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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SACRAMENTO

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

24 Petitioners and Plaintiffs,

25 v.

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

38 Respondents and Defendants.

Case No. 34-2016-00204740

**REPLY IN FURTHER SUPPORT OF
RESPONDENT AND DEFENDANT
CALIFORNIA HIGH-SPEED RAIL
AUTHORITY'S DEMURRER TO
SECOND AMENDED COMPLAINT**

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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18 *Hayward Area Planning Ass'n v. Alameda County Transportation Authority*
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1 **INTRODUCTION**

2 Plaintiffs' opposition to the demurrer misconstrues *California High-Speed Rail Authority v.*
3 *Superior Court* (2014) 228 Cal.App.4th 676, and ignores other controlling authority. Because
4 plaintiffs' arguments are devoid of merit, the Court should reject them and sustain the demurrer to
5 the Second Cause of Action, without leave to amend.

6 **ARGUMENT**

7 **I. THE SECOND CAUSE OF ACTION FAILS BECAUSE PLAINTIFFS' ONLY RIPE CLAIMS**
8 **ARE WRIT CLAIMS.**

9 Plaintiffs concede, as they must, that any challenge to the Authority's funding plans must
10 be determined in a mandamus action. (Opposition at p. 7.) They have pleaded mandamus in their
11 Third Cause of Action, alleging that the Central Valley Funding Plan and the Peninsula Funding
12 Plan do not comply with the Bond Act because they must rely on AB 1889, which plaintiffs
13 allege is unconstitutional. (SAC ¶¶ 96, 99, 120-122.)

14 Instead, plaintiffs argue that the Second Cause of Action survives demurrer because it is
15 based on a different "primary right," which plaintiffs characterize as "wasteful and/or illegal
16 expenditure of public funds." (Opposition at p. 8.) But the Second Cause of Action alleges only
17 one instance of illegal conduct or waste, specifically, the same alleged failure to comply with the
18 Bond Act in misplaced reliance on AB 1889 alleged in the Third Cause of Action for mandamus.
19 (Compare SAC ¶¶ 4-9, 25-27, 67-71, 77, 84-90; 92-106, with SAC ¶¶ 107-116.) The Second
20 Cause of Action does not allege a "breach of more than one duty," but breach of a single duty –
21 the duty of the Authority to comply with the requirements of the Bond Act. (See *ibid.*) To the
22 extent that claim is ripe, it will be adjudicated in the Third Cause of Action for mandamus relief.

23 Alternatively, plaintiffs attempt to distinguish the claim alleged in the Second Cause of
24 Action by characterizing it as a challenge to using public funds to prepare plans that, when
25 completed, "could never be found to be legally adequate." (Opposition at p. 8.) Even if this
26 alleged a different claim, and it does not, a challenge to staff work on yet to be completed draft
27 funding plans not yet approved by the Authority plainly would not be ripe under *California High-*
28 *Speed Rail Authority v. Superior Court, supra*, 228 Cal.App.4th at p. 713 (holding that challenge

1 to preliminary funding plan was not ripe, because “bond proceeds cannot be committed and
2 construction cannot begin until the final funding plan is sent to the Joint Legislative Budget
3 Committee and approved by the Director of the Department of Finance.”). Nor does a claim
4 challenging the preparation of plans not yet submitted to or approved by the Authority comply
5 with Judge Cadei’s Order Sustaining Demurrer. (ROA # 66, Minute Order on Demurrer, p. 3
6 [holding that claims based on funding plans that were not final when the action was commenced
7 or at the time the FAC was filed are not ripe].) At best, the process of preparing funding plans is
8 “but an interlocutory and preliminary step in [a multistep] process.” (*California High-Speed Rail
9 Authority v. Superior Court*, *supra* 228 Cal.App.4th at p. 712.)

10 The case on which plaintiffs principally rely,¹ *County of Santa Clara v. Superior Court*
11 (2009) 171 Cal.App.4th 119, is inapposite. That case addressed a challenge to policies governing
12 municipal entities’ response to Public Records Act requests. The court held that taxpayers who
13 had *no remedy* under the California Public Records Act were not foreclosed from bringing an
14 action for declaratory or injunctive relief under Code of Civil Procedure section 526a. (*Id.* at pp.
15 128-129.) The *County of Santa Clara* court specifically distinguished *Filarsky v. Superior Court*
16 (2002) 28 Cal.4th 419 – in which the California Supreme Court held that a public entity could not
17 circumvent an established statutory procedure by bringing a civil action – on the grounds that the
18 *County of Santa Clara* plaintiffs had no other statutory remedy. As in *Filarsky v. Superior Court*,
19 and unlike in *County of Santa Clara*, here plaintiffs have a statutory remedy under Code of Civil
20 Procedure section 1085 to adjudicate their claims.

21
22
23 _____
24 ¹ Plaintiffs cite in passing *Blair v. Pitchess* (1971) 5 Cal.3d 258, *White v. Davis* (2003) 30
25 Cal.4th 528, *City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, and *Los Angeles
26 Property Owners Assn. v. Hutcheon* (1977) 69 Cal.App.3d 22. None of those decisions address
27 whether plaintiffs’ claims should or could have been asserted as writ claims, or ripeness.
28 Plaintiffs also cite *Hayward Area Planning Ass’n v. Alameda County Transportation Authority*
(1999) 72 Cal.App.4th 95, a case that did not address either section 526a or whether plaintiffs’
claims should have been asserted as writ claims. “It is axiomatic that cases are not authority for
propositions not considered.” (*In re Marriage of Cornejo* (1996) 14 Cal.4th 381, 388; *Martin v.
City & County of San Francisco* (2005) 135 Cal.App.4th 392, 400, fn. 4.)

1 **II. PURPORTED PROCEDURAL ADVANTAGES, IF ANY, AFFORDED BY SECTION 526A**
2 **WOULD NOT PROVIDE GROUNDS TO OVERRULE THE DEMURRER.**

3 Plaintiffs suggest that they are entitled to assert a cause of action under Code of Civil
4 Procedure section 526a because that section (they argue) provides them with procedural
5 advantages not available in a writ action. (Opposition at pp. 8-9.)² Plaintiffs cite no authority in
6 support of this suggestion, and the Authority is aware of none. Even if there were such authority,
7 plaintiffs do not attempt to distinguish the authorities cited in the demurrer for the proposition that
8 section 526a may not be used to convert what otherwise would be a mandamus action into a civil
9 proceeding. (See Authority's Demurrer at p. 15 [citing *Nathan H. Schur, Inc. v. City of Santa*
10 *Monica* (1956) 47 Cal.2d 11, 17-18; *Animal Legal Defense Fund v. California Exposition and*
11 *State Fairs* (2015) 239 Cal.App.4th 1286, 1301; and *Daily Journal Corp. v. City of Los Angeles*
12 (2009) 172 Cal.App.4th 1550, 1557-1558].)

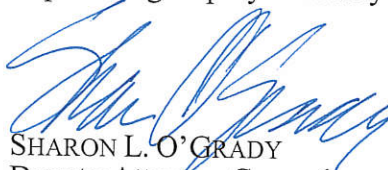
13 **CONCLUSION**

14 Plaintiffs do not argue that they can cure any defect by further amendment to their
15 complaint. The Court should therefore sustain the demurrer to the Second Cause of Action
16 without leave to amend.

17 Dated: December 1, 2017

Respectfully Submitted,

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20 TAMAR PACHTER
21 Supervising Deputy Attorney General

22 
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24 Deputy Attorney General
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24 SA2016104863

25 ² Plaintiffs' argument that proceeding under section 526a would grant them trial setting
26 precedence is mistaken because the portion of section 526a that provides for precedence applies
27 only to actions "to enjoin a public improvement project." The Second Cause of Action does not
28 seek to enjoin the high-speed rail project. (See SAC ¶ 105, Prayer ¶¶ 2-3.) And as this Court has
previously held, the Bond Act restricts the use of bond proceeds, not the construction of the high-
speed rail system. (*Tos v. High-Speed Rail Authority*, Super. Ct. Sacramento County No. 34-
2011-00113939, judgment denying petition and complaint entered Mar. 22, 2016, Ex. A, p. 10.)

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 DEMURRER TO SECOND AMENDED COMPLAINT** 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