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COUNTY IS EXEMPT FROM FILING FEES PER GOV. CODE SECTION 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, et al.,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY, et al,

Defendants.

CASE NO. 34-2011-00113919

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO PART II OF PLAINTIFFS' OPENING BRIEF, INCLUDING PLAINTIFFS' EVIDENCE SUPPORTING PART II

Trial Date: May 31, 2013

Defendants boldly assert that they are not "required" to even address part of plaintiffs' case because it has previously been decided that that part of plaintiffs' case will not be heard contemporaneously with the writ claim and will be heard much later during the regular course of civil trial proceedings. This is an unsupported assertion, and by failing deliberately to respond to half of plaintiffs' case, the defendants have waived all rights to so respond. Already, the defendants are in default, having failed to respond to plaintiffs' expert witness exchange document, thereby waiving their right to present expert evidence when the C.C.P. §526(a)/ declaratory relief/injunction part of the case goes to trial. Plaintiffs ask the Court to so find.

The Second Amended Complaint (SAC) was filed almost a year and a half ago. The SAC

was a combination of writ claims and claims for relief under C.C.P. § 526(a)/declaratory relief/injunctive relief. (We will refer to this second part of the case as the 526(a) part.) The Code of Civil Procedure permits any taxpayer to bring suit to prevent illegal expenditures by a public agency. The entire theory of plaintiffs' 526(a) claim is that the Authority has violated numerous provisions of Proposition 1A, thereby making any expenditure of Proposition 1A funds an illegal expenditure, justifying an injunction preventing such expenditure.

The 526(a) part of the lawsuit is a narrowly-focused claim: It is directed at use, and only use, of the bond proceeds.[1] It seeks to prevent the illegal expenditure (use) of those bond proceeds. Unlike the writ proceeding, the 526(a) part does not seek to set aside the act of the Authority. The 526(a) part does not ask the Court to set aside the Authority's decision and have it resubmitted to a public official (such as the Director of Finance) to re-decide in light of the Court's [possible] finding of illegality of the underlying Authority decision. Rather, the 526(a) part of the case simply alleges that the Authority acted illegally and that, accordingly, bond proceeds cannot be spent on starting construction of the High Speed Rail Project. This is the essence of C.C.P. § 526(a). The forms of relief as between mandamus and 526(a) are entirely different, and this is fundamental to appreciate; the standards of review and the burdens of proof are also entirely different. The claims are not mutually exclusive, and decisions on the mandamus claim are not collateral estoppel on the 526(a) claims, as will be explained *infra*.

Many months ago, because the SAC involved both writ claims and non-writ claims, the defendants' counsel, under the Sacramento local rules, moved to transfer the action to a single judge (Judge Kenny), and plaintiffs did not object. A case management conference was held many months ago. It was not recorded, and it was by telephone. Judge Kenny did not have a great deal of time since he was waiting on a jury. The case was briefly discussed. Plaintiffs' counsel pointed out that the case involved legal issues, mixed issues of law and fact, and issues where the facts were in dispute, and that plaintiffs desired a jury or, at least, an advisory jury on those factual disputes. Ultimately, the Court indicated that it would try the "legal" issues first and

[1] Plaintiffs are removing from their Second Amended Complaint all claims to enjoin or prevent the sale or issuance of Proposition 1A bonds. Therefore, this precise issue is no longer in the case. See Plaintiffs' Request for Dismissal as part of the papers filed with this closing brief, part II.

then depending on what the decision on the legal issues was, would move onto the remaining issues. This decision is logical and orderly; but there was no ruling by the Court that the 526(a) part of the case would be postponed, put on a different "track" (as defendants claim), destined for trial months later. May 31, 2013, was the date set for trial; the parties also agreed on the briefing schedule for trial briefs.

The defendants' counsel was always anxious for an early trial date, presumably to remove the cloud that hung over the High Speed Rail Project because of the *Tos* litigation. The plaintiffs were likewise anxious for the May 31, 2013, trial date because it made good sense to have a trial in advance of the commencement of construction. The Authority has now announced that construction will start six weeks after the May 31, 2013, trial date, emphasizing the correctness of plaintiffs' position. If things move according to plan, there should, therefore, be a decision on all issues before construction starts – an ideal outcome. Instead, it is obvious that the defendants desire a trial on a writ claims and then an indefinite postponement of the 526(a) trial thereafter [witness their statements that insist on discovery, law and motion, expert witness gathering, another case management conference, a trial setting conference, and similar activity]. The defendants have had more than six months to engage in this kind of activity, but have done nothing. Plaintiffs have engaged in some such activity (expert disclosure and submission of detailed Requests for Admissions, for example), and plaintiffs have also gone to great trouble to produce 15 declarations from experts all over the country on the issues in this case, thereby shortening the ultimate trial on the 526(a) issues. Defendants have done nothing, lying back and relying upon their mistaken impression that the 526(a) part of this case is on some kind of "indefinite hold" until it suits them to arrange otherwise.

The plaintiffs would be severely prejudiced if this action does not move forward as planned by the Court and as set by the Court. Courts generally do not like to postpone trials. The plaintiffs do not want a postponement; as the opening brief of plaintiffs demonstrates, we have done a great deal of work in the gathering of evidence and the preparation of this case for trial. Our witnesses are ready; postponing this trial, as defendants wish, would result in serious prejudice to plaintiffs and would be contrary to the normal policy of the Sacramento Superior

Court to move cases forward when set. Most significantly, the interests of justice will be served for everyone if the merits of this case are decided before construction starts. The defendants have a cynical interest in having the 526(a) case start after construction commences because they can then tell the Court that since the project has started, it cannot be stopped, and enormous prejudice would result if the project were halted. In short, that is the defense strategy; the plaintiffs' strategy is to accept the trial date set and move forward.

The Order of Trial

This case can easily be managed in accordance with the general plan set during the case management conference. The writ issues can be tried first. The writ claims are pure issues of law. But, it is important for the Court to understand the relationship between the writ issues and the 526(a) issues. Many of the writ issues involve the same violations as the 526(a) issues. But simply because the issues may be duplicative does not mean that the decisions in the writ case will be collateral estoppel on the same issues in the 526(a) claims. There are differences between writ claims and 526(a) claims. As set forth above, the writ claims seek to set aside a decision already made by a public agency/official (the Director of Finance, for example) approving what the Authority has done, and commanding that agency/official to reconsider the matter in light of what the Court has found (i.e., that the Authority's decision was illegal or unsupported). The 526(a) claim, on the other hand, simply asks the Court to decide that certain decisions of the Authority were "illegal" and that accordingly, no Proposition 1A bond funds can be "expended" or "used" by the Authority to commence construction. Under 526(a), an action for declaratory relief or injunction can be employed and joined with such claims to prevent exactly such use.[2]

The standard of review is different in mandamus than it is in 526(a). For mandamus, it may be abuse of discretion, or there may be some type of deference to be given to the Authority in its decision-making process. But in the 526(a) case, the plaintiffs only have to prove by a preponderance of the evidence that the Authority committed a violation of Proposition 1A (the illegal act) and that accordingly, an illegal expenditure will result if the Authority is allowed to

[2] See Section IV, plaintiffs' opening brief, part II, and cases cited therein supporting the propriety of joining 526(a) with declaratory relief and injunction claims.

use the bond money.[3]

Therefore, the interpretation of the interaction between the mandamus claims and the 526(a) claims is completely contrary to the claims of the defendants, who argue that if the plaintiffs lose the mandamus case, they lose everything in the 526(a) case through collateral estoppel. This cannot be true, for due process reasons, as standards of proof and the burden of proof are different. To use a colloquial example, O.J. Simpson was acquitted in his criminal trial; but he was then sued in a civil wrongful death case and lost the case because the standards of proof and the burdens of proof are entirely different. The same applies here.

Another huge difference between mandamus and 526(a) in this case is the temporal issue. In the mandamus claim, you look at the time that the Authority made the decision, and you consider the evidence before the Authority when it made its decision. In the 526(a) claim, you look at the decision of the Authority, and the plaintiffs are entitled to present any relevant evidence from any period of time up to the time of trial, to demonstrate that that decision was illegal and violated Proposition 1A.

For example, let us assume that Proposition 1A requires that all funding for the usable segment must be in place, committed or secured before the funding plan is submitted to the Legislature. Let us further assume that sufficient funds were in place when the funding plan was submitted to the Legislature. Theoretically, the Authority could not be challenged. But let us assume that an important part of the funding disappeared or was withdrawn a short time later; this would mean that it would be illegal for the Authority to proceed since it no longer had adequate funding, and this issue could be raised under the 526(a) claim, since Proposition 1A intends no construction to commence unless adequate funding is on hand to complete the construction. Therefore, the temporal issue is another critical distinction between mandamus and 526(a) claims.

[3] Actually, the defendants are correct in assessing how the present case may be different. Under a mandamus claim, the defendants do not have "discretion" or "deference" to do an illegal or invalid act. That would make a mockery of governmental process. Both for mandamus and the 526(a) claims, all that needs to be shown is that the defendants committed a violation of Proposition 1A. For example, see, defendants/respondents' responsive brief, page 17, admitting that an agency decision can be set aside if it is "unlawful." And see page 17, line 27, indicating that the petitioner (plaintiffs) have the burden to show that the agency's decision is "unlawful." Therefore, the burden of proof issue and the standards of proof are actually much simpler than defendants' convoluted arguments would have us believe. This is all that plaintiffs have ever claimed: if the Authority and the defendants violated Proposition 1A, this supports a judgment in their favor and such violations would be "invalid" and "unlawful" as defendants state.

In real life, and on the funding issue, the funding situation has deteriorated since the Authority made its decision, since the Federal Government has expressly withdrawn all support and all future funding for California High Speed Rail – a decision not reached by the Federal Government when the funding plan was submitted to the Legislature. This is but one illustration.

Therefore, decisions on the mandamus part of the case will not be collateral estoppel on the 526(a) part. If the plaintiffs were to lose the mandamus claims, they would still have the right to litigate 526(a) claims, because the forms of relief and the proof standards are different, the forms of relief are not duplicated, and plaintiffs could still prevail on the 526(a) claims on the merits by preponderance of the evidence, even though plaintiffs had not prevailed in the mandamus claim concerning the same violation.

Conversely, if plaintiffs won on the mandamus claim, it might come to pass that plaintiffs would agree that the corollary 526(a) claim would not be pursued, although the Court would have to analyze the "one final judgment" rule, because courts are supposed to try all issues in a case so that there is only one final judgment, instead of piecemealing the case. Probably, however, if plaintiffs won on the mandamus claim, in most cases, the heavier burden of proof in the mandamus claim would carry the day with the corollary 526(a) claim (plaintiffs having satisfied the heavier burden of proof in the mandamus claim).

Defendants also argue that plaintiffs cannot introduce evidence that contradicts the record in the writ proceeding. This is an argument without merit; if plaintiffs have a proper 526(a) claim, plaintiffs are not bound by an administrative record in a writ proceeding, but can introduce evidence from a wide range of sources, and without the time constraints of a writ proceeding.

Defendants also argue that declaratory and injunctive relief and 526(a) cannot be used to litigate or challenge the validity of decisions made by a public agency.[4] The plaintiffs contend that this makes no sense whatsoever: why else is C.C.P. § 526(a) on the books other than to allow taxpayers to "challenge" the validity of decisions made by public agencies if those decisions are going to result in legal expenditure?

[4] See Section IV of plaintiffs' opening brief, part II; defendants also ignore the facts that plaintiffs are challenging the constitutionality of the Legislature approval of the Authority's violations of Proposition 1A. See Section XVI of plaintiffs' opening brief, part II.

Plaintiffs posted their jury fees several months ago; the defendants were aware of that fact; they have not been caught by surprise; the defendants were served with plaintiffs' trial brief one month ago; they were fully aware of plaintiffs' contentions and of the evidence they intended to present, including 15 witnesses whose declarations were submitted for the convenience of the Court and for the shortening of the trial. The defendants have also refused to disclose expert witnesses, even though plaintiffs have complied with the expert witness disclosure. This will result in a waiver by defendants of the right to present experts. The defendants have been cavalier in their approach to this entire issue and their refusal to even respond to plaintiffs' trial brief, part II, on the legitimate 526(a)/declaratory/injunctive relief claims should result in their being precluded from doing so when these actions come on for trial.

The plaintiffs have no objection to having the 526(a) part of the case commence immediately after the writ claims are decided. The Court can then decide what effect the writ decision has on the 526(a) claims, since that issue will already have been briefed [or should have been briefed]. The plaintiffs have deliberately structured their 526(a) claims in such a way as to expedite the trial and shorten it measurably.

Defendants' objections to part II of plaintiffs' trial brief and the evidence supporting part II should be overruled, and the 526(a) part of the case should be allowed to proceed immediately after the writ decision.

The defendants claim that plaintiffs have "waived" their right to argue in the writ that various violations of Proposition 1A occurred, because those violations are not argued in the writ part of the case. What defendants ignore is the fact that there are several violations of Proposition 1A that even plaintiffs concede involve disputed issues of fact, and disputed issues of fact are not proper in a writ. For example, the whole issue of whether a subsidy will be required is a disputed issue of fact; the same applies to ridership, anticipated revenues, and operating costs. These are complex economic issues and the facts are concededly in dispute. Another important such issue is "trip time" and whether the Authority will be able to achieve its promise of two hours and 40 minute travel time from Los Angeles to San Francisco. This is another issue where the facts are strongly disputed. It was indicated in part I of plaintiff's opening trial brief that these

issues, because they were disputed factual issues, should more properly be handled in the 526(a) part of the case. Other issues are likewise in the 526(a) part of the case, and properly so. There is no impediment to plaintiffs electing to try those issues in the 526(a) part of the case and no collateral estoppel effect from doing so, even if they are not litigated in the writ portion of the case.

Conclusion and Ruling Requested:

1. Defendants objections to the filing of plaintiffs' closing brief, part II, should be overruled;

2. For failure of defendants to address arguments made by plaintiffs in their opening brief, part II, the Court should rule that defendants have waived their right to challenge such arguments;

3. For failure of defendants to challenge on the merits any of plaintiffs' evidentiary showing, or declarations, or requests for judicial notice, set forth in detail in plaintiffs' opening brief, part II, the Court should rule that defendants have waived any such objections;

4. For defendants' failure to respond to the expert disclosure documents and deadlines, defendants are precluded from presenting expert evidence during the 526(a) part of the trial.

Dated: April 26, 2013

/s/
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