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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MENDOCINO**

MENDOCINO RAILWAY,
Plaintiff,

vs.

JOHN MEYER; REDWOOD EMPIRE
TITLE COMPANY OF MENDOCINO
COUNTY; SHEPPARD
INVESTMENTS; MARYELLEN
SHEPPARD; MENDOCINO COUNTY
TREASURER-TAX COLLECTOR; all
other persons unknown claiming an
interest in the property; and DOES 1
through 100, inclusive
Defendants.

) Unlimited

) Case No. SCUk-CVED 20-74939

) DEFENDANT JOHN MEYER'S
CLOSING REPLY BRIEF

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A. Introduction

“Repetition does not transform a lie into the truth.” Franklin D. Roosevelt

Throughout the litigation and most of the trial Mendocino Railway has misrepresented that it was a common carrier that transported passengers and freight, thereby providing it with the right to take property through eminent domain.

After the trial testimony was re-opened Robert Pinoli (“Pinoli”) recanted his prior testimony and he confirmed that MR was not a common carrier, and that it did not transport freight or passengers until January 2022. Notwithstanding, MR argued the opposite in its closing trial brief.

Apparently MR has still not been dissuaded from repetitively lying about the material issues in this case. The court must stop MR’s attempt to acquire Meyer’s property by illegally employing the eminent domain process when it does not have the statutory power.

B. MR Was Neither A Railroad, Common Carrier, Or Public Utility When It Filed This Action In 2020.

After the close of testimony Meyer obtained a copy of the “Employer Status Determination For Sierra Entertainment and Mendocino Railway” issued by the Railroad Retirement Board, dated September 28, 2006 (“Retirement Board Decision”) (Exhibit AA.) The Retirement Board Decision contradicted and impeached the trial testimony of Pinoli regarding MR’s alleged status as a common carrier, its alleged transportation of freight, its alleged transportation of passengers, and its alleged connection to the interstate railroad system. (Exhibit AA.)

The Retirement Board Decision states the following:

- “Information regarding these companies [Sierra Entertainment and Mendocino Railway] was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC, outside counsel for Sierra Railroad Company.” (Exhibit AA, p. 1, paragraph 3.)
- “ Since Mendocino Railway’s only access to the railroad system is over this line, that access is currently unusable. Mendocino’s ability to perform common carrier services is thus

1 limited to the movement of goods between points on its own line, a service it does not perform.”
2 (Exhibit AA, p. 1, paragraph 4.)

3 ● “Since Mendocino reportedly does not and cannot now operate interstate commerce,
4 the Board finds that it is not currently an employer under the Acts. If Mendocino commences
5 operations, the Board will revisit this decision.” (Exhibit AA, p. 4, paragraph 1.)

6 The finding that MR was not a common carrier was confirmed by MR’s attorney in a
7 letter dated April 27, 2022, written to the Railroad Retirement Board, in which MR stated that
8 “MR believes that it has become a ‘carrier’ under the Act effective January 1, 2022”
9 (“Retirement Board Letter”). (Exhibit BB.)

10 Additionally, after this case was re-opened, MR’s President, Robert Pinoli, confirmed the
11 Railroad Retirement Board’s findings when he testified as follows:

12 “Q. Would it be correct to state that Mendocino Railway has not performed common
13 carrier services between the timeframe of 2004 when it purchased the railroad, the
14 California Western Railroad, and January 1st, 2022?

15 A. That is correct.” (11-3-22, p. 15, lines 6-11.)

16 Pinoli subsequently reconfirmed this point when he testified at the end of the trial to the
17 following:

18 “Q. All right. So based upon your statement, effectively Mendocino Railway does not
19 believe it became a common carrier until January 1, 2022; is that correct?

20 A. When it took over the operations from Sierra Northern Railway?

21 Q. That’s correct.

22 A. Yes.

23 Q. Yes?

24 A. Yeah.” (11-10-22, p. 52, lines 17-25.)

25 Pinoli also testified that no revenue was generated from the transport of freight or
26 passengers in 2020, specifically stating the following:

27 “Q. So it is your understanding that in 2020, 90 percent of - - approximately 90 percent of
28 the revenue that Mendocino Railway received was due to excursion services.

A. Approximately.” (11-3-22, p. 75, line 26 - p. 76, line -2.)

Q. Okay. So in the remaining ten percent that wasn’t due to excursions, where did that

1 revenue come from?

2 A. Leases and easements.” (11-3-22, p. 76, lines 11-14.)

3 This testimony cannot be clearer on the material issues. This testimony effectively
4 establishes that in 2020¹ all of MR’s revenue was received from excursion services, leases, and
5 easements. Therefore, this testimony proves that in 2020, MR did not receive any revenue from
6 common carrier services, such as the transportation of freight and/or passengers.

7 Public Utilities Code § 610 et seq., which regulates eminent domain actions for “railroad
8 corporations” and “common carriers” only applies to a corporation or utility that is a “public
9 utility.” (Public Utilities Code § 610.)

10 MR is not a “public utility” under Public Utilities Code § 229, which by definition
11 includes “every common carrier.” A “common carrier” means “every person or corporation
12 providing transportation for compensation,” including “every railroad corporation.” (Public
13 Utilities Code § 211.)

14 “A *railroad corporation* may condemn any property necessary for the construction and
15 maintenance of its railroad.” (Public Utilities Code § 611, italics added.) “A ‘railroad
16 corporation’ includes every corporation or person owning, controlling, operating, or managing
17 any *railroad* for compensation within this State.” (Public Utilities Code § 230, italics added.) A
18 “*railroad*” includes every commercial, interurban, and other railway, . . . owned, controlled,
19 operated, or managed for public use in the *transportation of persons or property*.” (Public Util.
20 Code § 229, italics added.)

21 The evidence establishes that MR does not operate a “railroad” because its trains do not
22 transport persons or property. (11-10-22, p. 49, line 18 - p. 50, lines 2; p. 52, lines 17-23.) Since
23 MR does not provide “transportation,” it is not a “railroad corporation,” “common carrier” or a
24 “public utility.” (11-10-22, p.52, lines 17-23; p. 49, line 18 - p. 50 line 2; p. 52, lines 17-23;
25 Exhibit AA; Exhibit BB.) That being the case, MR does not have the statutory power of eminent
26 domain.

27

28 _____
¹This action was filed by MR in 2020.

1 **C. MR's Excursion Service Is Not A Public Use, And MR Is Prohibited From**
2 **Taking Property By Eminent Domain To Use For Its Private Excursion Service.**

3 "The Constitution does not contemplate that the exercise of the power of eminent domain
4 shall secure to private activities the means to carry on a private business whose primary objective
5 and purpose is private gain and not public need." (*Council of San Benito County Governments v.*
6 *Hollister Inn, Inc.* (2012) 209 Cal. App. 4th 473, 494, quoting *City & County of San Francisco v.*
7 *Ross* (1955) 44 Cal. 2d 52.)

8 In *City of St. Helena v. Public Util. Comm'n.* (2004) 119 Cal. App. 4th 793, 798, the
9 court evaluated "whether the [C]PUC has jurisdiction to regulate the Wine Train as a public
10 utility," and it found the Wine Train did "not provide 'transportation'" and that it is "not subject to
11 regulation as a public utility because it does not qualify as a common carrier."

12 Similarly, the evidence in this case established that MR provides an excursion service
13 and it does not provide transportation of passenger or freight. Since MR does not provide
14 transportation, it is not a railroad, common carrier, or public utility, therefore it does not have the
15 power of eminent domain.

16 In *City & County of San Francisco v. Ross* (1955) 44 Cal 2d 52, 54 ("Ross"), the City of
17 San Francisco sought to acquire by eminent domain a site that would subsequently be leased to
18 private individuals who would build a parking structure in accordance with the city's
19 specifications and operate parking and other facilities. The city intended to allow a portion of the
20 ground floor frontage of the proposed building to be leased and occupied by retail stores. The
21 total floor space to be occupied by such retail commercial activity was estimated by the city to be
22 no more than four percent (4%) of building. (*Id.*, at 58-59.)

23 In *Ross* it was argued that "there is a clear taking of private property for private purposes
24 and [it is] so interwoven with an otherwise questionable exercise of eminent domain as to
25 characterize the whole taking as one without authority." (*Id.*, at 59.)

26 MR's use of Meyer's property for its private excursion service precludes it from acquiring
27 Meyer's property by eminent domain. Under the holding in *Ross*, MR cannot exercise the power
28 of eminent domain as a means to carry on its private business activities whose primary objective
and purpose is private gain from excursion services, and not public need.

1 Pinoli testified that MR did not perform common carrier services between 2004 and
2 2022. (11-3-22, p. 15, lines 6-11.) Pinoli also testified that in 2020 approximately 90 percent of
3 MR's revenue in 2020 was from excursion services and the remaining ten percent of revenue that
4 wasn't from excursions was obtained from leases and easements. (11-3-22, p. 75, line 26 - p. 76,
5 line -2; p. 76, lines 11 - 14.) MR's receipt of 90% of its revenues from private excursion services
6 is 22.5 times more than the 4% of private services deemed unacceptable in *Ross*. As such, MR's
7 private excursion services preclude it from taking Meyer's property by eminent domain.

8 **D. MR Doesn't Have A Right To Take, Due To Its Failure To Formulate A Plan
9 And Properly Evaluate The Project.**

10 “[A]n adequate project description is essential to the three findings of necessity that are
11 required to be made in all condemnation cases. Only by ascertaining what the project is can the
12 governing body make those findings.” (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal.
13 App. 4th 93, 113; *Cincinatti v. Vester* (1930) 281 U.S. 439, 448.) “[A] public agency has no right
14 to condemn in the absence of evidence to support the findings or necessity, and such evidence
15 cannot exist without a sufficient project description.” (*City of Stockton v. Marina Towers, supra*,
16 at 115; *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal. App. 3d 1121, 1129.)

17 MR cannot prove that “the project is planned or located in the manner that will be most
18 compatible with the greatest public good and the least private injury,” as required by Code of
19 Civil Procedure § 1240.030(b). There was no specific description or plans for the “Project”
20 when the eminent domain process began, and no plan was ever provided to Meyer. (8-25-22, p.
21 277, line, 27-p. 280, line 8.) The only conceptual drawing in place for the Meyer Property as of
22 the date of filing of the complaint depicted a *station/store, campground, and long-term RV rental*
23 *park*. (8-25-22, p. 235, line, 13- p. 236, line 4; Exhibit 33-49.)

24 MR's evaluation of the location for its site was based upon whether or not it was
25 conducive to camping, RV vehicle parking, and use for its excursion service, which are private
26 uses. (Exhibit 33-75; Exhibit 33-76; 8-25-22, p. 228, line 5- p. 232, line 17.) Such private uses
27 are not compatible with properly evaluating whether alternate locations are better, that is,
28 compatible with the greatest public good and the least private injury.

1 **E. MR Is Attempting To Take Excess Property Without Satisfying the**
2 **Requirements of Code of Civil Procedure § 1240.410.**

3 Code of Civil Procedure § 1240.410 permits property excess to the needs of the proposed
4 project to be taken only if it would be left as a remainder in such size, shape, or condition as to be
5 of little market value.

6 It is a ground for objection if excess property is sought to be acquired pursuant to Code of
7 Civil Procedure § 1240.410, but the acquisition does not satisfy the requirements of such section.
8 (Code of Civil Procedure § 1250.360(f).) When “the property is not needed for the physical
9 construction of the public improvement, the question of public use turns on the determination of
10 whether the taking is justified to avoid the excessive severance or consequential damages.
11 Accordingly, if the court determines that the excess condemnation is not so justified, it must find
12 that it is not for a public use.” (*People ex. Rel. Department of Public Works v. Superior Court of*
13 *Merced County, supra*, at 216.)

14 Pinoli testified that he substantial acreage² referenced as “natural habitat preserve” on the
15 preliminary site map in Exhibit 4 is a “natural barrier and is unnecessary for the project.” (8-24-
16 22, p. 66, lines 13-25.) Pinoli further testified that MR “had no intention of knocking down trees
17 or disrupting the stream bed so that area was precluded, if you will, from our developing it.” (8-
18 25-22, p. 285 line 27 - p. 286, line 6.)

19 Since the “natural habitat preserve” is not going to be developed by MR, Meyer should be
20 able to retain these 5-7 acres under the law. The size, shape, and condition does not make it of
21 little market value and Meyer has the legal right to retain it. (Exhibit 4; 8-24-22, p. 66, lines 13-
22 25; 8-25-22, p. 285 line 27 - p. 286, line 6.) MR’s taking of this excess property is not necessary
23 for the Project and it is illegal.

24 **F. A Final Judgment Should Be Issued Denying MR The Right To Take The**
25 **Property And Litigation Expenses Should Awarded To Meyer.**

26 MR’s internal emails reflected that this would be a “test case” for MR to attempt to take
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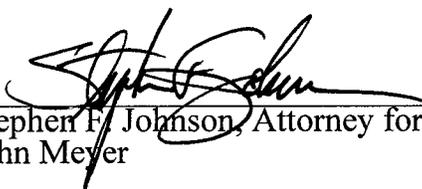
28 ² The “natural habitat preserve” appears to represent approximately 1/3rd to 1/4th of
Meyer’s 20 acre property.

1 property by eminent domain. (Exhibit D, p. 0158-0159.) MR has failed to meet the statutory and
2 constitutional prerequisites to take Meyer's property in this "test case." The evidence established
3 that MR is illegally attempting to take the Property by eminent domain without the constitutional
4 or statutory power to do so. MR also repeatedly lied regarding the material issues throughout
5 this litigation, and such lies cannot be argued away. The court should find that MR does not
6 have the right to acquire the Meyer property, and it should render a final judgment that denies
7 MR the right to take the Meyer property.

8 The court is required to award to the condemnee litigation expenses under Code of Civil
9 Procedure § 1268.610, when there is a final judgment which provides that the plaintiff does not
10 have the right to take the property sought to be acquired. Meyer requests that the court rule in his
11 favor and to award him reasonable attorney fees, litigations expenses, and costs of suit.
12 Additionally, a hearing date should be subsequently set for the court to evaluate Meyer's claim
13 for damages against MR, specifically including, but not limited to, damages arising out of the
14 "Klopping Rule." (*Klopping v. Whittier* (1972) 8 Cal. 3d 39, 46-52.)

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16 DATED: February 7, 2023.

MANNON, KING, JOHNSON & WIPF, LLP

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20 Stephen F. Johnson, Attorney for Defendant
21 John Meyer
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1 **PROOF OF SERVICE**

2 Mendocino County Superior Court Case No.: SCUK-CVED-20-74939

3 I declare that I am over the age of 18 years, employed in the County of Mendocino,
4 and not a party to the within action; my business address is P.O. Box 419, 200 N. School
5 Street, Room 304, Ukiah, CA 95482.

6 On February 7, 2023, I served the **DEFENDANT JOHN MEYER'S CLOSING**
7 **REPLY BRIEF** on the interested parties in this action by placing the original true
8 copies thereof, as follows:

9 **SEE ATTACHED SERVICE LIST**

10 <input type="checkbox"/>	By E-SERVICE. Pursuant to California Rules of Court Rule 2.251(c), adopted effective July 1, 2013, I am e-Serving the above-listed document(s) to the electronic service address(es) on the attached Service List and e-Filing the document(s) using one of the court's approved electronic service providers. A true and correct copy of the e-Service transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.
11 <input type="checkbox"/>	By MAIL. I am readily familiar with this law firm's practice for collection and processing of documents for mailing with the U. S. Postal Service. The above-listed document(s) will be deposited with the U. S. Postal Service on the same day shown on this affidavit, to the addressee(s) on the attached Service List in the ordinary course of business. I am the person who sealed and placed for collection and mailing the above-listed document(s) on this date at Ukiah, California, following ordinary business practices.
12 <input checked="" type="checkbox"/>	By E-MAIL. I e-mailed above-listed document(s) to the e-mail address(es) of the addressee(s) on the attached Service List. A true and correct copy of the e-mail transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.
13 <input type="checkbox"/>	By OVERNIGHT DELIVERY. The above-listed document(s) will be deposited with an Overnight Delivery Service on the same day shown on this affidavit, in the ordinary course of business. I am the person who sealed and placed for collection and overnight delivery the above-listed document(s) on this date at Ukiah, California, to the addressee(s) on the attached Service List following ordinary business practices. A true and correct copy of the overnight delivery service transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.
14 <input type="checkbox"/>	By PERSONAL SERVICE. I caused to have hand delivered, the above-listed document(s) to the parties indicated on the service list.
15 <input checked="" type="checkbox"/>	(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

16 Executed on February 7, 2023, at Ukiah, California.

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18 _____
19 Rochelle Miller, Legal Assistant

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SERVICE LIST

Mendocino County Superior Court Case No.: CVED-20-74939

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