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Superior Court of California
County of Mendocino

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

<p>10 MENDOCINO RAILWAY,</p> <p>11 Plaintiff,</p> <p>12 vs.</p> <p>13 JOHN MEYER; REDWOOD EMPIRE TITLE COMPANY OF MENDOCINO 14 COUNTY; SHEPPARD INVESTMENTS; MARYELLEN 15 SHEPPARD; MENDOCINO COUNTY TREASURER-TAX COLLECTOR; all 16 other persons unknown claiming an interest in the property; and DOES 1 17 through 100, inclusive</p> <p>18 Defendants.</p>	<p>) <u>Unlimited</u></p> <p>) Case No. SCUk-CVED 20-74939</p> <p>) DEFENDANT JOHN MEYER'S NOTICE OF MOTION TO REOPEN CASE; SUPPORTING MEMORANDUM; DECLARATION OF STEPHEN F. JOHNSON</p> <p>) Date: October 7, 2022 Time: 9:30 AM Dept: E</p>
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20 Please take notice that on the above date and time, or as soon thereafter as the
21 matter can be heard, defendant John Meyer, will move under Code of Civil Procedure
22 section 607(6) to reopen the case and request an order setting aside submission of the case
23 to allow for the introduction of additional evidence. This motion is made on the grounds
24 that there is good cause to reopen the case due to the discovery of new documentary
25 evidence that is probative on significant issues in this case. The documentary evidence is
26 attached to the Declaration of Stephen F. Johnson and it was not presented at trial because
27 despite due diligence, it was only discovered after the conclusion of the trial.
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1 This motion is based on all pleadings, records, and papers on file in this action;
2 and the attached Supporting Memorandum and Declaration of Stephen F. Johnson

3 **Supporting Memorandum**

4 In the ordinary order of proceedings, once the defendant has concluded presenting
5 evidence, the parties are limited to offering rebuttal evidence. However, the court may
6 permit the offering of evidence on the original case, for good reason and in furtherance of
7 justice under Code of Civil Procedure § 607(6). (5 Witkin California Procedure (6th Ed.)
8 Trial § 163.)

9 A party who seeks to introduce further evidence must make a motion to reopen the
10 case for further evidence. The motion must be supported by a showing of good cause and
11 due diligence. (*Ensher, Alexander & Barsroom v. Ensher* (1964) 225 Cal. App. 318, 326;
12 5 Witkin California Procedure (6th Ed.) Trial § 163.) A request to reopen for further
13 evidence is addressed to the discretion of the trial court whose determination is binding
14 on appeal in the absence of palpable abuse. (*McLear-Gary v. Scott* (2018) 25 Cal. App.
15 5th 145, 150; 5 Witkin California Procedure (6th Ed.) Trial § 163.) A motion to reopen
16 may be brought after the close of evidence and before argument. (*Cappa v. Oscar C.*
17 *Holmes* (1972) 25 Cal. App. 3d 978, 985; *McLear-Gary v. Scott* (2018) 25 Cal. App. 5th
18 150, 151; 5 Witkin California Procedure (6th Ed.) Trial § 163.)

19 Attached as Exhibit A to the Johnson Declaration is an “Employer Status
20 Determination For Sierra Entertainment and Mendocino Railway” issued by the Railroad
21 Retirement Board and dated September 28, 2006. (Johnson Declaration.) Stephen F.
22 Johnson was provided a copy of Exhibit A on September 6, 2022, from a person that is
23 not a party to this action. Johnson did not present this document at trial because he
24 initially received this document after the case had been submitted and before the filing of
25 closing briefs. Johnson would have presented Exhibit A at trial if he had received it prior
26 to trial. (Johnson Declaration.)

27 Exhibit A was not produced by Mendocino Railway in discovery or at trial. Meyer
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1 was diligent in requesting and attempting to obtain all relevant documents to Mendocino
2 Railway's common carrier status in discovery, but this document was not produced and it
3 was not obtained by Meyer or his counsel until September 6, 2022, after the submission
4 of the case. (Johnson Declaration.)

5 Exhibit A is going to be offered to contradict and impeach the trial testimony of
6 Robert Pinoli regarding Mendocino Railway's alleged status as a common carrier, its
7 alleged hauling of freight, and its alleged connection to the interstate railroad system.
8 Specifically, Exhibit A states the following:

9 ● "Information regarding these companies [Sierra Entertainment and Mendocino
10 Railway] was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC,
11 outside counsel for Sierra Railroad Company." (Johnson Declaration, Exhibit A, p. 1,
12 paragraph 3.)

13 ● "Mendocino's line runs between Fort Bragg and Willits, California, and
14 connects to another railway line over which there has been no service for approximately
15 10 years. Structural problems and bridge problems on the line will prevent service for
16 some time to come. Since Mendocino Railway's only access to the railroad system is
17 over this line, that access is currently unusable. Mendocino's ability to perform common
18 carrier services is thus limited to the movement of good between points on its own line, a
19 service it does not perform." (Johnson Declaration, Exhibit A, p. 1, paragraph 4.)

20 ● "Since Mendocino reportedly does not and cannot now operate interstate
21 commerce, the Board finds that it is not currently an employer under the Acts. If
22 Mendocino commences operations, the Board will revisit this decision." (Johnson
23 Declaration, Exhibit A, p. 4, paragraph 1.)

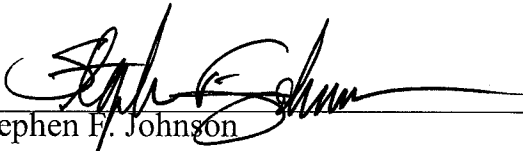
24 Exhibit A directly contradicts the testimony of Mr. Pinoli in this trial on many of
25 the main issues in this case, specifically it provides evidence that Mendocino Railway
26 does not in fact consider itself a common carrier, it does not haul freight on its line, and it
27 is not connected to the interstate railway system.

1 Exhibit A makes it readily apparent that Mendocino Railway is not a common
2 carrier and does not wish to be a common carrier if it is going to be required to make
3 retirement payments to its employees, but it wishes to be deemed a common carrier in
4 order to take property through eminent domain. Mendocino Railway is attempting to
5 obtain the benefits of being a common carrier without accepting the burdens of being a
6 common carrier. This type of conduct is unacceptable and Exhibit A calls into question
7 significant portions of Mr. Pinoli's testimony on the key issues of this case.

8 We respectfully request that the court reopen the case to address the issues raised
9 in this document and allow for the questioning of Mr. Pinoli regarding Exhibit A. The
10 reopening of the proceedings in order to address this document and the related issues will
11 not take much time, and the probative value of evidence and testimony is likely to be
12 significant.

13 DATED: September 12, 2022.

MANNON, KING, JOHNSON & WIPF, LLP

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15 
16 Stephen F. Johnson
17 Attorney for Defendant John Meyer

18 **Declaration of Stephen F. Johnson In Support of Motion**

19 I, Stephen F. Johnson, declare:

20 I am the attorney for defendant John Meyer in the above named action. I have
21 personal knowledge of the following facts and if called as a witness could and would
22 competently testify as follows:

23 1. Attached as Exhibit A is an "Employer Status Determination For Sierra
24 Entertainment and Mendocino Railway" issued by the Railroad Retirement Board and
25 dated September 28, 2006.

26 2. I was provided a copy of Exhibit A on September 6, 2022, from a person that is
27 not a party to this action. I did not present this document at trial because I initially
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1 received this document after the case had been submitted and before the filing of closing
2 briefs. I would have presented Exhibit A at trial if I had received it prior to trial.

3 3. Exhibit A was not produced by Mendocino Railway in discovery or at trial.
4 Meyer was diligent in requesting and attempting to obtain all relevant documents to
5 Mendocino Railway's common carrier status in discovery, but this document was not
6 produced and it was not obtained by Meyer or his counsel until after the submission of the
7 case.

8 4. Exhibit A is going to be offered to contradict and impeach the trial testimony of
9 Mr. Pinoli regarding Mendocino Railway's alleged status as a common carrier, its alleged
10 hauling of freight, and its alleged connection to the interstate railroad system.

11 Specifically, Exhibit A states the following:

12 ● "Information regarding these companies [Sierra Entertainment and Mendocino
13 Railway] was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC,
14 outside counsel for Sierra Railroad Company." (Exhibit A, p. 1, paragraph 3.)

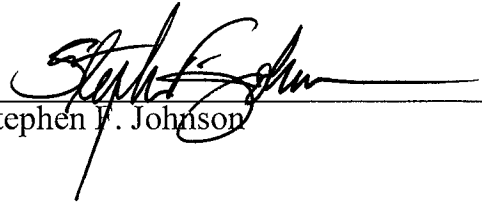
15 ● "Mendocino's line runs between Fort Bragg and Willits, California, and
16 connects to another railway line over which there has been no service for approximately
17 10 years. Structural problems and bridge problems on the line will prevent service for
18 some time to come. Since Mendocino Railway's only access to the railroad system is
19 over this line, that access is currently unusable. Mendocino's ability to perform common
20 carrier services is thus limited to the movement of good between points on its own line, a
21 service it does not perform." (Exhibit A, p. 1, paragraph 4.)

22 ● "Since Mendocino reportedly does not and cannot now operate interstate
23 commerce, the Board finds that it is not currently an employer under the Acts. If
24 Mendocino commences operations, the Board will revisit this decision." (Exhibit A, p. 4,
25 paragraph 1.)

26 I declare on September 12, 2022, under penalty of perjury under the laws of the
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State of California that the foregoing is true and correct, and that this declaration is executed at Ukiah, California.

By: 
Stephen F. Johnson

SEP 28 2006

EMPLOYER STATUS DETERMINATION
Sierra Entertainment
Mendocino Railway

This is the determination of the Railroad Retirement Board concerning the status of Sierra Entertainment and Mendocino Railway, as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Sierra Entertainment and Mendocino Railway are owned and controlled by Sierra Railroad Company, an employer under the Acts (B.A. No. 2774) and are affiliated with Midland Railroad Enterprises Corporation, also an employer under the Acts (B.A. No. 9750).¹

Information regarding these companies was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC, outside counsel for Sierra Railroad Company. Sierra Entertainment was created and began operations on January 1, 2003. It operates dinner and brunch trains and excursion trains over the lines of its common carrier affiliates within California pursuant to an operating agreement. It also provides trains for use in movies, television, and commercials. Its excursion trains include (1) the Skunk Train which operates a round-trip excursion train from Fort Bragg to Northspur, and from Willits to Crowley (Northspur and Crowley are turning points); (2) the Sacramento RiverTrain which operates a round-trip excursion train from Woodland, California, to a turning point; and (3) the Oakdale Dinner Train which operates a round-trip dinner/excursion train from Oakdale, California, to a turning point 14 miles out. Sierra Entertainment owns its own equipment and employs its own staff, but does not own any rail lines.

Mendocino was created in 2004 to acquire the assets of the former California Western Railroad (a covered employer under the Acts; B.A. No. 2782), a 40-mile rail line in Mendocino County². The acquisition was authorized by the Surface Transportation Board in a decision dated April 8, 2004 (Finance Docket No. 34465). Mendocino's line runs between Fort Bragg and Willits, California, and connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since Mendocino Railway's only access to the railroad system is over this line, that access is currently unusable.

¹ Midland is a subsidiary of Sierra Railroad Company.

² CWRR, Inc., d/b/a California Western Railroad, was terminated as an employer effective September 30, 2003 (B.C.D. 04-40).

EXHIBIT A

Mendocino's ability to perform common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," to include

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code * * *.

A virtually identical definition is found in sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) & (b)).

Section 10501 of Title 49 of the United States Code provides in pertinent part that the Surface Transportation Board has jurisdiction over rail carrier:

* * * transportation in the United States between a place in –

(A) a State and a place in the same or another State as part of the interstate rail network. [49 U.S.C. § 10501(a)(2)(A).]

The rail service provided by Sierra Entertainment may be 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 would not be subject to Surface Transportation Board jurisdiction and would therefore also not fall within the definition of "employer" set out in section 1(a)(1)(i) of the Railroad Retirement Act. Therefore Sierra Entertainment is not a carrier by railroad.

The Railroad Retirement Act and the Railroad Unemployment Insurance Act also define the term "employer" to include:

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *.

A virtually identical definition is found in sections 1 (a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351 (a) & (b)).

Section 202.4 of the Board's regulations (20 CFR 202.4) defines "control" as follows:

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines "common control" as follows:

A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Sierra Entertainment is under common control with a railroad employer by reason of its being owned by Sierra Railroad, which also owns Midland Railroad Enterprises Corporation, a covered employer under the Acts. Therefore, if Sierra Entertainment provides a service in connection with the transportation of passengers or property by railroad it is an employer under the Acts. Section 202.7 of the regulations (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

There is no evidence that Sierra Entertainment provides any service to Midland. Rather, the evidence shows that Sierra Entertainment operates solely to provide public passenger excursion tours within one state. Because Sierra Entertainment does not perform a service in connection with rail transportation, the Board finds that it is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Since Mendocino reportedly does not and cannot now operate in interstate commerce, the Board finds that it is not currently an employer under the Acts. If Mendocino commences operations, the Board will revisit this decision.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

PROOF OF SERVICE

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


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

On September 12, 2022, I served the **DEFENDANT JOHN MEYER'S NOTICE OF MOTION TO REOPEN CASE; SUPPORTING MEMORANDUM; DECLARATION OF STEPHEN F. JOHNSON** on the interested parties in this action by placing the original true copies thereof, as follows:

SEE ATTACHED SERVICE LIST

<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.
<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.
<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.
<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.
<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.
<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.

Executed on September 12, 2022, at Ukiah, California.



Karen Roman, Legal Assistant

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SERVICE LIST

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

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