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SECTION 6103**

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9 JOHN TOS; AARON FUKUDA;  
AND COUNTY OF KINGS

10  
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SACRAMENTO

13  
14 JOHN TOS, et al.,

15 Plaintiffs,

16 v.

17 CALIFORNIA HIGH SPEED RAIL  
AUTHORITY, et al.,

18 Defendants.

CASE NO. 34-2011-00113919

**SUPPLEMENTAL DECLARATION OF  
WILLIAM H. WARREN**

Trial Date: May 31, 2013

19  
20  
21 I, William H. Warren, declare as follows:

22 1. I reside in the city of Palo Alto, in the County of Santa Clara, in the State of  
23 California. I am a native of California, and have been a resident of California all my life, except  
24 two years when I was on active duty with the US Navy. Between 1959 and 1965 I completed my  
25 undergraduate studies and my MBA (Masters of Business Administration) at Stanford University.  
26 Between 1965 and 2005, for 40 years I was a business professional located in the Bay Area of  
27 California. My professional qualifications and involvement with the California High Speed Rail  
28 Program are as I submitted in my Declaration of March, 2012.

1 For clarity, the term “CHSRA” is the California High Speed Rail Authority, which is  
2 sometimes referred to as the “Authority” or the “authority” in other documents.

3 **On The Meaning Of The Word “Portion”**

4 2. Page 24 of the Defendant’s Memo of Opposition states that building and funding  
5 the High Speed Rail (HSR) system may be done in “portions” that are smaller than a Usable  
6 Segment. This is a critical issue as it speaks to the ability to determine ridership and therefore  
7 revenues, operating and maintenance costs, and therefore the potential need for a subsidy, for  
8 those miles of track to be constructed.

9 The CHSRA’s argument centers on one key sentence in AB 3034, in Section 2704.04 (c)  
10 which states:

11 “Capital costs payable or reimbursable from proceeds of bonds  
12 described in paragraph (1) of subdivision (b) include, with respect  
13 to the high-speed train system or any portion thereof, all activities  
14 necessary for acquisition of interests in real property and rights-of-  
way and improvement thereof; acquisition and construction of  
tracks, structures, power systems, .....

15 The CHSRA’s interpretation of this sentence is that funding can be done in “portions” that  
16 are smaller than a Usable Segment.

17 3. This is not my interpretation of AB 3034, for the following reasons:

18 There are only two other uses of the term “portions” in AB 3034. In Section 2704.01 two  
19 terms are defined:

20 (f) "Corridor" means a portion of the high-speed train system as  
described in Section 2704.04.

21 (g) "Usable segment" means a portion of a corridor that includes at  
22 least two stations.

23 In both of these sentences the word “portion” is being used to describe another word. In  
24 (f) “portion” is being used to describe the term “Corridor”, and in (g) “portion” is being used to  
25 describe the term “Usable Segment”. What is not contained in 2704.01 is another line such as:

26 (h) “Portion” means a portion of a usable segment that includes less  
27 than two stations.

28 The lack of such a line as “(h)” speaks directly to the intent of the statute – that being

1 there is to be nothing authorized smaller than a “Usable Segment”.

2 4. Therefore in 2704.04 (c) should be read as:

3 “Capital costs payable or reimbursable from proceeds of bonds  
4 described in paragraph (1) of subdivision (b) include, with respect  
5 to the high-speed train system or any “corridor” or any “usable  
6 segment” thereof, all activities necessary for acquisition of interests  
in real property and rights-of-way and improvement thereof;  
acquisition and construction of tracks, structures, power systems,  
.....”

7 It can not be read as:

8 “Capital costs payable or reimbursable from proceeds of bonds  
9 described in paragraph (1) of subdivision (b) include, with respect  
10 to the high-speed train system or any “corridor” or any “usable  
11 segment” or any “portion” thereof, all activities necessary for  
acquisition of interests in real property and rights-of-way and  
improvement thereof; acquisition and construction of tracks,  
structures, power systems, .....

12 because the line (h) defining the word “portion” does not exist in 2704.01.

13 5. The Defendant’s Memo of Opposition, on page 24, goes on to reference 2704.08  
14 (f), but this section clearly states:

15 “In selecting corridors or usable segments thereof for construction,  
16 the authority shall give priority to those corridors or usable  
segments thereof that are.....”

17 It does not state:

18 In selecting corridors or usable segments thereof for construction,  
19 the authority shall give priority to those corridors or usable  
segments or portions thereof that are.....”

20 6. The Defendant’s Memo of Opposition, on page 24, also goes on to reference  
21 2704.06, but this section is silent on the use of terms such as “corridors”, “usable segments”, and  
22 “portions”.

23 7. Therefore, it is my opinion that the CHSRA has made an incorrect interpretation of  
24 AB 3034, and it is not appropriate for the CHSRA to create a term, such as (h), above, which is  
25 not in the original AB 3034. Such an attempt appears to be an abuse of the CHSRA’s discretion,  
26 and does not seem proper.

27 **On The Issue Of Ridership**

28 8. The Defendant’s Memo of Opposition states in Section V – E, page 39 line 3 to 5

1 that “the same basic ridership model that the court has already found supported by substantial  
2 evidence in another proceeding” and references in Footnote 26 the Town of Atherton et al  
3 lawsuit. The Plaintiffs recognize the existence and current status of the “Atherton” case but  
4 believe that the issues with respect to the current ridership forecasts are based on a different set of  
5 facts.

6 9. The Defendant’s Memo of Opposition relies upon a Superior Court decision called  
7 Town of Atherton v. CHSRA, “Atherton”, for the proposition that the CHSRA’s ridership  
8 analysis/models in this Tos lawsuit are immune from challenge. I believe this is an incorrect  
9 conclusion, for the following reasons:

10 1. It is my understanding the “Atherton” case is now on appeal, thereby  
11 depriving the trial court decision of finality, and thereby depriving the Defendants from  
12 the ability to rely upon it.

13 2. Attorney Stuart Flashman will be presenting papers related to this  
14 Plaintiffs' Closing Brief, requesting that the court DENY the defendants' RJN of the  
15 papers related to the “Atherton” decision.

16 3. The “Atherton” case involved a determination in an entirely different  
17 context: CEQA and EIR adequacy. All that the Atherton case allegedly decided was  
18 whether the CHSRA's modeling plan provided substantial evidence supporting the EIR,  
19 nothing more.

20 4. The “Atherton” issues/questions are not relevant in a CCP 526a case; the  
21 statutes are different; the proof standards and the burden of proof are different.

22 5. In short, there is no valid argument that the “Atherton” decision is  
23 controlling, not to mention that it cannot be relied upon procedurally because of its current  
24 lack of finality.

25 10. The issues in this Tos lawsuit are based on the current facts that may be  
26 summarized as follows:

27 1. The CHSRA’s ridership model is being used to project ridership and  
28 revenues for “usable segments” for which there is no current survey data to know the

1 preferences of potential riders.

2 2. The available survey data is from 2005 and has no bearing on the currently  
3 planned IOS and Bay to Basin operating periods.

4 3. A small survey was performed in 2011, but it collected just data on prior  
5 trips of the survey's participants, but nothing about preferences for future trips. Therefore  
6 this survey has no bearing on setting preferences for future forecasts.

7 Clearly this lack of potential customer preference survey data is a different set of issues  
8 than the "Atherton" lawsuit. It is my professional opinion that the CHSRA has made an incorrect  
9 interpretation of the requirements of AB3034 in attempting to use the "Atherton" lawsuit as  
10 protection from the Tos lawsuit claims regarding the problems surrounding the current ridership  
11 forecasts. It is also my professional opinion that the current ridership forecasts are inadequate,  
12 because they lack reasonable survey data upon which to make ridership projections. Therefore, it  
13 appears that the CHSRA has abused their discretionary authority by not performing basic tasks  
14 needed to make a usable forecast.

15 11. In more detail, as discussed in the Declaration of William Grindley, March 2013,  
16 Mr. Grindley found that:

17 1. The May 2011 survey, which was an input to the November 2011 and  
18 April 2012 Business Plans, and their Plans' supporting documents, did not disclose the  
19 current implementation plan. This implementation plan being for the IOS to be only HSR  
20 service from Merced to the San Fernando Valley with bus service from Northern  
21 California to Merced, and bus and Metrolink service from the San Fernando Valley to the  
22 Los Angeles Basin. In May 2011 the public knew nothing about the phased construction  
23 implementation that was to be built into the upcoming plans. Therefore, to the extent the  
24 survey participants thought they understood the HSR plans; the participants'  
25 understanding was incorrect.<sup>1</sup>

26 2. The current plan is for the IOS to become operational in 2022 and by 2025

27  
28 <sup>1</sup> See Grindley Declaration, Exhibit C, paragraph 56.

1 it is projected that 8 Million passengers will be riding on the IOS, up from the 1 Million  
2 passengers who currently ride the Amtrak San Joaquin rail service which the IOS will  
3 replace and augment. There is no survey data to support such a growth rate, which can  
4 only occur by getting current automobile drivers in the Central Valley to switch to the  
5 HSR IOS service.<sup>2</sup> In addition, the current CHSRA projection is that 15% to 20% of these  
6 riders will be from the Bay Area who will elect to go to Merced to take the HSR service to  
7 the LA Basin via Metrolink.<sup>3</sup>

8 3. At the same time that the rail traffic is to grow from 1 Million per year to 8  
9 Million per year, the price of the tickets will go up, from about Amtrak's current 15 to 27  
10 cents per passenger mile (PPM) to the CHSRA's projected 38 to 48 cents PPM.<sup>4</sup> Note,  
11 the term "per passenger mile", or PPM, is the transportation industry measure of revenues  
12 and costs, as supported by the US Department of Transportation (DOT).<sup>5</sup> The result of  
13 this price increase is that the CHSRA projects the average ticket price between the Central  
14 (San Joaquin) Valley and Los Angeles will be between \$70 and \$73.<sup>6</sup> There is no survey  
15 data to support that such a price increase will be consistent with such a growth in  
16 ridership.<sup>7</sup>

17 4. The current plan for the IOS is for HSR service only from Merced to the  
18 San Fernando Valley with bus service from Northern California to Merced, and bus and  
19 Metrolink service from the San Fernando Valley to the Los Angeles basin. There is no  
20 survey data to show that customers will use their cars or buses and Metrolink to get to the  
21 HSR service of the IOS.

### 22 **On The Issue Of Operation And Maintenance And The Need For A Subsidy**

23 12. The Defendant's Memo of Opposition states in Section V – E that the certification  
24 in the Funding Plan of an Operating Subsidy Not Being Required Is Not Arbitrary, Capricious or

25 <sup>2</sup> See Grindley Declaration, Exhibit C, paragraph 58.

26 <sup>3</sup> See CHSRA's "Ridership and Revenue Forecasting, April 2012, Tables 5.9 and 5.10", AR002451-52

27 <sup>4</sup> See "To Repeat, December, 2012" report, RJN021, Appendix 5, page 3, Figure A5 - 2

28 <sup>5</sup> See Warren Declaration, Exhibit E, paragraph 5.

<sup>6</sup> See CHSRA's "Ridership and Revenue Forecasting, April 2012, Tables 5.9 and 5.10", AR002451-52

<sup>7</sup> See Grindley Declaration, Exhibit C, paragraphs 59 and 60.

1 Lacking in Evidentiary Support. My analysis which is included, in detail, in my Declaration of  
2 March, 2013 would lead me to the opposite conclusion. It is clear to me that the CHSRA had  
3 information that they chose to ignore which would have shown the likelihood of a subsidy being  
4 required was, for all practical purposes, assured.

5 13. As stated in the Tos Brief II, page 15, lines 1 and 2, for the purposes of this  
6 discussion of the need for a subsidy, the revenues and pricing assumptions are being accepted as a  
7 baseline for the following analysis. The Defendant's Memo of Opposition on page 42, lines 11 to  
8 13 states that the Plaintiff alleges that "the Authority revenue and cost estimates are too low and  
9 are not credible". This sentence is not completely correct. The CHSRA's projected revenues per  
10 passenger mile (PPM) of 23 cents are lower than what appear to be the averages revenues PPM  
11 on a world wide basis, of about 40 cents. This is because the CHSRA's pricing must meet the  
12 highly competitive California airline and automotive market places. We agree with the CHSRA  
13 that they can not raise these PPM revenue rates up to the world averages. Therefore in our  
14 analysis we left these CHSRA price levels unchanged. The issue lies with the assumptions  
15 associated with the CHSRA's projected Operating and Maintenance costs, which as shown in the  
16 Business Plan, are dramatically less than we found costs being incurred around the world. The  
17 difference between the CHSRA's projected O & M costs of 10 cents per passenger mile (PPM),  
18 compared to worldwide costs in the range of 40 cents PPM is a factor of one fourth of world  
19 costs.<sup>8</sup> The CHSRA's projected costs are either arbitrary or capricious or lacking in complete  
20 evidentiary support.

21 14. The Defendant's Memo of Opposition in Section V – E. from page 38, line 6 to  
22 page 42, line 9, discusses the very complex issues surrounding the ridership model and its  
23 resulting revenue forecast, and the involvement of the Ridership Peer Review panel in this  
24 process. Note, this panel was formed by CEO Van Ark, and it is NOT the Peer Review Group  
25 mandated by AB 3034. Specifically, with reference to the discussion on pages 41 line 23 to page  
26 42, line 9, regarding the Acela service in the Northwest Corridor, we have found no evidence that

27 \_\_\_\_\_  
28 <sup>8</sup> See Warren Declaration, Exhibit E, paragraph 10.

1 the Ridership Peer Review panel reviewed the publically available operating cost data of Acela  
2 that appears to be in the range of 60 cents per passenger mile and reconciled this data to the  
3 CHSRA projected costs of 10 cent per passenger mile.<sup>9</sup> Additionally, we have found no  
4 evidence that this Ridership Peer Review panel 1) validated the O & M projected cost parameters  
5 that were input into the profit and loss calculation against existing O & M HSR actual costs  
6 around the world, 2) acknowledged and incorporated into their analysis the information points  
7 known to the CHSRA as discussed below, or 3) endorsed the CHSRA's O & M projected cost  
8 parameters based on their professional experience. Therefore, the conclusion that is stated on  
9 page 42, line 13 to 15, that "It is clear....the operating subsidy certification....reviewed by  
10 experts", appears to be incorrect and intentionally misleading.

11 15. Examples of information in the possession of the CHSRA prior to the publishing  
12 of the Draft Business Plan and the approval of the Funding Plan in November, 2011, and  
13 therefore also before the approval of the Final Business Plan in April 2012, include the following  
14 four points:

15 1. The UIC/IUR's February 2011 letter to Mr. Van Ark, and its Official  
16 UIC/IUR position on profitability where HSR revenues and operating cost were roughly  
17 equated to one another. For example, if international revenues are about 40 cents PPM,  
18 O&M costs must therefore be in the range of 40 cents PPM. This letter with this very  
19 important statement about the relationship of revenues and costs in Europe was not  
20 mentioned in the Business Plans, or the Parsons Brinckerhoff Operating and Maintenance  
21 Cost documents.<sup>10</sup>

22 2. Spain's RENFE presentation to Mr. Van Ark and the CHSRA Board in  
23 June 2011. When the Spanish HSR AVE system's revenues, profit margins, load factors,  
24 ticket prices and distances were analyzed; revenues and costs per passenger mile could be  
25 estimated to be between 55 cents to 45 cents per passenger mile, as shown in the right  
26

27 <sup>9</sup> See Warren Declaration, Exhibit E, paragraphs 12, 15, and 16.

28 <sup>10</sup> See Warren Declaration, Exhibit E, paragraph 10.



1 hand column of Figure A6-1 of the “To Repeat” report.<sup>11</sup> This presentation with this very  
2 important information about the relationship of revenues and costs in Spain was not  
3 mentioned in the Business Plan, or the Parsons Brinckerhoff O&M Cost documents.<sup>12</sup>

4 3. By July of 2011 our investigations showed that the ticket prices the  
5 CHSRA were planning to charge, at about 23 cents on a PPM (per passenger mile) basis,  
6 were dramatically lower than the prices of the existing HSR international systems and the  
7 Acela system on the Northeast Corridor of the United States. These systems’ ticket prices  
8 were averaging above 40 cents PPM. This analysis was first published as Brief Note #14,  
9 “On Evidence-Based High-Speed Rail Fares” in July, 2011. As we continued to  
10 investigate the existing worldwide high-speed rail operations we learned that, generally  
11 speaking, these operations, most of which are state owned and operated, are not highly  
12 profitable operations (by US commercial standards), and according to public reports, these  
13 systems are currently requiring government operating subsidies. We first published this  
14 apparent price-to-cost problem in July, 2011, in Brief Note #15 “On Operating Costs Out  
15 Of Sync With The FRA And Reality”.<sup>13</sup> By September, 2011 we had finished our last  
16 report on the 2009 Business Plan. This report, “Revisiting Issues In The October 2010  
17 Report: The Financial Risks of California’s Proposed High-Speed Rail Project”,  
18 incorporated all of the events of the past year, including the financial implications of the  
19 international HSR revenues and costs that we had documented in our Brief Notes #14 and  
20 #15. This report was sent by certified mail to the CHSRA Board Chairman, Mr. Umberg.  
21 There was no response from the CHSRA.<sup>14</sup>

22 4. In our analysis of the Parsons Brinckerhoff Operating and Maintenance  
23 (O&M) Cost documents that were published with the November 2011 Draft of the 2012  
24 Plan, we found references, via Footnotes, to a 2007 international study by BBVA showing  
25 operating costs for existing European HSR systems far in excess of the CHSRA cost

26 <sup>11</sup> See “To Repeat, December, 2012” report, RJN021, Appendix 6, page 2, Figure A6-1.

27 <sup>12</sup> See Warren Declaration, Exhibit E, paragraph 10.

28 <sup>13</sup> See Warren Declaration, Exhibit E, paragraph 8.

<sup>14</sup> See Warren Declaration, Exhibit E, paragraph 9.

1 projections, when compared on a per passenger mile basis. While footnoted, no statement  
2 was included as to how these much higher costs estimates were factored into or reconciled  
3 to the Business Plan projections.<sup>15</sup>

4 16. Following the release of the Draft Business Plan and the approval of the Funding Plan  
5 in November 2011, and the release of the Final Business Plan in April 2012, two other events  
6 occurred that the CHSRA also chose to ignore in the April 2012 Final Business Plan:

7 1. By September, 2011 we had formalized a Power Point Presentation, titled  
8 “Financial Aspects of California’s Proposed High-Speed Rail System, September, 2011”.  
9 Included in this presentation was a slide summarizing the apparent ‘disconnect’ between  
10 the very low operating costs the CHSRA was projecting on a PPM basis, and what appear  
11 to be much higher worldwide operating costs, on a PPM basis. A copy of this  
12 presentation, with a cover letter, was provided to Governor Brown’s Office in October  
13 2011. As this cover letter mentioned, copies of this presentation were also delivered in  
14 September to Ken Alex, Gareth Elliott and Chris Ryan who were assisting Governor  
15 Brown at the CHSRA. No response was ever received from the Governor’s office or his  
16 three members of the CHSRA management team.<sup>16</sup>

17 2. At the urging of the Treasurer’s Office, a meeting was arranged between  
18 the new CHSRA Board Members, Mr. Richard and Mr. Rossi, and Mr. Morales of  
19 Parsons Brinckerhoff, me and one of my co-authors, Mr. William Grindley, on November  
20 17, 2011. A substantial portion of the meeting centered on the pages of the Power Point  
21 Presentation that highlighted the ticket price (revenue) to operating cost PPM ‘disconnect’  
22 relative to the world market and the risk of the need for an illegal subsidy. Mr. Rossi took  
23 the responsibility to investigate the matter and respond to us. To assist them, on  
24 November 18, 2011, I e-mailed copies of Brief Notes #14 and #15, as additional  
25 information. Despite numerous attempts to follow up with Mr. Rossi and Mr. Richard, no  
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27 <sup>15</sup> See Warren Declaration, Exhibit E, paragraph 11.

28 <sup>16</sup> See Warren Declaration, Exhibit E, paragraph 9.

1 response was received.<sup>17</sup>

2 17. Subsequent to the release and approval of the April 2012 Business Plan and the  
3 Funding Plan of November 2011, two other independent sources of information have become  
4 public which confirm the fact that the CHSRA's cost projections of 10 cents PPM are, at the  
5 minimum, not credible. These are:

6 1. On May 2, 2012 the Legislative Analyst's Office (LAO) released a letter to  
7 four members of the Legislature that stated that in the LAO's opinion the international  
8 HSR operating costs are in the range of 30 cents PPM. Additionally, the LAO stated that  
9 they were not able to reconcile this information to the projections of the CHSRA, even  
10 after meeting with the CHSRA on this subject. This 30 cent PPM is less than our  
11 projection, but still about three times the CHSRA projection of 10 cents PPM.<sup>18</sup>

12 2. On May 18, 2012 the California High-Speed Rail Peer Review Group  
13 publically released their comments on the April 2012 Business Plan. (It should be noted  
14 that this is the Peer Review Group authorized by AB 3034, and is not the Ridership Peer  
15 Review Panel created by CEO Van Ark.) This Group's conclusion was that the O & M  
16 costs would be about equal to operating revenues, in other words costs will be in the range  
17 of 23 cents PPM, and therefore about 2.3 times higher than the current CHSRA cost  
18 projection of 10 cents PPM.<sup>19</sup> I find it hard to believe that this conclusion was not shared  
19 with the CHSRA prior to the release of the April Business Plan, since there is no material  
20 difference in the revenue and cost projections, on a PPM basis, between the November  
21 2011 Draft Business Plan and the April 2012 Final Business Plan.

22 18. It is my professional opinion the CHSRA had independent outside sources  
23 providing information that indicated that O&M costs were, on a per passenger mile basis, higher  
24 at the existing HSR systems worldwide than what the CHSRA was planning to charge as  
25 revenues on a per passenger mile basis. What was missing was a proposal from an existing HSR

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27 <sup>17</sup> See Warren Declaration, Exhibit E, paragraph 9.

28 <sup>18</sup> See Warren Declaration, Exhibit E, paragraph 11.

<sup>19</sup> See Warren Declaration, Exhibit E, paragraph 16.

1 operator who would be willing to provide HSR operating services based on the 10 cents PPM cost  
2 projection.<sup>20</sup> Instead, all the CHSRA had were in-house staff projections based on some, but  
3 clearly not all, of the information available to them. The logical conclusion from all this  
4 additional evidence would be that an operating subsidy will be needed. The CHSRA chose to  
5 ignore these sources of information and did not even acknowledge the existence of this  
6 information. Such actions seem to me to be an abuse of discretion, very arbitrary and capricious,  
7 and certainly lacking in providing complete evidentiary support for the CHSRA's certification  
8 regarding the lack of a need for a subsidy.

9 I declare under penalty of perjury pursuant to the laws of the State of California that the  
10 foregoing is true and correct.

11 Executed on this \_\_\_ day of April, 2013, at Palo Alto, California.

12  
13 /s/

\_\_\_\_\_  
WILLIAM H. WARREN

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<sup>20</sup> See Warren Declaration, Exhibit E, paragraph 19.