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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SACRAMENTO

10 **JOHN TOS; QUENTIN KOPP; TOWN OF**
11 **ATHERTON, a municipal corporation;**
12 **COUNTY OF KINGS, a subdivision of the**
13 **State of California; PATRICIA LOUISE**
14 **HOGAN-GIORNI; ANTHONY WYNNE,**
15 **COMMUNITY COALITION OF HIGH-**
16 **SPEED RAIL, a California nonprofit**
17 **corporation; TRANSPORTATION**
18 **SOLUTIONS DEFENSE AND**
19 **EDUCATION FUND, a California**
20 **nonprofit corporation; and CALIFORNIA**
21 **RAIL FOUNDATION, a California**
22 **nonprofit corporation,**

23 Petitioners and Plaintiffs,

24 v.

25 **THE STATE OF CALIFORNIA,**
26 **CALIFORNIA HIGH SPEED RAIL**
27 **AUTHORITY, a public entity, BOARD OF**
28 **DIRECTORS OF THE CALIFORNIA**
HIGH-SPEED RAIL AUTHORITY in their
individual and official capacities, JEFF
MORALES, in his official capacity as Chief
Executive Officer of the California High-
Speed Rail Authority, MICHAEL COHEN,
in his official capacity as Director of the
Department of Finance of the State of
California, and DOES 2-20 inclusive,

Respondents and Defendants.

Case No. 34-2016-00204740

**REPLY IN FURTHER SUPPORT OF
RESPONDENT AND DEFENDANT
CALIFORNIA HIGH-SPEED RAIL
AUTHORITY'S MOTION TO STRIKE**

Date: December 8, 2017
Time: 9:00 a.m.
Dept: 31
Judge: Hon. Michael P. Kenny
Trial Date: None set
Action Filed: December 13, 2016

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INTRODUCTION

If the Court reaches this alternative motion to strike it should grant it, because plaintiffs are not entitled to injunctive relief.

ARGUMENT

I. THE ALTERNATIVE MOTION TO STRIKE IS PROCEDURALLY PROPER.

Plaintiffs argue that the Authority’s motion to strike is improper because it seeks to strike “matter that is essential to a cause of action,” which must be challenged by demurrer, which the Authority has done. (Opposition at p. 4.) They fail to acknowledge that this motion is made in the alternative. The Court need not reach this motion if it grants the Authority’s demurrer.

There is nothing procedurally improper in filing both a demurrer and an alternative motion to strike. (See *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 384-385 [recognizing that defendant could have filed a motion to strike as an alternative to its demurrer]; 1 Cal. Affirmative Def. § 1:4 (2d ed. April 2017 Update) [noting motion to strike may be filed as an alternative to a demurrer or in conjunction with a demurrer]; Witkin, *Cal. Proc., Pleading*, § 1015 (5th ed. 2008).)

II. THE REQUESTS FOR INJUNCTIVE RELIEF SHOULD BE STRICKEN BECAUSE PLAINTIFFS’ SOLE REMEDY FOR CLAIMS CHALLENGING THE AUTHORITY’S FUNDING PLANS IS A WRIT OF MANDAMUS.

As discussed in the Authority’s demurrer and motion to strike, plaintiffs’ only ripe claims (other than their facial challenge to AB 1889) are those arising out of the Authority’s final approved funding plans, and those claims challenging the Authority’s final funding plans must be made in a writ proceeding, a proposition plaintiffs do not dispute. (See Opposition to the Authority’s Demurrer, p. 7.) Claims based on the Authority’s process of preparing funding plans are not ripe, because that process is at best “but an interlocutory and preliminary step in [a multistep] process.” (*California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 712.)

1 **III. INJUNCTIVE RELIEF IS NOT AN APPROPRIATE REMEDY.**

2 **A. The Second Cause of Action Does Not Support the Remedy of an**
3 **Injunction.**

4 Plaintiffs do not defend the substance of the allegations in the Second Cause of Action that
5 ask the Court to order the Authority to recover and restore to “their proper funding sources”
6 monies that the Authority has already spent. Instead, plaintiffs contend that their request for
7 dismissal that purported to dismiss scattered paragraphs, sentences and portions of sentences in
8 the SAC, complies with Code of Civil Procedure section 581, subdivision (c), which permits
9 dismissal of the “complaint, or any cause of action in its entirety,” rendering the motion to strike
10 these allegations moot. (Opposition at p. 2 & fn. 1.) Plaintiffs implicitly argue that section 581,
11 subdivision (c) allows them to edit out bits of their complaint in lieu of following appropriate
12 procedures to seek leave to amend their complaint. (See Code Civ. Proc. § 473, subd. (a); Cal.
13 Rules of Court, rule 3.1324.) The purported dismissal is ineffective because it does not comply
14 with section 581, subdivision (c). (See *Steele v. Litton Industries* (1968) 260 Cal.App.2d 1157,
15 1172.)¹

16 The balance of their argument on the Second Cause of Action argues that plaintiffs are
17 entitled to an injunction under Code of Civil Procedure section 526a, because they claim that they
18 are not challenging the Authority’s funding plans on that count. (Opposition at p. 4.) But
19 plaintiffs’ necessarily are, for as Judge Cadei found, unless the Authority’s funding plans violate
20 the Bond Act, there are no grounds for the injunction plaintiffs seek. (ROA # 66, Minute Order
21 on Demurrer, p. 3. See *Styrene Information & Research Ctr. v. Office of Environmental Health*
22 *Hazard Assessment* (2012) 210 Cal.App.4th 1082, 1294 [rejecting claim that Caltrans’ approval
23

24
25 ¹ In addition to deleting allegations seeking recovery of monies already expended, the
26 request for dismissal eliminates some but not all of the allegations in the First Cause of Action
27 that seek a declaration of the constitutionality of AB 1889 as applied to the Authority’s funding
28 plans. (Compare SAC ¶ 90 [left intact by the Request for Dismissal and seeking a declaration as
to the validity of AB 1889 and the parties’ duties “in relation to pending funding plans”], with
Prayer, item 1 [seeking a declaration that AB 1889 is invalid facially “and as applied to the
Funding Plans that are currently being prepared by [the Authority],” with the quoted language
identified as deleted in the Request for Dismissal].)

1 and route adoption should be enjoined as government waste, holding that expenditures that were
2 the result of a difference of opinion concerning the effect of a statute did not constitute waste].)

3 **B. The Allegations of the First Cause of Action Do Not Support the Remedy**
4 **of an Injunction.**

5 In the opening brief, the Authority argued that, to the extent the request for injunction
6 duplicates the request for declarative relief, the remedy is improper because the SAC does not
7 allege that the Authority would attempt to enforce AB 1889 in defiance of a judgment declaring
8 the statute unconstitutional, citing *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 742-
9 743, 750.² Plaintiffs do not dispute that the SAC lacks such allegations, but argue that they may
10 be entitled to a preliminary injunction. (Opposition at p. 7.) They are not, for two reasons. First,
11 plaintiffs' motion for preliminary injunction has been denied (ROA # 7), and plaintiffs did not
12 appeal that decision. Second, as taxpayers, plaintiffs have not pled and cannot show the type of
13 irreparable injury that would support a preliminary injunction. (*White v. Davis* (2003) 30 Cal.4th
14 528, 524.)

15 Plaintiffs' further suggestion that a permanent injunction should issue just in case they
16 prevail on the writ and just in case the effect the writ is suspended by the filing of an appeal (see
17 Opposition at p. 7), is unsupported by legal authority of any kind.³ This argument is implicitly
18 undercut by plaintiffs' own cited authority, *City of Pasadena v. Department of Transportation*,
19 *supra*, 29 Cal.App.4th at p. 1295 (acknowledging that Caltrans was entitled to continue to act in
20 accordance with its view of the effect of the disputed statute "in the interim between trial court
21 judgment and the finality of our opinion."). It also demonstrates just how improper is the request

22
23 ² See *City of Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280,
24 1292-1292 (refusing to expand scope of injunction based on City's suggestion that Caltrain would
ignore the court's interpretation of the statute at issue).

25 ³ Plaintiffs' reliance on *Styrene Information & Research Ctr. v. Office of Environmental*
26 *Health Hazard Assessment, supra*, 210 Cal.App.4th 1082 is misplaced. That decision notes that
27 the trial court had entered a preliminary injunction in the case, but the appeal was from a final
28 judgment, and there was no discussion as to whether a permanent injunction had even issued,
much less whether a permanent injunction was an appropriate remedy. In *City of Pasadena v.*
Department of Transportation (1994) 29 Cal.App.4th 1280, Caltrans challenged the trial court's
judgment on the merits, but not whether a permanent injunction against its construction of a
freeway was an appropriate remedy.

1 for injunctive relief; an injunction should not and cannot be used as an end-run around the general
2 rule that the effect of a writ is stayed pending appeal. (See Civ. Proc. Code §§ 916, subd. (a),
3 1110, 1110b; see *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 728.)

4 **C. The Allegations of the Third and Fourth Causes of Action Do Not Support**
5 **Plaintiff's Claimed Injunctive Remedy.**

6 Although neither of plaintiffs' writ causes of action mention an injunction, plaintiffs argue
7 that they may be entitled to an injunction on their mandamus causes of action. (Opposition at
8 pp. 7-10.) Their argument is unconvincing because it is not supported by the allegations of those
9 counts.

10 The Third Cause of Action does not allege any facts that would support a permanent
11 injunction. As the court of appeal in *City of Pasadena v. Department of Transportation, supra*,
12 found, the fact that there is a disagreement over the interpretation of a statute does not suggest
13 that the state actor will disregard a final court ruling, and an injunction must be based on the
14 allegations of the complaint. (29 Cal.App.4th at pp. 1293-1295.) The cases on which plaintiffs
15 rely do not support their position. Plaintiffs' cited CEQA decisions are inapposite because there
16 is a specific statute that allows injunctions in CEQA cases. (Pub. Resources Code, § 21168.9; see
17 *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 415-416.) *Camp v.*
18 *Board of Supervisors* (1981) 123 Cal.App.3d 334, the only other case plaintiffs cite, does not
19 support their implied contention that an injunction is available in mandamus in the absence of any
20 supporting allegations.

21 The Fourth Cause of Action is asserted only against the Director of Finance. (SAC, ¶¶ 118-
22 122.) Plaintiffs' prayers for injunctive relief, as well as the underlying allegations, are directed
23 solely to the Authority (*id.*, ¶¶ 7, 27, 105, Prayer, items 2-3), and therefore are irrelevant to the
24 Fourth Cause of Action.

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CONCLUSION

If the Court overrules the Authority's demurrer, it should grant this motion to strike.

Dated: December 1, 2017

Respectfully Submitted,

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SA2016104863

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Tos, John, et al. v. California High-Speed Rail Authority**

No.: **34-2016-00204740**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On December 1, 2017, I served the attached **REPLY IN FURTHER SUPPORT OF RESPONDENT AND DEFENDANT CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S MOTION TO STRIKE** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT**, addressed as follows:

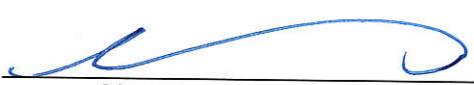
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 1, 2017, at San Francisco, California.

Susan Chiang

Declarant



Signature