified Section 1 of AB 1889 references SB 1029, the appropriation statute funding the two funding plans primarily at issue in this case, Section 2, the codified portion of the bill, does not limit its effect to the appropriation in SB 1029, but applies to any Funding Plan prepared pursuant to Section 2704.08(d).

bond measures, such as Prop. 116, Prop. 1A did not include a provision allowing the Legislature to modify the act in the future. (See, *Shaw v. People Ex Rel. Chiang* (3rd Dist., 2009) 175 Cal.App.4th 577, 589 [Legislature allowed, by 2/3 recorded roll call vote of both houses, to amend section, so long as amendment is consistent with and furthers section's purposes].)

There is an enormous difference between adding conditions and criteria to a specific appropriation and modifying a voter-approved requirement needed for a project to be eligible for use of bond funds in its construction. AB 1889 falls on the wrong side of that division.

B. AB 1889 WAS NOT A MINOR INSUBSTANTIAL CHANGE TO THE BOND MEASURE.

Defendants also point to *Cal. HSR Auth., supra*, for the proposition that, especially for a large project, minor modifications to a project are allowable, so long as the basic project remains what the voters approved. This question was addressed directly by the California Supreme Court in *O'Farrell v. Sonoma County* (1922) 189 Cal. 343, 347-348:

> When the defendant board was contemplating a bond issue on the 16th day of April, 1919, it had a statutory right to make its order just as broad, and just as narrow, and just as specific as it was willing to be bound by, so long as the provisions of the statute were complied with. … … but nothing to the contrary appearing, the electors had the right to assume that after the election the board of supervisors would call for bids for the construction of a road four miles in length … …The order calling the election and the ratification of that order by the electors constituted a contract between the state and the individuals whose property was thereby affected. (*Peery v. City of Los Angeles* (1922) 187 Cal. 753) After the contract had been made, it could not be altered by one of the parties, only, but by all of the parties thereto.

O'Farrell, and other cases following it, crystalized the principle that a bond measure may be as flexible or as stringent as its authors make it, but, like a traditional contract, its provisions cannot be unilaterally and substantially changed after the voters' approval.

Defendants argue that this contract theory of bond approval has been "eroded" by subsequent case law. (Def. P&A at p. 14:23-25.) To the contrary, *Cal. HSR Auth*. *supra,* 228 Cal.App.4th at p. 701 specifically acknowledges the continued vitality of *O'Farrell*, whether by a theory of contract or a status analogous to such a relation. The court in *Cal. HSR Auth.* noted that in many cases, a bond act left the definition of uses general, allowing flexibility. (*Id.* at p. 703.) Taking into account the early state of the project at that point (April of 2012), the court went on to

note that, "We cannot and should not decide whether any future use of bond funds will stray too far from the express language used in Proposition 1A to describe the purpose and parameters of the Bond Act." (*Id.*)

Now, however, it is 2017, five years later, and Defendants have issued two Final Funding Plans describing in some detail what they propose to build. At this point, it is very appropriate to measure those plans against the requirements approved by the voters; and not against unilateral modifications made long after the voters' ratification of the measure.

Defendants claim that the changes made by AB 1889 were insubstantial, because they still provided for construction of a high-speed rail system. (Def. P&As at p. 14: 19-20.) Yet the provision being changed was substantial enough to appear not once, but twice in Section 2704.08 – once in subsection (c) and again in subsection (d). Further, it was highlighted in the Governor's 2008 budget message, which called out the need to modify the bond measure before placing it on the ballot to require that before construction began, the measure needed to require that all funds needed to provide service on the portion being constructed had been secured. (Plaintiffs RJN Opposing Demurrer, Exhibit C.) That budget message, unlike AB 1889 or the Legislative Counsel's 2012 opinion, was an important part of the legislative history of Prop. 1A, and, unlike later *post hoc* statements, deserves careful scrutiny in interpreting possible ambiguity. (*Reyna v. McMahon* (1986) 180 Cal.App.3d 220, 225 [Governor's budget message part of bill's legislative history]; *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922 [legislative counsel opinion provided after bill's passage "is only as persuasive as its reasoning."].)

C. WITHOUT AB 1889, THE CENTRAL VALLEY PROJECT CANNOT BE FOUND "SUITABLE AND READY FOR HIGH-SPEED TRAIN OPERATION.

Finally, Defendants argue that even without AB 1889, their Central Valley Segment complies with the requirements of Prop. 1A, and specifically with the requirement that if the usable segment was completed as proposed in the Funding Plan, it would be "suitable and ready for high-speed train operation." They claim that their Central Valley Segment would qualify because it could be used as a "test track" for high-speed rail vehicles. (Def. P&A at p. 17.)

A test track is a far cry from an operable high-speed rail segment.[3] (See, Exhibit C to Flashman Declaration at p. 32 [Central Valley Segment would need additional investments to begin high-speed rail operations].) While it is true that with less extensive further investments, the Central Valley Segment might be used by Amtrak's conventional rail San Joaquin service, that is also nothing close to high-speed train operation. Especially when one considers that the amendments to the bond measure made in AB 3034 were intended to assure that any portion of the high-speed rail system cleared for construction would, when the construction was finished, be able to "provide service," the inadequacy of the Central Valley Segment is indisputable.

IV. THE BALANCE OF HARMS, AND THE PUBLIC INTEREST, FAVOR THE PLAINTIFFS.

It must be kept in mind that the purpose of a preliminary injunction is not to decide the case, but merely to temporarily preserve the status quo until a final determination is made upon the merits. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21.) Assuming Defendants allow the case to move forward expeditiously, an injunction might only remain in effect for two or three months before a hearing on the merits would decide the case.

According to Exhibit B, page 3 to the Declaration of William Warren, construction expenditures from April through June 2017 would total $228,330,000, while total remaining available cap & trade funds for construction, as of January 31, 2017, totaled $548,798,895. Thus it would appear that there would be no need to halt or even slow down construction during FY2016-2017 even if the preliminary injunction were granted, because cap & trade funds could cover the full construction costs over that period. Further, if the case were decided in favor of Defendants,

[3] Defendants' own Funding Plan is forced to acknowledge that the segment would not even be truly suitable and ready for use as a test track, as the Funding Plan provided no funds for any high-speed rail vehicles to use in testing. (Plaintiffs' RJN in Support of TRO and Preliminary Injunction, Exhibit C at p. 4.)

none of Defendants' dire prophesies about the federal government demanding repayment of already-expended federal grant funds would come to pass.[4]

By contrast, if the injunction is denied, CHSRA would spend over $200 million in state funds on construction over the next three months. If cap & trade fund spending stays steady at roughly $40 million per month, Defendants would spend $80 million in bond funds over that same period.

As explained earlier (see Section I, supra), construction expenditures jump considerably with the start of FY2017-2018. Thus, in the absence of a preliminary injunction, expenditures in July double, rising from $60-80 million per month to $130-150 million per month. At that accelerated "burn rate," Defendants will have spent approximately $1 billion of state funds from April through December 2017, with the vast majority coming from Prop. 1A. Without an injunction, Defendants would have no incentive to expedite hearing the case on its merits. Instead, as with *Tos et al. v. CHSRA et al ("Tos I")* (Sacramento County Superior Court case no. 34-2011-00113919), the case would likely drag on, depleting the bond funds until there was nothing left to fight over.[5]

V. BECAUSE THE PLAINTIFFS INCLUDE TWO PUBLIC AGENCIES, NO BOND CAN BE REQUIRED.

Defendants argue vigorously that if the Court decides that an injunction is merited, Plaintiffs must be required to put up a multi-million dollar bond. (Def. P&As at p. 20.) However, Defendants overlook that two of the plaintiffs herein are public entities – the Town of Atherton and Kings County. Under Code of Civil Procedure Section 995.220, a variety of public entities,

[4] Even if the Court were to conclude that Prop 1A funds could not be expended on the Central Valley Project, nothing (other than politics) would prevent the Legislature from appropriating other funds to replace them. Additionally, there is no requirement under the Federal Railroad Administration ("FRA") grants to Defendants that unmatched FRA grant funds be repaid. Thus Defendants' predictions are no more than speculation about possible worst-case future FRA actions.

[5] That case, filed in November 2011, did not reach final judgment until March 2016. (Exhibit 3 to Declaration of Sharon O'Grady)

specifically including counties and cities, "are not required to give the bond and shall have the same rights, remedies, and benefits as if the bond were given." (*See also, City of South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 Cal.App.4th 916.) Since all of the plaintiffs herein have joined in the motion for preliminary injunction, and Kings County and Town of Atherton have a more than adequate basis to seek preservation of the remaining Prop. 1A bond funds available for high-speed rail construction, the injunction may issue in their names at least without a bond requirement.

CONCLUSION

Defendants dearly want to continue moving forward with spending Prop. 1A bond funds on their Central Valley Segment. With their main source of federal funds almost fully expended, they hope to use Prop. 1A funds to continue the illusion of progress, even if producing a viable high-speed rail project is totally beyond reach. But an illusion is not what the voters expected when the approved Prop. 1A. They expected construction of a functioning high-speed rail line, which is not what Defendants are now building. Defendants should not be allowed to continue frittering away this large pot of public funds in defiance of the voters' intent. The motion of a preliminary injunction should therefore be granted.

Dated: April 12, 2017

Respectfully submitted,

Michael J Brady

Stuart M. Flashman

Attorneys for Plaintiffs

by: Stuart M. Flashman

Stuart M. Flashman

PROOF OF SERVICE BY OVERNIGHT 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 April 12, 2017, I served the within PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; PLAINTIFFS' OBJECTIONS TO DECLARATION OF SHARON L. O'GRADY; and [proposed] ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION on counsel for the Defendants by placing true copies thereof enclosed in a sealed envelope with priority mail one day postage thereon fully prepaid and submitting them to a U.S. Post Office station at Oakland, California for delivery at the address shown below:

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

In addition, on the above-same day, I also served the above-same documents, converted into pdf files, on the above-same party via electronic service as e-mail attachments sent to the e-mail address shown above. I received no e-mail response indicating that the e-mail had not been properly received.

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 April 12, 2017.

Stuart M. Flashman