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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF FORT BRAGG, Plaintiff, v. MENDOCINO RAILWAY, Defendants.	Case No. 22-CV-06317-JST *Assigned for all purposes to:* *Hon. Jon S. Tigar, Ctrm. 6* **CITY'S MOTION TO REMAND ACTION TO STATE COURT** DATE: February 2, 2023 TIME: 2:00 p.m. CTRM: 6

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 2, 2023 at 2:00 p.m. or as soon thereafter as the matter may be heard in Courtroom 6 – 2nd Floor, of the above-entitled Court, located at Oakland Courthouse, 1301 Clay Street, Oakland, California 94612, although civil motion hearings in this Courtroom are held by Zoom webinar, unless otherwise ordered, Plaintiff CITY OF FORT BRAGG will and does hereby move to remand the action to the California Superior Court, as having been improperly removed by Defendant MENDOCINO RAILWAY, for lack of subject matter jurisdiction. 42 U.S.C. § 1447 (c). In particular,

there is no federal subject matter jurisdiction merely for a claimed federal preemption defense. Also, there is no federal preemption as alleged by Plaintiff, because Defendant Mendocino Railway is not subject to exclusive regulation by the Surface Transportation Board as a matter of law.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the Declaration of Krista MacNevin Jee, filed concurrently herewith, the file and records in this case, and any further argument the Court deems just and proper to hear at or before the hearing on this Motion.

Dated: November 21, 2022

JONES MAYER

By:/s/ Krista MacNevin Jee
Krista MacNevin Jee
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CITY OF FORT BRAGG

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant Mendocino Railway's ("MR's") action to remove the State court action of the City of Fort Bragg ("City") is but one part in a long line of MR's repeated attempts to avoid a State court ruling with which it is unhappy, and to engage in forum shopping in order to avoid the decision of the State court judge in the City's action that was issued against MR. In fact, the State court denied MR's demurrer in April 2022, and ever since, MR has made every procedural attempt possible to avoid the judge assigned to the case, who issued the ruling against MR. Despite no right to appeal the ruling on demurrer, MR sought a writ of mandate in the California Court of Appeal, as well as the California Supreme Court, both of which were denied. MR attempted to obtain a ruling that the City's case was related to an already-pending eminent domain case with a private property owner, in an attempt to have the City's matter transferred to another judge. When that was also unsuccessful, MR attempted to have the judge disqualified, but an appointed judge ruled that there were no grounds for disqualification. When all of these myriad efforts proved useless, and facing a motion to dismiss in the federal action that MR filed against the City -- some four months *after* the undesirable demurrer ruling in the City's State court action, MR improperly removed the City's action.

Now, MR attempts now to take advantage of the intervention of a new party, the California Coastal Commission, which has merely joined the City's action – pending for *more than one year*, to remove when MR failed to timely do so at the outset. MR cannot use the addition of merely a new party to remove the action it never removed initially. More importantly, MR cannot remove the City's action to federal court based merely on MR's assertion of a federal *defense*. The assertion of a federal defense does *not* qualify the matter for subject matter jurisdiction by this Court on any federal question. Finally, MR does not validly assert a federal preemption claim in any event, since it is not exclusively regulated by the Surface Transportation Board, since MR does not engage in any interstate commerce.

II. STATEMENT OF FACTS AND CASE.

The City commenced an action against Plaintiff Mendocino Railway ("MR") in *City of Fort Bragg v. Mendocino Railway*, Mendocino County Superior Court Case No. 21CV00850 ("Mendocino County Action") on October 28, 2021. This action is for Declaratory Judgment as to the City's regulatory authority of MR. Although the authority at issue in that matter is stated broadly as "whether [Mendocino Railway] is subject to the City's ordinances, regulations, codes, local jurisdiction, local control, local police power, and other City authority," the City seeks "a stay, temporary restraining order, preliminary injunction, and permanent injunction commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority," but *only* "as applicable."

A related issue to the City's regulatory authority is MR's status as a public utility under the authority of the California Public Utilities Commission ("CPUC"), which has determined that Mendocino Railway does not function as a "public utility" pursuant to State law. *See* Declaration of Krista MacNevin Jee, filed concurrently herewith ("Jee Decl."), at Exhibit C (*In the Matter of the Application California Western Railroad, Inc.*, 1998 Cal. PUC LEXIS 189, 78 CPUC2d 292, Decision 98-01-050 (January 21, 1998)). This public utility status under state law is also at issue in the Coastal Commission's Complaint in Intervention. (Notice of Removal, Request for Judicial Notice ("RJN"), Exhibit B, at .)

MR challenged the validity of the City's Complaint by demurrer filed on or about January 14, 2022. (Jee Decl., ¶ 2.) The demurrer was denied by The Honorable Clayton L. Brennan on April 28, 2022. In the demurrer ruling, the State court confirmed that MR is not a public utility according to the CPUC (citing *In the Matter of the Application California Western Railroad, Inc.*, 1998 Cal. PUC LEXIS 189, 78 CPUC2d 292, Decision 98-01-050 (January 21, 1998)), and the CPUC has subsequently confirmed this by letter. (Jee Decl., ¶ 2; ¶ 5 (Exhibit C).)

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Thereafter, MR proceeded to challenge the demurrer ruling to the Court of Appeal and the Supreme Court. (Jee Decl., ¶ 2.) There is no right of appeal as to a denial of a demurrer, so Mendocino Railway filed a Petition for Writ of Mandate in the California Court of Appeal, which was denied, and then a Petition for Review with the California Supreme Court, which was also denied. The trial court proceedings were briefly stayed by the Court of Appeal pending decision, until June 9, 2022. (*Id.*)

Between MR's filing of its Petition for Review with the California Supreme Court on June 20, 2022, and the Supreme Court's summary denial of the Petition on June 23, 2022, MR also filed a Notice of Related Case in another case pending in Mendocino County Superior Court, in which Mendocino Railway had been participating as a party for nearly two years, *Mendocino Railway v. John Meyer, et al.*, Mendocino County Superior Court Case No. SCUK-CVED-20-74939 ("Eminent Domain Action"). (Jee Decl., at ¶ 3.)

The Eminent Domain Action relates to MR's attempt to take the private property of an individual, Defendant John Meyer, in the City of Willits by eminent domain. *Id.* Testimony before Judge Nadel has concluded as to a bifurcated trial in the Eminent Domain Action on or about November 10, 2022.

Given its lack of success with the appellate courts and in order to avoid the demurrer ruling issued the Mendocino County Action by Judge Brennan, MR sought to avoid Judge Brennan by attempting to have the earlier Eminent Domain Action deemed related to the Mendocino County Action, thereby necessitating the transfer of the latter from Judge Brennan in the Ten Mile Courthouse in Mendocino County to the Honorable Jeanine Nadel in the Ukiah Courthouse. (Jee Decl., at ¶¶ 2-3.) Transfer of the case to another judge was denied on or about September 30, 2022. (Jee Decl., at ¶ 3.)

After a case management conference in the Mendocino County Action, Mendocino Railway filed a Request for Disqualification of Judge Brennan, on September 12, 2022, which was denied by another judge assigned for the purpose of reviewing the request, The Honorable Gregory Elvine-Kreis, on September 29, 2022. (Jee Decl., at ¶ 4.)

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At the case management conference, the City had notified the Court and the parties that the California Coastal Commission had expressed its intention to file a Motion to Intervene in the Mendocino County Action. (Jee Decl., at ¶ 4.) The City had previously notified the court and MR of the same in the City's Case Management Statement filed on August 25, 2022. (*Id.*) The California Coastal Commission thereafter filed its motion to intervene on or about September 8, 2022, which was granted on October 20, 2022. (*Id.*)

MR's federal action against the City and the Executive Director of the California Coastal Commission was commenced on August 9, 2022 (Case No. 4:22-CV-04597-JST). The sole cause of action is for Declaratory Judgment. MR's complaint in that action acknowledged, at the time of commencement of the action, that the City had a then-pending "state-court action." (MR's Complaint, at ¶ 4.) MR claimed a very broad scope of the City's action in this matter – ignoring the entirety of the Complaint except the few words supporting its mischaracterizations, in order to attempt to claim that the City's action was preempted, as it does here in its Notice of Removal (¶ 2). However, the actual scope and nature of the City's claims are not so broad, and the Superior Court's actual exercise of authority has yet to be determined, due to the delay of MR's multiple attempts to obtain a new judge and its appellate challenges of the demurrer ruling.

Like its Notice of Removal here, MR has asserted in its own federal action that it is a "federally regulated railroad with preemption rights," and it seeks "[t]o avoid the unlawful enforcement of federally-preempted regulation, [and] the concomitant disruption of its railroad operations and projects." (MR's Complaint, at ¶¶ 4-5.) Specifically, MR has claimed that it is "subject to the STB's jurisdiction," that it "was and continues to be a federally licensed railroad subject to the STB's jurisdiction," and that it is a "common-carrier railroad subject to the STB's jurisdiction." (MR's Complaint, at ¶¶ 9, 18.) MR's primary assertion in its Complaint is that it "is a federally regulated common carrier that is part of the interstate rail network under the STB's exclusive jurisdiction." (MR's Complaint, at ¶ 30.) It "seeks a declaration that the actions of the Commission and the

City to regulate Mendocino Railway's operations, practices and facilities are preempted . . . and that Mendocino Railway's activities are subject to the STB's exclusive jurisdiction."

It makes similar claims in its notice of removal – that, purportedly as a "federally regulated railroad [it is] subject to the exclusive jurisdiction of the STB under ICCTA and the Supremacy Clause." (Notice of Removal, at ¶ 5.) MR asserts that the City's Complaint and the Commission's Complaint in Intervention in this action supposedly seek "local land-use permitting and oversight of [MR's] rail-related activities [which] are federally preempted." These claims are wholesale, and MR seeks to simply be free of any regulatory authority whatsoever by the City and the Coastal Commission – and more importantly, to be free from *any state action whatsoever*. This is simply not the law and any preemption claim by MR does not operate in such a sweeping or comprehensive manner as to local jurisdiction. More importantly, MR's claims are merely defenses, which do not present a federal question over which this Court has subject matter jurisdiction, and MR's claims are false in any event, since MR does not operate in interstate commerce, and this is the measure of STB jurisdiction. Further, MR – despite having had, and long ago asserting, its federal preemption defense in this action in State court as part of its demurrer, failed to timely remove, and the Coastal Commission's Complaint did not spontaneously renew any right to remove. Finally, MR has waived any removal right by its full and aggressive participation in State court, including seeking review and relief from the California Supreme Court. Thus, this Court must remand the matter to State court. MR simply cannot be permitted to so continually delay, obtain rulings with which it disagrees, and simply move on to another court in the vain hope of obtaining a new decision to its liking.

III. LEGAL STANDARD.

A matter may be removed based on the federal court first having jurisdiction over the case originally filed. *Northbrook Nat'l Ins. Co. v. Brewer*, 493 U.S. 6, 12 (1989); *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987); *Snow v. Ford Motor Co.*, 561 F.2d

787, 789–790 (9th Cir. 1977). Removal itself is only statutory, whereas the underlying requirement for federal question subject matter jurisdiction is constitutional. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). In fact, there is strong presumption *against* removal, so as to properly preserve the difference realms of authority of federal and state courts. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Removal must be strictly construed, and doubts must be generally resolved in favor or *remand*. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938); *Libhart*, at 1064 (9th Cir. 1979). Further, it is the removing party's burden to demonstrate federal jurisdiction. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857–858 (9th Cir. 2001); *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990). That party also has the burden of showing that it has timely and properly complied with removal requirements and procedures. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265–1266 (9th Cir. 1999).

Further, a federal claim over which this Court has jurisdiction can only be found "within 'the plaintiff's statement of his own cause of action.'" A federal question must be presented in a complaint, *not* in an answer. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126 (1908) (lack of federal question jurisdiction when anticipated defense based on federal law).

MR has not and cannot meet its burden here. Removal was not timely made by it more than a year ago when the City first brought its action. Indeed, MR improperly awaited a ruling by the California Superior Court, and used every procedural maneuver imaginable to attempt to obtain a new judge, before it finally resorted to its improper and belated removal to this Court. Further, removal is not proper here, as MR's mere asserted federal preemption defense does not confer jurisdiction, there is no renewed right to removal here, and MR has no such defense in any event, since MR is not, and has never been, engaged in interstate commerce. Thus, this matter must be remanded to the State court forthwith, having been improperly removed.

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IV. ARGUMENT.

A. MR HAS WAIVED ANY RIGHT TO REMOVAL, HAVING FAILED TO TIMELY REMOVE THIS ACTION AT THE OUTSET, AND HAVING SHOWN ITS INTENT TO LITIGATE IN STATE COURT; THE COASTAL COMMISSION'S COMPLAINT IN INTERVENTION ALSO DID NOT RENEW THAT TIME, AND REMOVAL WAS THUS IMPROPER.

A notice of removal is generally required to be filed within 30 days after a defendant is served with an initial pleading that shows the basis for removal. 28 U.S.C. § 1446(b)(1). If a timely removal is not made, the "right" to removal is lost. 28 U.S.C. § 1446(b). Further, even when a notice to remove is *timely*, a defendant can *waive* or lose the "right" to removal by, for instance, seeking a motion to dismiss, or taking other action that manifests an intent to litigate in state court. *See, e.g., Heafitz v. Interfirst Bank*, 711 F. Supp. 92, 95 (S.D.N.Y. 1989) (defendant waived right to remove by filing motion to dismiss, which unequivocally indicated intent to litigate matter in state court). Indeed, the rule providing such waiver "is intended to preclude a defendant from experimenting with a case in state court prior to removing it to federal court, where the defendant then has a second opportunity at re-litigating any adverse decisions of the state court." *Bourdier v. Diamond M Odeco Drilling*, 1994 U.S. Dist. LEXIS 804, at *2-3 (E.D. La. 1994) (citing, et al., *Brown v. Demco, Inc.*, 792 F.2d 478, 481, 482 (5th Cir. 1986) (permitting defendants to remove after having "tested state-court waters" gives them second opportunity to forum shop and further delay suit)). In *Bourdier*, the court found that there had been no waiver based on removal made by a defendant after it had merely filed an answer in state court, noting that "[t]his is clearly not a case where defendant sought removal only after having defended the suit in state court *for an extended period of time*, and only after having filed *numerous demands, amendments or motions in the state court*." *Bourdier*, 1994 U.S. Dist. LEXIS 804, at *4 (italics added). *See also, Foley v. Allied Interstate*, 312 F. Supp. 2d 1279, 1285 (C.D. Cal. 2004) ("a defendant may not experiment in state court and then seek to remove upon receipt of an adverse ruling");

Towne v. Am. Family Mut. Ins. Co., 2010 U.S. Dist. LEXIS 16114, at *13–*14 (S.D. Ind. 2010) (removal waived because sought only after state court denial of motion to dismiss, in order to "prevent defendants, unhappy with adverse state court rulings, from taking a second bite at the apple in federal court") (internal changes and quotations omitted); *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893) (removal acts "do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court").

In contrast to both *Heafitz* and *Bourdier*, MR filed not only a motion to dismiss in state court (demurrer) on or about *January 14, 2022*, but it sought affirmative relief from the Court of Appeal *and* the California Supreme Court in *June 2022*. (Jee Decl., ¶ 2.) It also sought to transfer the City's State case to another judge, and to have the assigned judge disqualified. (*Id.*) Only after all these attempts failed, and MR realized it was again before the judge who had denied MR's demurrer, did MR seek to remove the City's action to federal court. Thus, MR has manifested its clear intent to litigate the matter in state court. Further, it is abundantly clear that MR seeks to use the removal process to allow it to re-litigate matters it submitted to the State court, and to give it a second opportunity to forum shop, and obtain different results, or to have tested the water in State court first.

In addition, any federal preemption claim that MR asserts now that purportedly serves as the basis for this Court's jurisdiction was always present and known to MR. As noted above, MR asserted in its demurrer, filed with the State court in January 2022, that the City's claims were preempted by federal law, that MR was subject to the exclusive jurisdiction of the Surface Transportation Board, and that the City's whole action and all claims were subject to dismissal on this ground. This assertion is not new or different that its basis for removal now. Instead, MR utilized every maneuver available to it to attack the City's complaint, and only when all of those efforts were exhausted – not to MR's advantage, did MR then seek to remove this matter to federal court. Its Notice to Remove was purportedly based on the new filing by the Coastal Commission's Complaint in Intervention, which sought only a supportive complaint to the City's, primarily "an

injunction ordering that Defendant Mendocino Railway . . . must comply with the City's ordinances, regulations, jurisdiction, and authority." (Request for Judicial Notice supporting MR's Notice of Removal, Exhibit B, at p. 1, ll. 27-28.) The Coastal Commission – contrary to MR's claims, did not seek to determine whether MR is a federally regulated railroad or subject to the jurisdiction of the STB.[1] (Notice of Removal, at ¶ 4.a.)

B. AN ACTION CANNOT BE REMANDED BASED ON A FEDERAL DEFENSE, AND THERE IS ALSO NO FEDERAL PREEMPTION IN ANY EVENT BECAUSE MR IS NOT AND HAS NOT BEEN ENGAGED IN ANY INTERSTATE COMMERCE, WHICH IS THE ONLY BASIS FOR STB JURISDICTION.

The United States Constitution establishes that federal courts have authority to hear cases "arising under [the] Constitution, the laws of the United States, and treaties." U.S. Const., art. III, § 2. With respect to the original jurisdiction of the courts to hear matters based on a federal question, Congress has provided authority similar to the Constitution: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Even though both of the above provisions refer broadly to matters "arising under" federal law, the Supreme Court has applied the language more narrowly. *See, e.g., Merrell Dow Pharmaceuticals, v. Thompson*, 478 U.S. 804, 813 (1986) (federal question jurisdiction requires a cause of action based on federal statute). The Complaint does not present a federal question that meets these standards, or which can be adjudicated by this Court.

Federal question jurisdiction under Title 28 United States Code section 1331 exists in two types of cases: (1) when it is apparent on the face of plaintiff's complaint that the plaintiff's cause of action was created by federal law; or (2) when the plaintiff's cause of

[1] Although the Coastal Commission's *prayer* seeks a declaration that the application of the State's Coastal Act and the City's Local Coastal Program "are not preempted by any state or federal law," this is merely the reverse of MR's federal *defense*. This is not a *new* claim, or one which itself confers federal question jurisdiction on this Court.

action was created by state law, but resolution requires determination of a substantial question of federal law and the implicated federal law provides the plaintiff with a cause of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (there is a federal question if the law creates the cause of action); *Merrell Dow*, 478 U.S. at 817 (federal question exists if an element of the state cause of action is a federal statute that creates a federal cause of action for plaintiff).

The Ninth Circuit in *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 1118 (9th Cir. 2019), concluded that "[n]either a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction." *Id. See also, Chicago Tribune Co. v. Board of Trs. of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("it is blackletter law that a federal defense differs from a claim arising under federal law"). There is no substantial question of federal law, when MR has merely asserted a preemption defense. It is well-established that a federal defense does not establish federal jurisdiction. *See Louisville & Nashville Rd. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *City Nat'l Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982) (anticipation of federal defense does not establish federal jurisdiction). Contrary to MR's claims, neither the City's Complaint nor the Coastal Commission's Complaint in Intervention "clearly presents a federal question on the face of [the] complaint[s]." And, even assuming *arguendo* that the Coastal Commission's Complaint did so, it only did so to the *same extent* that the City's Complaint did so at the outset, and thus the removal was untimely because it was not sought by MR within 30 days after the service of the City's Complaint on MR on or about November 23 and 30, 2021. (Jee Decl., ¶ 2.)

First, MR's assertion about the nature of the Coastal Commission's Complaint are simply inaccurate. MR claims in its Notice of Removal that the Coastal Commission seeks in its first cause of action for a declaration that MR is "is not a federally regulated railroad subject to the federal Surface Transportation Board's . . . exclusive jurisdiction." It does no such thig. Instead, it seeks a determination that "ongoing and proposed activities by the Railway within the coastal zone of the City, including but not limited to,

alterations to structures, constitute 'development' under both the Coastal Act and the City's [Local Coastal Program]." (Coastal Commission Complaint, at ¶ 12.) Specifically, the Coastal Commission seeks a declaration regarding "whether the Railway's development activities in the coastal zone are subject to the Coastal Act and the City's [Local Coastal Program]." (Coastal Commission Complaint, at ¶ 15.)

In the Answer MR filed to the Coastal Commission Complaint, on November 14, 2022 [Doc. 10], MR even admitted the limited nature of its asserted preemption claim, which does *not* even apply to the whole of the Coastal Commission's Complaint. MR expressly "admit[ted] that it contends that its rail-related activities in the coastal zone are not subject to state or local land-use regulations." (Answer, at ¶ 1.) Repeatedly throughout the Answer, MR claims only that some portion of its activities – its "rail-related" activities or rail-related uses of property are purportedly preempted. Thus, MR acknowledges that there is at least some portion of the Coastal Commission Complaint that is *not* preempted. Moreover, MR does not explain how it is that a purportedly applicable *partial* federal preemption *defense* provides it with federal subjection matter jurisdiction as a federal question.

Indeed, even assuming *arguendo* that federal preemption applied, it is not absolute in this instance. As the Fifth Circuit found, discussing the same principle found in the Eleventh Circuit, "Congress narrowly tailored the ICCTA pre-emption provision to displace only regulation, i.e., those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. . . . The text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." *Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 410 (5th Cir. 2010) (quotations and changes omitted) (quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). *See also, Maumee & Western Railroad Corporation and RMW Ventures, LLC -- Petition For Declaratory Order*, STB Finance

Docket No. 34354, 2004 STB LEXIS 140, *3 (March 2, 2004) ("Federal preemption [under 49 U.S.C.§ 10501] does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety."); *Shupp v. Reading Blue Mt. & N. R.R.*, 850 F. Supp. 2d 490, 501 (M.D. Pa. 2012) ("ICCTA does not present complete preemption of all state law") (remanding to state court due to no federal defense of preemption) (citing *New York Susquehanna and Western Railway Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007)); *Allied Erecting & Dismantling Co. v. Ohio Cent. R.R.*, 2006 U.S. Dist. LEXIS 76542, at *15 (N.D. Ohio 2006) ("section 10501(b) does not completely preempt all regulations that affect railroads").

Where there is not *complete* preemption, remand is the proper remedy. And even a *defense* of preemption under the ICCTA, for instance, is a "determination [that] is consigned to the considered judgment of the state court on remand." *Beatty Grp. v. Great W. Ry. of Colo., L.L.C.*, 2020 U.S. Dist. LEXIS 54383, at *10 (D. Colo. 2020) (quotations omitted) (quoting *Tres Lotes LLC v. BNSF Ry. Co.*, 61 F. Supp. 3d 1213, 1218 (D.N.M. 2014)).

In fact, even regulations related to the physical rail lines may not be preempted as MR claims. In *Cook v. Union Pac. R.R.*, 2011 U.S. Dist. LEXIS 133494, at *14-17 (D. Or. 2011), a state statute regulating the size of the ballast and the slope of the right of way along a railroad's tracks was found to have only a remote or incidental effect on rail transportation." In *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1131 (10th Cir. 2007), the court favorably discussed findings in *Rushing v. Kansas City Southern Railway Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001) (internal citations, changes and quotations omitted), which found that:

> the ICCTA did not preempt plaintiffs' claims for negligence and nuisance based on the railroad's construction of an earthen berm, which was constructed to reflect and absorb noise emissions originating from the rail yard and resulted in the pooling of rainwater on the plaintiffs' property. The ICCTA did not preempt those claims because the design/construction of the

> berm does not directly relate to the manner in which the Defendant conducts its switching activities. The court also found that an order directing the railroad to compensate and correct drainage problems resulting from the construction of the berm would not implicate the type of economic regulation Congress was attempting to prescribe when it enacted the ICCTA.

In *Emerson*, the court found that "no ICCTA provision gives the STB authority to dictate how the Railroad should dispose of detritus or maintain drainage ditch vegetation," so these specific matters were thus not preempted. *Emerson*, at 1132. Further, the *Emerson* Court noted the absurdity of the railway's claims:

> the Railroad's argument has no obvious limit, and if adopted would lead to absurd results. If the ICCTA preempts a claim stemming from improperly dumped railroad ties, it is not a stretch to say that the Railroad could dispose of a dilapidated engine in the middle of Main Street--a cheap way to be rid of an unwanted rail car. After all, in this hypothetical, as in this case, the Railroad is merely disposing of unneeded railroad equipment in a cost-conscious fashion.

Id. (citing *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982)). In fact, "not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety." *Emerson*, at 1133 (quotations omitted). *See also, Friends of the Eel River v. N. Coast R.R. Auth.*, 230 Cal. App. 4th 85, 105 (2014):

> The ICCTA "does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce. [Citations.] For instance, the STB has recognized that [the] ICCTA likely would not preempt local laws that prohibit the dumping of harmful substances or wastes, because such a generally applicable regulation would not constitute an unreasonable burden on interstate commerce. [Citations.]" (*Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097.

Indeed, the *Emerson* court noted that a preemption claim as to a state regulation "requires a factual assessment," and that it is the defendant asserting the defense that has the burden of proof of demonstrating that there is preemption. *Id.* at 1134. The STB has agreed that "state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." *Maumee & Western Railroad Corporation and RMW Ventures, LLC—Petition for*

Declaratory Order, STB Finance Docket 34354 (March 2, 2004). *See also, New York Susquehanna and W. Ry. Corp.*, STB Fin. Docket No. 33466, 6 (Sept. 9, 1999) (STB has recognized that "not all state and local regulations that affect railroads are preempted"), cited in *Fla. E. Coast Ry. v. City of W. Palm Beach*, 110 F. Supp. 2d 1367, 1377 (S.D. Fla. 2000)).

The First Circuit noted, for instance, that a regulation relating to railroad rates might arguably be completely preempted, that would not mean that railroads would be automatically immunized from state nuisance claims, concluding that they were not, and that such claims would not "clearly provide a federal cause of action amounting to nuisance." *Fayard v. Ne. Vehicle Servs.*, 533 F.3d 42, 48 (1st Cir. 2008). Further, *Fayard* expressly concluded that, since *defendant* had the burden of showing some "clear cut federal cause of action," its failure to do so meant that "there are good reasons, certainly for a lower federal court, to refuse to extend complete preemption beyond its current boundaries." *Id.* *Complete* preemption is a "'narrow exception'" as found by the Supreme Court, and is subject to "the usual rule against federal jurisdiction or removal premised merely upon a prospective federal defense. Both jurisdiction and removal are primarily creatures of Congress; and the balance Congress has struck should not lightly be disregarded." *Id.* (citing *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)). As the *Fayard* Court further noted as to the important underlying interests of preserving State court jurisdiction:

> [A]bsent a clear cut federal cause of action, a danger exists of creating gaps in protection by categorically supplanting state claims with non-existent federal remedies. By contrast, where the state claim is left intact, federal interests are still largely protected: nothing prevents a preemption defense from being asserted, albeit in state courts.

Fayard, at 49. The *Fayard* Court found that remand should have been granted, based on an absence of subject matter jurisdiction, finding that "preemption may well be a defense to the Fayards' nuisance claims, but the conditions have not been met to authorize removal through the extreme and unusual outcome of complete preemption." *Id.*

In addition, the STB does not have jurisdiction over excursion railroads like MR's.

See, e.g., Denver & Rio Grande Railway Historical Foundation—Petition for Declaratory Order, STB Finance Docket 35496 (August 15, 2014). It also does not have jurisdiction over rail lines that are not, and have never, operated in interstate commerce. *See, e.g., Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999) ("Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track."); ("preemption does not apply to operations that are not part of the national rail network" or "to state or local actions under their retained police powers so long as they do not interfere with railroad operations or the Board's regulatory programs") (citing *Hi Tech Trans, LLC-- Petition for Declaratory Order--Hudson County, NJ*, STB Finance Docket No. 34192, 2003 STB LEXIS 475 at *10-11, 2003 WL 21952136 (2003), *aff'd Hi-Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) ("no preemption for activity that is not part of 'rail transportation'").

MR operates a sightseeing excursion service only, with no service connection to interstate commerce; its railway activities are limited, and not subject to federal preemption. Indeed, the federal Railroad Retirement Board has so held as to Mendocino Railway's operations. *See* Jee Decl., Exhibit A. The Board issued a decision in B.C.D. 06-42 in 2006, finding that, even though the STB authorized Mendocino Railway's acquisition in 2004 of the assets of California Western Railroad, Mendocino's rail lines "between Fort Bragg and Willits . . connects to another railway line over which there has been no service for approximately ten years," and significant "problems on the line will prevent service for some time to come." The line was, at that time, "unusable" – and it remains so today.[2] *Id.* The Board concluded that "Mendocino's ability to perform

[2] As alleged in the City's Complaint, this line has had a collapsed tunnel since in or about 2016, and Plaintiff admits that the further connection of its line at the Willits Depot end of the Fort Bragg-Willits disconnected line has been "temporarily" under federal embargo

common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform." *Id.* Further, its services were "characterized as a tourist or excursion railroad operated solely for recreational and amusement purposes. Since passengers are transported solely within one state, under section 10501 (a)(2)(A), above, Sierra Entertainment [, Plaintiff's parent company,] would not be subject to [STB] jurisdiction. . . ." The Board concluded that "[s]ince Mendocino reportedly does not and cannot now operate in interstate commerce, the Board finds that it is not currently an employer under the Acts." *Id.*

In this action of the City against MR, the City seeks to exercise legitimate police powers not within the jurisdiction of the STB and not subject to federal preemption. Similarly, the Coastal Commission's Complaint seeks to enforce State law, including the Coastal Act, to generally unspecified actions of MR, still to be determined by the State court, and which are not completely preempted as erroneously asserted by MR. Further, as noted above, the Railroad Retirement Board concluded, since 2006, that Mendocino Railway does *not* conduct activities in interstate commerce, is *not* a common carrier, and is *not* subject to STB authority or jurisdiction. Thus, MR's assertions as to purported exclusive STB authority and preemption are simply false, and do not support federal question jurisdiction in any event.

V. CONCLUSION.

For all of the foregoing reasons, this Court must remand this matter to State court, as having been improperly and not timely removed. Further, MR states no valid federal cause of action over which this Court has any subject matter jurisdiction, and has not satisfied its burden to demonstrate how remand is proper; a mere hypothetical, anticipated assertion of a federal preemption defense by MR is insufficient. In addition, to the extent any such preemption defense existed, MR has known and asserted such defense since the outset of the City's action a year ago, and MR had an obligation to remove at that time,

(since in or about 1998, *see* FRA Emergency Order No. 21, Northwestern Pacific Railroad) (Notice of Removal, RJN, Ex. A, ¶ 9.) And, MR's Answer admits that "it is estimated to cost around $5 million to repair and reopen Tunnel No. 1." (Jee Decl., ¶ 2.)

not a year later – after MR has already manifested a clear intent to litigate this matter in State court, having filed a motion to dismiss (demurrer), a notice of related case, a request for disqualification, *and* a petition for writ of mandate to the Court of Appeal and a petition for review to the California Supreme Court. In addition, the City must be permitted the opportunity to have its action to proceed in the chosen forum, and for MR not to be permitted to seek another forum for the clear purpose of obtaining a second ruling, when the state court one was not to its liking. Finally, MR inaccurately asserts federal preemption of the STB that does not even apply, since MR has already been found not to be engaging in interstate commerce and *not* subject to STB jurisdiction, as well as it operating merely an excursion, sightseeing train that is not subject to such jurisdiction.

Dated: November 21, 2022

JONES MAYER

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