

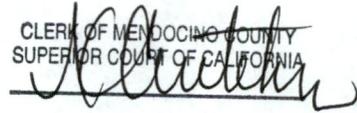
1 JAMES F. KING, SBN 41219
STEPHEN F. JOHNSON, SBN 205244
2 MICHAELYN P. WIPF, SBN 300428
MANNON, KING, JOHNSON & WIPF, LLP
3 200 North School Street, Suite 304
Post Office Box 419
4 Ukiah, California 95482
Telephone: (707) 468-9151
5 Facsimile: (707) 468-0284

6 Attorneys for Defendant John Meyer

FILED

AUG 19 2022

CLERK OF MENDOCINO COUNTY
SUPERIOR COURT OF CALIFORNIA



7
8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
FOR THE COUNTY OF MENDOCINO

10 MENDOCINO RAILWAY,) Unlimited
11 Plaintiff,) Case No. SCUK-CVED 20-74939
12 vs.) DEFENDANT JOHN MEYER'S
13 JOHN MEYER; REDWOOD EMPIRE) MOTION IN LIMINE TO EXCLUDE
14 TITLE COMPANY OF MENDOCINO) TESTIMONY AND EVIDENCE FROM
COUNTY; SHEPPARD) KENNAN H. BEARD III
15 INVESTMENTS; MARYELLEN)
SHEPPARD; MENDOCINO COUNTY) TRIAL DATE: AUGUST 23, 2022
16 TREASURER-TAX COLLECTOR; all) TIME: 9:30 AM
other persons unknown claiming an) DEPT: E
17 interest in the property; and DOES 1
through 100, inclusive)
18 Defendants.)

19
20 Defendant John Meyer objects to any trial testimony that may be offered by
21 Mendocino Railway's witness, Kennan H. Beard III.

22 **A. Relevant Facts.**

23 Plaintiff's counsel disclosed on August 17, 2022, that it intended to call Mr. Beard
24 as a witness at the trial. (Johnson Declaration, p. 1.) Defense counsel immediately
25 objected to Mr. Beard offering testimony at trial and met and conferred with plaintiff's
26 counsel regarding the issue. (Johnson Declaration, Exhibit A.)

27 Mr. Beard was not disclosed as an expert witness, not disclosed in any discovery
28

1 responses, and not disclosed at the deposition of Robert Pinoli, President of Mendocino
2 Railway, as being a witness who has any knowledge of any facts related to this litigation.
3 (Johnson Declaration, p. 1 and Exhibit A.)

4 Defense counsel stated the following in a “meet and confer” email:

5 “I don’t believe Mendocino Railway had any obligation to disclose Mr. Beard as a
6 potential witness. He is the President of the California Short Line Railroad
7 Association and his testimony relates to the public use and public interest and
8 necessity issues. Mr. Beard’s testimony relates to the public use and public
9 interest and necessity issues. Mr. Beard’s testimony is expected to be consistent
10 with Mendocino Railway’s discovery responses, including documents produced
11 and Mr. Pinoli’s deposition testimony, and information contained in exhibits
12 previously disclosed (Exhs. 27, 28 and 29.) If you would like to take his
13 deposition, we will make him available (tomorrow, Monday, etc.). I am happy to
14 meet and confer further with you on this or any other matter.” (Johnson
15 Declaration, Exhibit A.)

16 In response plaintiff’s counsel stated the following:

17 “I am not in a position to take his deposition tomorrow or Monday, and also a
18 court reporter would not get us a transcript before trial. Additionally, Mr. Beard
19 was never disclosed as an expert. The testimony of Public use, public interest and
20 necessity issues were established by the President of the company Mr. Pinoli and
21 through your discovery responses. This is a sandbag job in my opinion and his
22 testimony will be opposed.” (Johnson Declaration, Exhibit A.)

23 **B. Mr. Beard is Not A Designated Expert And Cannot Testify As An Expert.**

24 As referenced in plaintiff’s counsel’s email, Mr. Beard is the President of the
25 California Short Line Railroad Association and his testimony will relate to the public use,
26 public interest, and necessity issues. (Johnson Declaration, Exhibit A.) This
27 representation makes it apparent that Mr. Beard intends to testify in this trial as an expert,
28

1 but Mr. Beard cannot testify as expert because he was not disclosed as an expert as
2 required by Code of Civil Procedure § 2034.260.
3

4 The general rule set forth in Code of Civil Procedure § 2034.300, is that a trial
5 court shall exclude from evidence the expert opinion of any witness that is offered by any
6 party who has unreasonably failed to do any of the following: (a) “List that witness as an
7 expert under Section 2034.260”; “(b) Submit an expert witness declaration”; (c) Produce
8 reports and writings of expert witnesses under Section 2034.270”; or “(d) Make that
9 expert available for deposition”.

10
11 Plaintiff’s counsel served an expert witness disclosure in this action which did not
12 reference Mr. Beard as an expert, or otherwise mention him in any other capacity.
13 (Johnson Declaration, Exhibit B.) Plaintiff also failed to produce reports and writings of
14 Mr. Beard, and it failed to reasonably make him available for a deposition.
15

16
17 Plaintiff disclosed Mr. Beard as a trial witness on August 18, 2022 (five days
18 before trial), and plaintiff’s counsel offered to make Mr. Beard available for a deposition
19 on August 19th or August 22nd. This extremely late disclosure and the proposed
20 deposition dates are completely unreasonable. (Johnson Declaration, Exhibit B.)
21

22 An exception to requirements of Code of Civil Procedure § 2034.300 is provided
23 in Code of Civil Procedure § 2034.310. Section 2034.310 permits a party to call an
24 undesignated expert witness to testify if the expert has already been designated by another
25 party that has been deposed, or if “[t]hat expert is called as a witness to impeach the
26
27
28

1 testimony of an expert witness offered by any other party at trial.” (Code of Civil
2 Procedure § 2034.310(a) and (b).)
3

4 The exceptions referenced in Code of Civil Procedure § 2034.310 do not apply
5 because Mr. Beard was not disclosed as an expert witness by any party and he was not
6 deposed. Additionally, Mr. Beard cannot offer any testimony to impeach the testimony of
7 any expert witness offered by any other party at trial because there are no experts
8 testifying in this initial stage of the bifurcated trial.
9

10 Plaintiff’s counsel claims in his latest email that Plaintiff was under no obligation
11 to disclose Mr. Beard as an expert because a demand for exchange of experts was never
12 served by the parties under Code of Civil Procedure § 2034.210 et seq. The basis of
13 Plaintiff’s argument is incorrect and it is also unconvincing.
14

15 Plaintiff served Plaintiff Mendocino Railway’s Demand For Exchange which is
16 attached as Exhibit D to the Johnson Declaration. The referenced demand required the
17 parties to file with the court a “list of expert witnesses and statement of valuation data” as
18 required by Code of Civil Procedure § 1258.210. The demand requirements referenced in
19 Code of Civil Procedure § 1258.210 control in eminent domain cases.
20
21

22 The parties subsequently made their respective expert disclosures on the expert
23 disclosure date of April 12, 2022. The referenced disclosure date and the scheduling of
24 all of the expert deposition dates is evidenced in the Plaintiff’s counsel’s email attached
25 to the Johnson Declaration as Exhibit E. Plaintiff never amended its expert disclosure
26
27
28

1 statement to include Mr. Beard, or otherwise gave any verbal or written notice of Mr.
2 Beard's involvement in the case until August 17, 2022.

3
4 Accordingly, Plaintiff has no legal right to now call Mr. Beard as an expert.

5 **C. Mr. Beard Should Be Excluded From Testifying As A Percipient Witness.**

6 Defendant does not know if Mr. Beard was a percipient witness to the issues in
7 this case, but if he was a percipient witness then he should have been disclosed during the
8 discovery process.

9
10 Defendant John Meyer served numerous Special Interrogatories, Form
11 Interrogatories and Requests For Admissions on Mendocino Railway. In many of these
12 requests Mendocino Railway was asked to state the names "of all persons who have
13 knowledge of those facts." Mr. Beard was not listed as a having knowledge of the facts
14 in any of the responses, specifically including responses that address public use, public
15 interest and necessity issues. (Johnson Declaration, Exhibit C.)

16
17 Precluding a witness from testifying at trial is proper when a party *willfully and*
18 *falsely* withholds or conceals a witness's name in response to an interrogatory. (*Saxeny v.*
19 *Goffney* (2008) 159 Cal. App. 4th 316, 332; *Thoren v. Johnston & Washer* (1972) 29 Cal.
20 App. 3d 270, 274.) "Where the party served with an interrogatory asking the names of
21 witnesses to an occurrence then known to him deprives his adversary of that information
22 by willfully false response, he subjects the adversary to unfair surprise at trial. Under
23 these circumstances, an order barring the testimony of the witness must be sustained as a
24 sanction" (*Id.*)

1 There are not very many witnesses in this action. If Mr. Beard is in fact a
2 percipient witness, then he should have been disclosed in the discovery responses. If this
3 is the case, the failure to disclose would have to be considered a willful and false
4 concealment of a witness which has deprived Meyer of important information. There is
5 no way that the failure to disclose Mr. Beard as a percipient witness was an oversight.
6

7
8 **D. Conclusion.**

9 The court must exclude Mr. Beard from testifying at trial as an expert and/or as a
10 percipient witness due to its failure to disclose him as an expert, its failure to mention him
11 in any discovery responses, and due to the unfair surprise of the late disclosure.
12

13 DATED: August 19, 2022.

MANNON, KING, JOHNSON & WIPF, LLP

14
15
16 
17 _____
18 Stephen F. Johnson, Attorney for Defendant
19 John Meyer
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

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

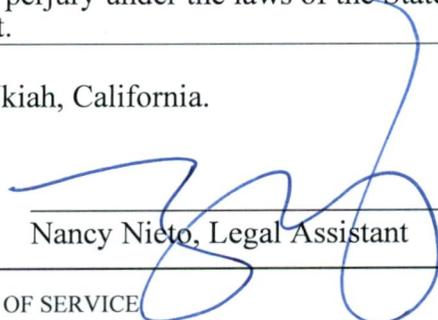
I declare that I am over the age of 18 years, employed in the County of Mendocino, and not a party to the within action; my business address is P.O. Box 419, 200 N. School Street, Room 304, Ukiah, CA 95482.

On August 19, 2022, I served the **DEFENDANT JOHN MEYER'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE FROM KENNAN H. BEARD III, DECLARATION OF STEPHEN F. JOHNSON IN SUPPORT OF DEFENDANT JOHN MEYER'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE FROM KENNAN H. BEARD III, DEFENDANT JOHN MEYER'S REQUEST FOR JUDICIAL NOTICE, DEFENDANT JOHN MEYER'S TRIAL BRIEF** 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 August 19, 2022, at Ukiah, California.



Nancy Nieto, Legal Assistant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

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

Glenn L. Block California Eminent Domain Group, APC 3429 Ocean View Blvd., Suite L Glendale, CA 91208 glb@caledlaw.com	Christian Curtis Office of Mendocino-Administration Center 501 Low Gap Road, Room 1030 Ukiah, CA 95482 curtisc@mendocinocounty.org
Maryellen Sheppard 27200 North Highway 1 Fort Bragg, CA 95437 sheppard@mcn.org	Debi S. Carbon California Eminent Domain Law Group. APC 3429 Ocean View Blvd, Suite L Glendale, CA 91208 dsc@caledlaw.com
Brina Blanton Office of the County Counsel 501 Low Gap Road, Room 1030 Ukiah, CA 95482 blantonb@mendocinocounty.org	Christopher Washington California Eminent Domain Law Group, APC 3429 Ocean View Blvd, Suite L Glendale, CA 91208 cgw@caledlaw.com