IN THE COURT OF APPEAL OF THE STATE OF CALIFONRIA FIRST APPELLATE DISTRICT, DIVISION ONE

A168497 & A168959

MENDOCINO RAILWAY
Plaintiff-Appellant,

v.

JOHN MEYER
Defendant-Respondent.

On Appeal from the Superior Court of California,
County of Mendocino
(Case No. SCUKCVED202074939, Hon. Jeanine Nadel)

RESPONDENT'S BRIEF

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

INTRODUCTION

Plaintiff and appellant Mendocino Railway ("MR") is a privately held corporation that operates roundtrip excursion trains for sightseeing in Mendocino County. (RT 126:25-127:15, 322:13-16, 328:21-24, 525:10-17, CT 2037.) MR operates a 40-mile long railroad line between Fort Bragg and Willits, California, however a tunnel collapse in 2015 prevents MR from running trains the full length of the line. (RT 64:19-22, 65:3-6, 66:6-13, 95:19-101:4, 344:11-17.).)

MR filed this action against defendant and respondent John Meyer ("Meyer") to take his 20 acre parcel west of Willits ("the Property" or "Meyer Property") by eminent domain. MR wishes to take the Property for the purpose of allegedly constructing a train station and maintenance facility for its railroad operations ("the Project"). (CT 15:1-4.) Meyer objected to the taking of the Property. (CT 19-25.)

Contrary to the Project description in the complaint and MR's arguments at trial, MR's plan when this action was filed consisted of taking the Property for the purpose of constructing a train station, maintenance facility, *campground, pool,* and *recreational vehicle camping area*. (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.)

At the time of trial, MR's proposed plan had been changed to take the Meyer Property to build a new station that would allow for transloading of freight, a wye for turning trains around, a maintenance area, and a "pit" for repairs. (RT 456:15-457:5, CT 1686-1687.)

MR's new alleged plan is to use its line for the transportation of freight, even though the last time that MR interchanged a freight train onto the adjoining inoperable North Coast Railroad Authority's ("NCRA") line was November 1998 due to a federally imposed safety moratorium. (RT 43:23-43, 336:2-7, 706:13-22.) MR's argument that it wishes to take the Meyer Property to start a freight operation on its isolated 40 mile long line makes no financial or logistical sense.

Robert Pinoli ("Pinoli"), the President and Chief Executive Officer of MR, testified that between 2004, when MR purchased the railroad, and January 1, 2022, MR did not perform common carrier services by transporting freight or passengers. (RT 866:6-11.)

The court found that MR is not authorized by statute to exercise the power of eminent domain. The court's decision stated that there is no dispute that the only evidence of railroad income during the relevant time was, and is, earned from the excursion services. (CT 2039-2040.) MR conceded that the excursion service does not fall under the category of

"transportation" and it does not qualify MR as a public utility. (CT 2039-2040.) The trial court found that MR cannot exercise the power of eminent domain for the purpose of carrying on its private business activities. (CT 2041.)

The court also found that MR did not comply with the specific eminent domain requirements for this Project, and it questioned MR's credibility on the material issues. (CT 2042) The court ultimately concluded that "MR has failed to meet its burden of establishing that its attempt to acquire Meyer's property through eminent domain is supported by constitutional and statutory powers." (CT 2042.)

The court's decision is supported by substantial evidence and it should be affirmed.

STATEMENT OF THE CASE

I. Initial Procedural History

On December 22, 2020, MR filed a complaint against Meyer to take by eminent domain Meyer's 20 acre parcel west of Willits, on Highway 20, commonly known as Mendocino County Assessor Parcel Number 038-180-53 ("the Property"). (CT 15-18.) On February 17, 2021, Meyer filed an answer to the complaint in which he objected to MR taking his property. (CT 19-25.)

The six day court trial was presided over by Honorable Jeanine B. Nadel, in the Mendocino County Superior Court. (CT 2036.)

II. Statement Of Facts

MR's statement of facts in its opening brief is argumentative and heavily biased in favor of MR. MR's statement of facts fails to accurately summarize the facts because it completely ignores all material evidence and testimony that contradicts its argument.

MR's Operation Of The Line.

MR is a privately held California corporation formed in 2004. (CT 1318.) MR purchased the California Western Railroad ("CWR"), also known as the "Skunk Train" line out of bankruptcy in 2004. (RT 61:20-62:3, 63:3-7, 64:14-65:6, 154: 8-20, CT 1341.) MR operates the CWR as a tourist excursion train for sightseeing purposes. (RT 126:25-127:15, 322:13-16, 328:21-24, 525:10-17.)

In 2015 there was a landslide in tunnel number 1 that continues to prevent trains from running the full length of the line between Willits and Fort Bragg. (RT 95:19-101:4, 344:11-17.) One sightseeing train leaves the station in Willits and heads west approximately 7.5 miles on the line and then returns to the Willits station. (RT 326:21-327:13, 525:10-17, 525:10-17.) MR operates a different sightseeing train that leaves a station in Fort

Bragg and travels to the east 3.5 miles on the line and then returns to Fort Bragg. (RT 319:12-26.) The trains respectively leaving Willits and Fort Bragg return the passengers to their original departing location when the ride is completed; these trains do not actually transport passengers to a different location. (RT 324:6-17, 327:3-14.)

MR's 2020 Site Plan

Pinoli testified that in 2020 MR did not have a development plan in place at the time it decided to move forward with taking the Meyer Property by eminent domain. (RT 267:2-16.) The only plan for the Meyer Property that existed as of the date of the filing of the complaint in December 22, 2020, reflected the development of a station/store, long-term RV rental park, a primary campground, and parking ("2020 Site Plan") and the plan is attached as Exhibit A. (RT 463:13-25, (CT 14, 1660, 1666-1668, 1685-1690; RT 456:5-457:28.)

Pinoli testified that the operation of a campground and RV park is not consistent with the operation of a railroad. (RT 518:13-15.)

MR's Evaluation Of Potential Properties For The Project.

MR's evaluation of the Meyer Property and other potential property options for the Project were thoroughly discussed by MR's management in a series of emails written between January 17th to June 27th 2020. (RT

443:19-444:1, CT 1765-1794.) Over the course of six months of email discussions there was absolutely no reference to MR's use of the properties for potential freight or commuter operations. (RT 443:19-444:1, CT 1765-1789.)

MR began evaluating the Meyer Property for the Project on May 14, 2020, and by June 26, 2020, the two main sites that MR was evaluating were the Meyer Property and a nearby KOA campground property. (RT 435:13-21, CT 1765-1789, 1787.) The major focus of MR's evaluation of the KOA campground property and the Meyer Property was their respective development and use as a campground/RV park, and MR's return on investment. (RT 448:13-449:10, CT 1686-1687, 1779-1780.)

On July 19, 2020, Mike Hart ("Hart"), Pinoli's boss, personally sent out an email that provided an overview of his financial evaluation of the KOA campground property and Meyer Property, and it included a proposed conceptual plan of use for the Meyer Property, which is attached as Exhibit A. (RT 456:5-14, CT 1686-1687, 1779-1780.) Hart's July 19th email included the following evaluation of the two sites:

> "The math: So if KOA owners would sell for $4M rather than $5M they indicated with Robert [Pinoli], we would have to adjust the Meyer property to match in value. We would deduct the $400,000 to purchase. We would then have $3,600,000 to recreate the same power, water, sewer and roads infrastructure etc. IF WE WANTED TO RUN THE RV PARK! To build 93 spaces on average would

> cost just under $2M based on average RV park costs. We would then have $1.6M to cover the cost of a new pool, amenities, landscaping, main road, etc. . . . My opinion is that they Meyer property is a HUGE advantage for us as we would end up with new infrastructure designed in a way that helps our operation for the same or potentially lower cost." (CT 1687.)

At the time Hart was making the 2020 Site Plan, he was not evaluating the impact that the Project may have on Meyer, or whether or not the use of the Property was to be developed for the greatest public good. (RT 459:18-460:14, CT 1765-1789.) According to Pinoli, the main focus was how to efficiently grow the MR organization. (RT 460:10-17.)

On July 21, 2020, just two days after the circulation of the site map attached as Exhibit A, MR began discussing whether it should engage an attorney to take the Meyer Property by eminent domain. (RT 470:12-472:25, CT 1686, 1771-1772.) Hart referenced in an email that this could be a "test case," in which MR could test whether it could in fact legally take property through the eminent domain process. (RT 470:12-472:25, CT 1686, 1771-1772.)

On August 19, 2020, Hart wrote an email to Pinoli and copied the others involved in the process, in which he stated:

> "Thank you for connecting me with John Meyer . . . though I have to say I can't imaging how you put up with the calls you have already had with him. Talking with him was like watching a ground squirrel on crack dropped into a room full of walnuts." (CT 1766.)

This was quite a disparaging comment about Meyer, and Pinoli confirmed that Hart did not treat Meyer well and that he disrespected him. (RT 480:26-481:23, 48:1-16.)

The next day, on August 20, 2020, MR decided to obtain an appraisal of the Meyer Property and to engage eminent domain attorney, Glen Block. (RT 473:13-474:5, CT 1765-1766, 1770.)

MR's 2022 Site Plan

MR subsequently created a new preliminary site plan for the development of the Property in June 2022. (RT 265:27-266:23; CT 1156.) This new plan was prepared 18 months after MR filed its complaint, and only about two months before the trial began ("2022 Site Plan"). (RT 265:27-266:23, 513:16-19; CT 1156.) The 2022 Site Plan completely removed the campground and RV park and it included a "maintenance facility and yard," "rail transload facility," "natural habitat preserve," "depot and offices," and "parking." (CT 1156.) A copy of the 2022 Site Plan is attached as Exhibit B. (CT 1156.)

Pinoli testified that 5-7 acres of "Natural Habitat Preserve" as shown on Exhibit B was not going to be developed by MR and that it was not necessary for the Project. (CT 1156; RT 270:24-271:25.)

The 2022 Site Plan depicts the train maintenance facility right next to

two residential houses, one of which is owned by Meyer. (CT 1156; RT 516:14-19.) Pinoli admitted that the idling and operation of trains is loud, but testified that the maintenance facility and the operation of such trains directly behind the residences would have no real impact on the residents living there. (CT 1156; RT 517:8-24.) The court found that Pinoli's testimony on this issue was not credible. (CT 2042.)

Pinoli's Initial Trial Testimony

Pinoli initially testified that MR believes that it is "without question" a "railroad corporation" and it is "without question" a "common carrier." (RT 519:20-25.) MR also considers itself a "public utility" because it is allegedly a "common carrier." (RT 520:13-28.)

Pinoli testified that MR operates railroad commuter passenger and freight services between Fort Bragg and Willits, and has offered these services since 2004. (RT 695:28-696:16.) Pinoli stated that MR transports persons and property, and what "the railroad is doing today is not different than what the railroad has been doing for its 137 years of existence." (RT 522:7-17.)

Pinoli's Trial Testimony After The Case Was Reopened

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 on September 28, 2006 ("the Retirement Board Decision"). (CT 1917-1920.) Meyer requested that the court reopen the case, and the court subsequently heard additional testimony from the parties related to the issues discussed in the Retirement Board Decision. (CT 1140-1141.)

The Retirement Board Decision contradicted the initial 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. (CT 1917-1920.)

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." (CT 1917.)

- "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 limited to the movement of goods between points on its own line, a service it does not perform." (CT 1917.)

- "Since Mendocino reportedly does not and cannot now operate

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." (CT 1917.)

After the trial was reopened Pinoli testified:

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

Pinoli: A. That is correct." (Underlining added, RT 866:6-11.)

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

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

Q. That's correct.

A. Yes.

Q. Yes?

A. Yeah." (RT 1004:17-25.)

Pinoli also testified that no revenue was generated in 2020[1] from the transport of freight or passengers, specifically stating:

"Q. So it is your understanding that in 2020, 90 percent of - - approximately 90 percent of the revenue that Mendocino Railway

[1] This action was filed on December 22, 2020 (CT 14.)

received was due to excursion services.

Pinoli: A. Approximately." (RT 926:26-927:2.)

"Q. Okay. So in the remaining ten percent that wasn't due to excursions, where did that revenue come from?

Pinoli: A. Leases and easements." (RT 927:11-14.)

Pinoli was questioned on whether that same breakdown in income between MR's excursion services and leases and easements would apply to the last 10 years of MR's operations, and Pinoli would not comment on the financials of the company given that he did not have them in front of him. (RT 928:18-23.) Although MR has the burden of proof in this action, Pinoli testified that MR did not present its financials at the trial because MR was not asked to do so. (RT 928:18-929:1)

The Retirement Board's finding that MR was not a common carrier was also confirmed by MR's attorney in a letter written to the Railroad Retirement Board dated April 27, 2022[2], in which MR's attorney stated that "MR believes that it has become a 'carrier' under the Act effective January 1, 2022" ("Retirement Board Letter"). (CT 1921-1926.)

MR claims in its opening brief that it has "commuter fares" that the

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[2] MR's letter to the Retirement Board was written just four months before the trial in this action, and approximately 16 months after the complaint was filed. (CT 1921.)

public can take advantage of, however such commuter fares are not available for public use, as they can only be purchased by specified people that own property along the line and their guests. (RT 541:17-542:6, CT 1233-1256.)

MR Cannot Access The Interstate Rail System

MR's line connects to the NCRA railroad line in Willits. (RT 881:13-882:6.) The NCRA line is currently inactive but remains subject to the Surface Transportation Board's ("STB") jurisdiction. (RT 881:13-882:6.) In 1998 the Federal Railroad Administration placed a moratorium on the use of the NCRA line due to safety issues. (RT 336:19-26.) As a result of the ongoing moratorium, the last time that MR interchanged a freight train onto the NCRA line was 26 years ago. (RT 336:2-7, 336:19-26.)

On February 6, 2020, Robert Pinoli wrote a letter to Mitch Stogner, Executive Director of the NCRA, in order to formally request that the NCRA restore rail service on its rail line south from Willits. (CT 1717.) Pinoli stated:

> "Mendocino Railway's line connects with the NCRA's line at Willits. Through that connection, Mendocino Railway connects to the national rail network. Since 1998, the NCRA's line has been embargoed as a result of unsafe operating conditions and noncompliance with federal rail safety laws and regulations. . . . Shippers located on our line cannot access the national rail network

until the NCRA restores service on its line." (CT 1717.)

Pinoli's letter admits MR's inability to ship freight on the national rail network. (CT 1717.) Thus, MR's claim that it is allegedly somehow a functioning part of the interstate railroad network is not credible.

III. The Trial Court's Decision & Subsequent Events

On April 19, 2023, Judge Nadel issued a thoughtful and thorough Decision After Trial ("the Decision"). (CT 2036-2043.) With respect to the court's evaluation of MR's "Public Utility Status," the Decision states:

> "Plaintiff in this action has the burden of proof to establish its legal status a public utility. There is no dispute that the only evidence of railroad income during the relevant time was and is earned from the excursion services only. MR concedes that the excursion service does not fall under the category of 'transportation' and does not qualify MR as a public utility." (CT 2040.)

The court further found that "MR may be able to obtain public utility status in the future but [the] court is not convinced that such status is appropriate at this time based on the evidence provided by MR at trial." (CT 2040.)

The court evaluated the eminent domain requirements and found that the acquisition of the Property "would enhance the operations of MR's excursion service that admittedly does not fall within the definition of transportation. MR cannot exercise the power of eminent domain to carry on its private business activities." (CT 2041.)

The court found that "the proposed use of the property also conflicts with the statutory requirements of public use and least private injury." (CT 2041.) There was no evidence of an actual plan for development or funding for the Project, thereby violating the holding in *City of Stockton v. Marina Towers LLC* (2009) 171 Cal. App. 4th 93, 113, which states that an "adequate project description is essential to the three findings of necessity that are required to made in all condemnation cases." (CT 2042.)

The court stated that "the credibility of the testimony is questionable when the initial plan prepared at the time the complaint was filed included a campground." (CT 2042.) The court also questioned the credibility of the "late hour evidence" of the 2022 Site Plan which "was done presumably to satisfy the requirements of the statute." (CT 2042.)

The court found the analysis lacking as it relates to the impact that the maintenance and transload facility would have on residents (including Meyer) living directly adjacent to the proposed site. (CT 2042.) The decision states "that MR did not meet its burden to establish that the current site plan supports a project that is planned or located in the matter that will be most compatible with the greatest public good and least private injury which is required by statute and case law." (CT 2042.)

The court concluded that MR failed to meet its burden required to

take the Meyer property by eminent domain, and it found in favor of Meyer. (CT 2042.) Judge Nadel signed and filed a Judgment After Trial By Court on June 2, 2023 ("Judgment").

Following entry of the Judgment, MR filed two motions: (1) a motion to reopen the trial and (2) a motion to set aside and vacate the court's Judgment because it was allegedly filed prematurely. On July 11, 2023, the court denied both motions following a hearing on the issues. (CT 2154, 2219.)

The court stated at the hearing of MR's motion to reopen the case and vacate the Judgment that the signing of the Judgment two days prior to the cutoff to object was harmless error. (RT 1056:2-5.) The court found that there was no need to amend the Judgment, even if the law allowed for it. (RT 1056:6-8.) The court stated that "a dismissal of the eminent domain claim was warranted for the reasons set forth in the decision." (RT 1056:6-10.)

The court also stated the following at the hearing:

> "Throughout the trial, plaintiff was steadfast in its position that this Court maintain jurisdiction over the eminent domain proceeding. To claim now that a ruling would potentially interfere with any input from the Surface Transportation Board as to whether the Court's decision could constitute an improper regulation of MR's services and whether such regulations preempted, is not only disingenuous, but untimely and unsupported by any legitimate authority." (RT 1056:12-20.)

The court denied MR's motion to reopen the case because the issue raised by MR "was addressed at trial when Mr. Pinoli testified that Mendocino Railway assumed carrier responsibilities from its affiliates in 2022." (RT 1056:21-25.) The court went on to state that "this case was filed in 2020 with Mendocino Railway as the only plaintiff in the action. This case was filed with full knowledge that Mendocino Railway was not acting or providing common carrier services." (RT 1057:20-23.)

On August 30, 2023, the court signed and filed an Amended Judgment After Trial By Court in which it awarded Meyer his litigation expenses including costs and attorney fees in the amount of $265,533.50. (CT 2239-2240.)

MR appealed the Judgment on July 11, 2023, and then appealed the Amended Judgment that ordered MR to pay Meyer's litigation expenses. (CT 2238, 2240.) On July 8, 2024, this court consolidated the appeals of the Judgment and the cost order.

IV. Questions Presented

1. Does Appellant Have The Power of Eminent Domain?

2. Even If Appellant Had The Power of Eminent Domain, Did It Satisfy The Statutory Requirements?

3. Does Substantial Evidence Support The Court's Decision?

V. The Standard of Review

Matters presenting pure questions of law are subject to the appellate court's independent review. (*United Police Officers Assn. v. City of Upland* (2003) 111 Cal. App. 4th 1294, 1301; *Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 799.) The interpretation of a statute is a question of law and the appellate court is not bound by the evidence presented on the question in the trial court. (*United Police Officers Assn. v. City of Upland* (2003) 111 Cal. App. 4th 1294, 1301.)

If a court's decision raises legal questions as well as questions of fact the court's findings must be upheld if they are supported by any substantial evidence in the record. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 733.) In order to be "substantial," evidence must be credible, reasonable in nature, and of solid value. (*Sasco Elec. v. FEHC* (2009) 176 Cal. App. 4th 532, 535.) "Substantial" refers to the quality of the evidence, not the quantity. (*Hope v. California Youth Auth.* (2005) 134 Cal. App. 4th 577, 589.)

In applying the substantial evidence standard, the appellate court generally views the evidence in the light most favorable to respondent. (*Turman v. Turning Point, Inc.* (2010) 191 Cal. App. 4th 53, 58.) It accepts

respondent's evidence as true, resolves all conflicts in the evidence in respondent's favor, and draws all favorable interferences that reasonably may be drawn. (*Estate of Leslie* (1984) 37 Cal. 3d 186, 201.) Further, the appellate court cannot reweigh the evidence. (*In re E. B.* (2010) 184 Cal. App. 4th 568, 578.) Even if the court believes the evidence to be in appellants' favor, it cannot reverse the judgment on that basis. (*Albaugh v. Mount Shasta Power Corp.* (1937) 9 Cal. 2d 751, 773.)

When a verdict is attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, in support of the findings of fact. *(Crawford v. Southern Pacific Company* (1935) 3 Cal. 2d 427, 429; *Bristol v. Young* (1943) 23 Cal. 2d 221, 222.) When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 478.)

An appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion. (*Dart Industries, Inc. v. Commercial Union Insurance Company* (2002) 28 Cal. 4th 1059, 1078). The "abuse of discretion" standard is highly deferential. The appropriate test for abuse of discretion is whether the court exceeded the bounds of

reason. (*Kayne v. The Grande Holdings Ltd.* (2011) 198 Cal. App. 4th 1470, 1474.)

An appellate court will not reverse a trial court's decision because another resolution may have been more appropriate, or because it would have reached a different decision if it were deciding the issue. (*Goodman v. Lozano* (2010) 47 Cal. 4th 1327, 1339.)

Only error that is prejudicial to the losing party will result in reversal. (*Unlimited Adjusting Group, Inc. v. Wells Fargo Bank* (2009) 174 Cal. App. 4th 883, 895.) A miscarriage of justice occurs when the appellate court concludes it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal. 4th 780, 800.) Error is not prejudicial if the evidence could not, in any event, support a judgment in appellant's favor. (*Hillman v. Garcia-Ruby* (1955) 44 Cal. 2d 625, 627,)

ARGUMENT

I. Appellant's Opening Brief Is Incomplete, Misleading, And Argumentative

California Rules of Court, rule 8.204(a)(2)(C) provides that an appellant's opening brief shall "provide a summary of significant facts . . . ." In *Hjelm v. Prometheus Real Estate Group, Inc.,* (2016) 3 Cal. App. 5th

1155, 1166, the court cited the leading California appellate practice guide which provides the following instruction for the preparation of a statement of facts:

> "'Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias; and likewise as to the applicable law. Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly 'undo' an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions, and may well cause you to lose the case.'" (*Id.,* citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (the Rutter Group 2010) 9:27, p. 9-8 . . ., italics omitted.)

An opening brief cannot reargue the "facts" as it would have them. An argumentative presentation not only violates the rules noted above, but also disregards the admonition that it shall not merely reassert its position at trial. (*Hjelm v. Prometheus Real Estate Group, Inc., supra* at 1166.) "As Justice Mosk well put it, such 'factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail.'" (*Id.,* quoting *Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 398-399.)

All evidence must be viewed most favorably to the respondent and in support of the verdict. (*Id.*) "Where a party presents only facts and inferences favorable to his or her position, the contention that the findings

are not supported by substantial evidence may be deemed waived." (*Id.*, quoting *Nwosu v. Uba* (2004) 122 Cal. App. 4th 1229, 1247.) In order to "demonstrate error, the appellant must present a cogent argument supported by legal analysis and relevant citation to the record." (*Slone v. El Centro Medical Center* 2024 Cal. App. Lexis 755, 16.) The court may disregard conclusory arguments that are not supported by pertinent legal authority or that fail to disclose the appellant's reasoning that it wishes the court to adopt. (*Id.*)

MR's statement of facts fails to comply with the precepts of appellate review. Below are verbatim statements in MR's statement of facts followed by references to contradictory testimony and/or documents in the record that should have been referenced in MR's statement of facts:

MR Statement of Facts, p. 8:

> "Since its 2004 acquisition of the CWR, Mendocino has operated roundtrip excursions on the line. CT 2037. But that excursion service has neither excused nor prevented Mendocino from carrying out its common-carrier obligation to also offer freight and non-tourist passenger service to the public. In fact, the record shows that Mendocino Railway has continuously offered *and* performed commuter passenger and freight rail transportation services along the CWR, even after through-service along the entire length of its line was interrupted in 2015."

MR Statement of Facts, p. 9-10:

> "The undisputed testimony at trial established that Mendocino

Railway has '[a]bsolutely' no intent 'to cease providing freight rail services along the railroad between Willits and Fort Bragg.'"

MR Statement of Facts, p. 11:

"As the record shows, Mendocino Railway's provision and performance of freight and non-excursion transportation on the CWR makes it a common-carrier public utility under the Public Utilities code."

MR Statement of Facts, p. 15:

"The court also discounted unrebutted evidence testimony that, for the past two decades, Mendocino has offered and performed freight and non-excursion passenger transportation on the CWR, qualifying it as a public utility under the Public Utilities Code."

MR Statement of Facts, p. 15

> "The trial court concluded that Mendocino was not a common-carrier public utility, thereby blocking the railroad's exercise of eminent domain. CT 2038-2040. This came as a shock to Mendocino given the evidence about its status that had presented over the course of the trial's six days, the absence of any contrary evidence, and the trial court's statement at trial that the sole witness to testify– Mendocino's President, Robert Pinoli– was 'very credible, articulate, and very knowledgeable.' RT 693:13-15."

Evidence in the Record:

- "Q. Would it be correct to state that Mendocino Railway has not performed common carrier services between

the timeframe of 2004 when it purchased the railroad, the California Western Railroad, and January 1st, 2022?

Pinoli: A. That is correct." (Underlining added, RT 866:6-11.)

- Pinoli testified that MR does not believe that it became a common carrier until January 1, 2022, when MR took over freight operations from Sierra Northern Railway. (RT 1004:17-25.)

- Pinoli testified that MR has "commuter fares," but these fares cannot be used by the public, as they can only be purchased by people that own property on the line and their guests. (RT 541:17-542:6, CT 1237-1238, 1233-1256.) Additionally the published commuter fares specifically designate the limited number of families that may take advantage of such fares. (RT 541:17-542:6, CT 1237-1238, 1233-1256.)

MR Statement of Facts, p. 8:

"Once Mendocino acquired the CWR, it became a STB-regulated common-carrier railroad. *Burlington*, 596 F.3d at 1220."

MR Statement of Facts, p. 10:

"Because Mendocino Railway is an STB-regulated common-carrier, it is a public utility by virtue of the California Constitution declaration that all 'common carriers . . . are public utilities.' Cal. Const. Art. XII, § 3."

Evidence in the Record:

- On March 12, 2004, MR submitted a "Notice of Exemption" to the STB for the acquisition of the assets of The California Western Railroad ("CWR") and it stated that MR is a "non-carrier." (CT 1320-1322.) The Notice of Exemption also states, "CWR has – at least recently– relied almost solely on tourism to support its continued operation." (CT 1322.) The Notice of Exemption does not state that CWR is a common carrier. (CT 1320-1340.)

- On April 4, 2004, the STB published a notice of "Mendocino Railway Acquisition Exemption" to purchase the California Western Railroad ("STB Notice") in the Federal Register, 69 Fed Reg. 18999 (April 9, 2004). (CT 1341.) The STB Notice specifically states that MR is a "*noncarrier*," and it does not state in any way that MR is a common carrier (CT 1341.)

- MR's numerous statements in its brief that it is an STB-regulated common carrier are not supported by any references to any documentary evidence in the clerk's transcript. Additionally, MR's ability to perform common carrier services is limited to the movement of goods between points on its own line, a service it does not perform. (RT 866:6-11, CT 1917.)

Glossing over facts do not make them go away. Appellants must

discuss the evidence fairly because they are making a substantial evidence challenge. MR's Opening Brief discussed only evidence and inferences favorable to it, and pursuant to *Hjelm v. Prometheus Real Estate Group, Inc., supra* at 1166, the court should consider MR's substantial evidence claim waived.

II. Appellant Does Not Have The Power Of Eminent Domain

Appropriately exercised, the eminent domain power effects a compromise between the public good for which private land is taken, and the protection and indemnification of private citizens whose property is taken to advance that public good. (*City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 64.) The Fifth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, and the California Constitution, article I, Section 19, require this protection of private citizens. (*Id.*)

Constitutional provisions restrain the power to condemn in two ways: by requiring (1) a "public use" and (2) payment of "just compensation" for property taken. Despite the broad eminent domain powers of federal and state governments, the power of eminent domain may only be exercised by a person authorized by statute to exercise it to acquire property for that use. (*Id.*; Code of Civil Procedure § 1240.020.)

"Statutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is resolved against the entity." (*Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal. App. 4th 276, 282-283.)

A. Appellant Is Not A "Railroad Corporation" Or "Common Carrier"

MR claims that it is a railroad corporation. (CT 14.) "A 'railroad corporation' may condemn any property necessary for the construction and maintenance of its *railroad*." (Public Utilities Code § 611, italics added.) "A 'railroad corporation' includes every corporation or person owning, controlling, operating, or managing any *railroad* for compensation within this State." (Public Utilities Code § 230, italics added.) A "'railroad' includes every commercial, interurban, and other railway, . . . owned, controlled, operated, or managed *for public use in the transportation of persons or property*." (Public Utilities Code § 229, italics added.)

The evidence and law do not support MR's argument that it is a common carrier or "public utility" under Public Utilities Code § 229.

MR's opening brief states that "[t]he record unequivocally establishes that Mendocino has always offered and made available freight and non-excursion passenger transportation to the public for

compensation." (OB p. 25.) Pinoli initially testified that MR could take the property through eminent domain because it is a "railroad corporation," "common carrier," and "public utility." (RT 519:20-25, 520:13-38.)

Pinoli subsequently testified that Mendocino Railway has not performed common carrier services from the time that it purchased the CWR in 2004 through January 1st, 2022. (RT 866:6-11.) Additionally, MR's attorney confirmed in a letter written to the Railroad Retirement Board dated April 27, 2022[3], that "MR believes that it has become a 'carrier' under the Act effective January 1, 2022." (CT 1921-1926.)

MR makes a convoluted argument that a common carrier does not need to actually provide transportation of freight or passengers, but that it just must offer to provide such services to the public. This argument is not supported by case law or the facts in the record.

The court stated in its decision that MR had the burden of proof to establish its legal status as a public utility, and "[t]here is no dispute that the only evidence of railroad income during the relevant time was and is earned from the excursion services only. MR concedes that the excursion service does not fall under the category of 'transportation' and does not qualify MR

[3] MR's letter to the Retirement Board was written just four months before the trial in this action, and approximately 16 months after the complaint was filed. (CT 1921.)

as a public utility." (CT 2040.)

MR did not meet its burden of proof, and the evidence unequivocally established that MR did not operate as a "railroad," nor is it a common carrier or public utility because its trains do not transport persons or property. (CT 1917-1926; RT 866:6-11, 926:26-927:2, 1004:17-25.)

i. The STB Does Not Recognize MR As A Common Carrier

MR purchased the CWR assets out of bankruptcy and the sale was approved by the STB. (RT 154:8-20, CT 1341.) At trial Pinoli testified that the STB affirmed the purchase of the CWR assets by Mendocino Railway as a Class III common carrier. (RT 154:8-20.) The STB documents approving the sale of the assets reflect "noncarrier" status. (CT 1341.)

On March 12, 2004, MR submitted a "Notice of Exemption" to the STB for the acquisition of the assets of the CWR, which stated that MR is a "non-carrier." (CT 1320-1322.) The Notice of Exemption also does not state that CWR is a common carrier. (CT 1320-1340.) The Notice of Exemption states, "CWR has – at least recently– relied almost solely on tourism to support its continued operation." (CT 1322.)

On April 4, 2004, the STB published notice of "Mendocino Railway

Acquisition Exemption" to purchase the CWR ("STB Notice") in the Federal Register, 69 Fed Reg. 18999 (April 9, 2004). (CT 1341.) The STB Notice specifically states that MR is a "*noncarrier*," and it does not state that either MR or CWR are common carriers (CT 1341.)

MR's numerous statements in its brief that it is an STB-regulated common carrier contradicts the referenced STB notices, and MR's statements on this issue are not supported by any references to evidence in the record.

Pinoli's testimony and MR's argument that MR is a Class III common carrier is not supported with any documentary evidence. The court's decision stated that no evidence was submitted to support the allegation that MR or its affiliates performed common carrier services between 2004 and 2022. (CT 2039.) The court's decision went on to state that "MR did not offer evidence in the form of contracts with affiliated entities, operating agreements, ledgers, receipts, payments etc." (CT 2039.)

MR's opening brief discusses, *Bhd. Of Maint. Of Way Employees Div. C. Burlington N. Santa Fe Ry. Co.* (2010) 596 F.3d 1217, 1220 (10th Cir.) ("*Burlington*"). (OB p. 6-8.) *Burlington* involved the transfer of an interstate common carrier railroad to a purchaser that was not a common carrier. The facts and holding in *Burlington* are not applicable here because

there is no evidence that establishes that CWR was a interstate railroad or common-carrier when its assets were sold to MR, or that MR was, or subsequently became, an STB regulated common carrier. (CT 1320-1340.)

MR claims that state and local laws and regulations governing railroad construction and operations are federally preempted and state laws cannot be used to impair a federal railroad's ability to operate and conduct needed facilities. (RT 542:19-543:1, CT 781-782.) Pinoli was questioned on this issue, and he stated that MR recognizes that a state court has jurisdiction to address the eminent domain issues in its complaint. (RT 542:19-543:27.) He went on to testify that it was his understanding that if MR was arguing that federal law preempts California eminent domain laws, this would be the wrong venue to make that argument. (RT 543:28-544:11.)

Following entry of the Judgment, MR filed a motion to reopen the trial claiming that the ruling could impede upon the STB's jurisdiction and the court stated the following at the hearing on MR's motion:

> "Throughout the trial, plaintiff was steadfast in its position that this Court maintain jurisdiction over the eminent domain proceeding. To claim now that a ruling would potentially interfere with any input from the Surface Transportation Board as to whether the Court's decision could constitute an improper regulation of MR's services and whether such regulations preempted, is not only disingenuous, but untimely and unsupported by any legitimate authority." (RT

1056:12-20.)

MR's declaration that it is an STB regulated carrier is not supported by the law or the record. Additionally, the STB has no power to determine whether a railroad can take property by eminent domain in California.

ii. The Railroad Retirement Board Does Not Recognize Appellant As A Common Carrier

After the close of testimony Meyer obtained a copy of the Retirement Board Decision, and following Meyer's motion to reopen the case, the court heard testimony related to the Retirement Board Decision. (CT 1917-1920.)

The Retirement Board Decision directly contradicted Pinoli's initial testimony on the material issues in this case. Specifically the Retirement Board Decision unequivocally established that based upon representations made by MR's own legal counsel, MR is neither a "common carrier," a "public utility," nor a "railroad," because it does not transport freight or passengers on its line, and its line is not connected to the interstate railway system. (CT 1917-1920.)

Pinoli confirmed the Railroad Retirement Board's findings when he testified as follows:

"Q. Would it be correct to state that Mendocino Railway has not

performed common carrier services between the timeframe of 2004 when it purchased the railroad, the California Western Railroad, and January 1st, 2022?

Pinoli: A. That is correct." (RT 866:6-11.)

Pinoli confirmed that "MR represented to the Railroad Retirement Board that it had no freight traffic and was a purely tourist excursion operation, and therefore was entitled to an exemption from rail labor retirement taxation." Pinoli stated that this was a true statement. (RT 901:27-902:27; CT 1943.)

Four months before trial, MR's attorney wrote a letter to the Railroad Retirement Board requesting that it revisit its "prior coverage decision based on a change of circumstances." (CT 1921.) In this letter, MR states that "Mendocino Railway believes that is has become a 'carrier' under the Act effective January 1, 2022." (CT 1922.)

Pinoli was asked at trial if the referenced passage was a true statement, and he confirmed that it was a true statement. (RT 1003:14-1004:7.) Pinoli was also asked to confirm that the reference to a "carrier" in the letter was effectively the same as the term "common carrier," and he confirmed that it was, and that he believes that was what the attorney was referring to in the letter. (RT 1004:8-16.)

iii. Appellant Failed To Prove That It Received Revenue From Freight Or Passengers

Pinoli testified that MR did not perform common carrier services, which is the transportation of freight or passengers, between 2004 when it purchased the railroad and January 1, 2022. (RT 866:6-11.) Pinoli also testified that no revenue was generated in 2020 (the year this action was filed) from the transport of freight or passengers, and that approximately 90 percent of the revenue that MR received was due to excursion services and 10 percent was from leases and easements. (RT 926:26-927:2.) Therefore, in 2020 MR did not receive any revenue from common carrier services, such as the transportation of freight and/or passengers in 2020. (RT 926:26-927:2.)

Pinoli was questioned on whether that same breakdown in income between MR's excursion services and its leases and easements would apply relatively to the last 10 year of MR's operations, and Pinoli would not comment on MR's financials, given that he did not have them in front of him. (RT 928:18-23.) Pinoli claimed that MR did not bring its financials to the hearing or present its financials at the hearing because MR was not asked to do so. (RT 928:18-929:1) Although MR had the burden of proof, it did not offer any evidence of MR's revenue or receipts for the respective

excursion, freight, or passenger services that it allegedly provides. (RT 705:3-706:2, 928:18-929:1.)

iv. The CPUC Does Not Recognize Appellant As A Common Carrier

The California Public Utilities Commission ("CPUC") found in 1998 that MR's predecessor in interest, California Western Railroad, Inc.'s excursion services also did not constitute "transportation" under Public Utilities Code § 1007." The CPUC's decision states:

> "CWRR's[4] excursion service does not constitute "transportation" under PU Code § 1007. . . .The primary purpose of CWRR's excursion service is to provide the passengers an opportunity to enjoy the scenic beauty of the Noyo River Valley and to enjoy sight, sound and smell of a train. It clearly entails sightseeing. . . . [T]he Commission [has] also opined that public utilities are ordinarily understood as providing essential services. .. [B]ut, CWRR's excursion service [is] not essential to the public in the way that utilities services generally are. In providing its excursion service, CWRR is not functioning as a public utility. Based on the above, we conclude that CWRR's excursion service should not be regulated by the [CPUC]." (*In the Matter of Application of California Western Railroad Inc.,* 1998 Cal. PUC LEXIS 189, 7-8, underlining added ("*California Western*").)

A similar analysis was made by the court in *City of St. Helena v. Public Util. Comm'n.* (2004) 119 Cal. App. 4th 793 ("*St. Helena*").[5] In *St.*

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[4] CWRR is previously referred to as "CWR" in the brief.

[5] The decision in *St. Helena* was overruled in part on a different issue in *Gomez v. Superior Court* (2005) 35 Cal. 4th 1125, 1140.

Helena, the court compared the "Wine Train" that takes tourists sightseeing in the Napa Valley to the "Skunk Train." The *St. Helena* court stated that the *California Western* decision "declared that the Skunk Train, providing an excursion service between Fort Bragg and Willits, was not a public utility." (*Id.* at 798.) The *St. Helena* court also cited to the CPUC decision in *Western Travel Plaza* (1981) 7 Cal. P.U.C. 2d 128, 135, which "held sightseeing is . . a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service." (*Id.*)

The *St. Helena* court evaluated "whether the [C]PUC has jurisdiction to regulate the Wine Train as a public utility." (*Id.*) The *St. Helena* court found that the CPUC had exceeded its jurisdiction by finding that the Wine Train was a public utility. (*Id.* at 801, n.4.) The court recognized that the CPUC may retain safety authority over a railroad, but that did not mean the railroad was a public utility. (*Id.*) It also emphasized that "not every business that deals with the public or is subject to some form of state regulation is necessarily a public utility." (*Id.*)

The court found that "[t]he fact that the Wine Train could provide transportation in the future does not entitle it to public utility status now." (*Id.* at 803.) Avowals or declarations of public service purposes or future

intentions to "provide transportation" is not sufficient— as a train cannot maintain public utility status based on intentions or future proclamations. (*Id.*)

On July 26, 2022, MR's General Counsel sent a letter to the CPUC requesting that the CPUC confirm that MR is a regulated public utility railroad. The CPUC responded on August 12, 2022, in a letter to Michael Hart, CEO of Sierra Railroad Company, that MR "is a commission regulated railroad, but it is not a public utility within the California Constitution, the California Public Utilities Code and the Commissions orders." (CT 1835.)

The referenced letter goes on to inform MR of the following:

> "The Commission is not aware of any changes to the excursion services provided by Mendocino Railroad that would cause a change to its 1998 determination that Mendocino Railway is a regulated railroad but not a public utility. As such, the 1998 determination is still applicable law with regard to Mendocino Railway's status." (CT 1836.)

B. Appellant's Excursion Service Is Not A Public Use

While the eminent domain power is broad, it is not unlimited. "The power of eminent domain may be exercised to acquire property only for a public use." (Code of Civil Procedure 1240.010; *City of Oakland v. Oakland Raiders, supra,* at 69.) "The statutory authorization to utilize the

power of eminent domain for a given 'use, purpose, object, or function' constitutes a legislative declaration that the exercise is a 'public use.'" (*Id.*)

The question as to whether the land was to be devoted to a public use, as distinguished from private purposes, or to accomplish some purpose which is not public in character, is a proper issue for judicial determination. (*Id.*; *Dept. Of Public Works v. Largiss* (1963) 223 Cal. App. 2d 23, 39.)

"A railroad corporation may condemn any property *necessary for the construction and maintenance of its railroad.*" (Public Util. Code § 611, italics added.) The Law Revision Commission Comments for Public Utilities Code § 611, state that this statute "would not, however, permit condemnation by a railroad corporation of land to be used for example, as an industrial park." Similarly, it is reasonable to assume, that section 611 would not permit the condemnation of land by a railroad corporation for the construction of a private campground, RV park, or for a private excursion service as reflected in MR's proposed plan attached as Exhibit A.

In *City & County of San Francisco v. Ross* (1955) 44 Cal 2d 52, 54 ("*Ross*"), the City of San Francisco sought to acquire by eminent domain a site that would subsequently be leased to private individuals who would build a parking structure in accordance with the city's specifications and

operate parking and other facilities. The city intended to allow a portion of the ground floor frontage of the proposed building to be leased and occupied by retail stores. The total floor space to be occupied by such retail commercial activity was estimated by the city to be no more than four percent (4%) of the building. (*Id.*, at 58-59.)

In *Ross* it was argued that "there is a clear taking of private property for private purposes and [it is] so interwoven with an otherwise questionable exercise of eminent domain as to characterize the whole taking as one without authority." (*Id.*, at 59.) The court in *Ross* concluded that the "Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." (*Id; Council of San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal. App. 4th 473, 494.)

Pinoli testified that MR did not perform common carrier services between 2004 and 2022. (RT 866:6-11.) Pinoli also testified that in 2020 approximately 90 percent of MR's revenue was from excursion services and the remaining 10% of revenue was obtained from leases and easements, and he refused to discuss MR's revenue streams for other years. (RT

926:26-927:2, 928:18-929:1.)

Under the holding in *Ross*, MR cannot exercise the power of eminent domain as a means to carry on its private business activities, whose primary objective and purpose is private gain from excursion services, leases and easements, and not public need. MR's receipt of 90% of its revenues from private excursion services and 10% from leases and easements are 25 times more than the use of 4% of the building for a private business that was deemed unacceptable in *Ross*.

The evidence established that MR is operating for private gain, and as such, the taking of the Property for the benefit of MR's private excursion services, leases, and easements, preclude MR from taking Meyer's property by eminent domain.

III. Even If Appellant Had The Power Of Eminent Domain, It Did Not Satisfy The Statutory Requirements

A. Appellant Did Not Intend To Devote The Meyer Property For The Purposes Stated In The Complaint

A defendant may object to the right to take if "plaintiff does not intend to devote the property described in the complaint to the stated purpose." (Code of Civil Procedure § 1250.360(c).) Specifically, "the owner can object to the condemnation on the ground that the agency does

not intend to put the property to the identified use." (Miller & Starr California Real Estate (4th Ed.) § 24:7; *People ex rel. Dept. of Public Works v. Garden Grove Farms* (1965) 231 Cal. App. 2d 666, 671.)

MR's complaint provides that "[t]he project ('Project') for which Mendocino Railway seeks to acquire the Parcel consists of construction and maintenance of rail facilities related to Plaintiff's ongoing and future freight and passenger rail operations and all uses necessary and convenient thereto." (CT 15.)

MR did not intend on using the Property for the purpose stated in the complaint. The evidence established that when the complaint was filed the proposed Project consisted of MR taking the Property for a train station, maintenance area, *pool, campground and a recreational vehicle camping area.* (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28, 463:16-464:4.)

Additionally, MR improperly focused its evaluation of the potential properties to be taken based upon their use as a private campground and recreational vehicle camping area, and not for railroad related activities. (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.) A private campground is not mentioned in the complaint, nor does the complaint reference MR's excursion services operated for private gain, or any type of

recreational facilities or other activities. (CT 14-18.)

As of December 22, 2020, the date that MR filed the complaint, the only site plan for the Meyer Property reflected a large campground and recreational vehicle parking area, as shown on Exhibit A. (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.) Pinoli also testified that the operation of a campground is not consistent with the operation of railroad. (RT 518:13-15.) Pinoli further admitted that MR could not take the Property by eminent domain and use it as a campground and RV Park. (RT 518:7-12.)

In June 2022, nearly a year and a half after the complaint in this action was filed, MR prepared the 2022 Site Plan attached as Exhibit B. (CT 1156; RT 266:21-23, 513:13-19.) As the court discussed in its decision, this last minute change of the site plan was likely the direct result of this litigation. (CT 2042.)

The taking of the Meyer property to construct a campground is not consistent with the plan description in the complaint, and the proposed plan for the site was improperly changed just before trial. (RT 443:19-444:1, CT 1765-1789, 2042.) Meyer's objections to the proposed plan are justified, and the court's decision is supported by substantial evidence.

B. Public Interest And Necessity Do Not Require The Project

Code of Civil Procedure § 1240.030 states that the power of eminent domain may be exercised to acquire property for a proposed project only if the following are established:

"(a) The public interest and necessity require the project.

(b) The project is planned or located in the manner that will be most compatible with the greatest public good and least private injury.

(c) The property sought to be acquired is necessary for the project."

The Project does not comply with these requirements as individually discussed below.

"A railroad corporation may condemn any property *necessary* for the construction and maintenance of its railroad." (Public Utilities Code § 611, italics added.) The complaint fails to describe or specify why the Property is necessary for MR's construction and maintenance of its alleged railroad, as required by Public Utilities Code § 611. (CT 14-18.)

MR's failure to reference any specific plan details prevented Meyer and the court from properly evaluating whether the condemnation of the Property is necessary. (CT 14-18.)

The 2020 Site Plan attached as Exhibit A did not include any reference to transloading, a wye, a maintenance area, a pit, or freight. (RT

456:15-457:5, CT 1686-1687.) In 2020, when Hart was making a plan for the Project, MR was not evaluating the impact that the Project may have on Meyer, or whether or not the use of the Property was necessary, or whether it was in the public interest. (RT 459:18-460:14.) MR's main focus was on how to efficiently grow the organization and on MR's financial return on investment. (RT 448:13-449:10, 460:10-17.)

The evidence established that MR is attempting to exercise the power of eminent domain to operate a private excursion service and build tourist related facilities which are not necessary or in the public interest.

C. The Project Was Not Planned So As To Be Compatible With The Greatest Public Good And The Least Private Injury

MR did not establish that "the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury," as required by Code of Civil Procedure § 1240.030(b).

In *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452, 469-470 ("*SFPP*"), the court analyzed the meaning of Code of Civil Procedure § 1240.030(b), which requires that the project be "planned or located in the manner that will be most compatible with the greatest public good and the least private injury." "This limitation which involves essentially a comparison between two or more sites, has also been

described as 'the necessity for adopting a particular plan for a given public improvement.'" (*Id.* at 470.)

A "finder of fact inquiring into the greatest public good and least private injury should consider all the facts and circumstances." (*SFPP, supra,* at 473.) The *SFPP* court stated that "[t]he words 'most', 'greatest' and 'least' are comparative terms that relate to both the plans and the location of the project." (*Id.* at 469.) The *SFPP* court explained that these "comparative terms cannot be applied in the abstract, instead they unambiguously show the Legislature's intent that the condemner's proposed location be compared with other potential locations to see how those other locations compare in effect on the public good and private injury resulting project." (*Id.* at 470; *People v. Chevalier* (1959) 52 Cal. 2d 299, 307.)

"[A]n adequate project description is essential to the three findings of necessity that are required to be made in all condemnation cases. Only by ascertaining what the project is can the governing body make those findings." (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal. App. 4th 93, 113; *Cincinatti v. Vester* (1930) 281 U.S. 439, 448.) "[A] public agency has no right to condemn in the absence of evidence to support the

findings or necessity, and such evidence cannot exist without a sufficient project description." (*City of Stockton v. Marina Towers, supra,* at 115; *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal. App. 3d 1121, 1129.)

The description in the complaint provides that the taking is for the "construction and maintenance of rail facilities." (CT 15.) This description is too general for Meyer or the court to have a clear understanding of the nature of the Project.

MR did not prove that "the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury," as required by Code of Civil Procedure § 1240.030(b). There was no specific description or plans for the Project when the eminent domain process began, and no plan was ever provided to Meyer. (RT 505:27-508:8.) The only conceptual drawing in place for the Meyer Property as of the date of filing of the complaint depicted a *station/store*, *campground,* and *long-term RV rental park*, as depicted on Exhibit A. (CT 1660, 1666-1668, 1685-1690; RT 456:5-457:28.)

MR's evaluation of the potential sites were based upon whether or not the different sites were conducive to camping, RV vehicle parking, and

use as an excursion service, which are all private uses. (CT 1660, 1666-1668, 1685-1690; RT 455:13-458:18.) Such private uses are not compatible with properly evaluating whether alternate locations are better, that is, compatible with the greatest public good and the least private injury.

MR developed a new site plan immediately before the trial in June 2022, and it planned for the construction of the train maintenance facility right next to two residential houses, one of which is owned by Meyer. (CT 1156; RT 516:14-19.) The court found that a site plan with a maintenance facility right next to two residences is not consistent with planning the Project for the greatest public good and the least private injury. (CT 1156, 2042.)

The evidence established that the Project was not planned or located in the manner that will be most compatible with the greatest public good and the least private injury, as required by Code of Civil Procedure § 1240.030(b).

D. The Property Is Not Necessary For Appellant's Project

MR cannot establish that the "property sought to be acquired is necessary for the project," as required by Code of Civil Procedure § 1240.030(c). The complaint fails to state with any specificity the nature of

the Project, and it otherwise fails to specify MR's proposed use of the Property. (CT 15-18.) The failure to reference any specific details prevents Meyer and the court from evaluating whether the condemnation of the entire Property, or only a portion of the Property, is necessary for the Project. (CT 15-18.)

"A railroad corporation may condemn any property *necessary* for the construction and maintenance of its railroad." (Public Utilities Code § 611, italics added.)

The "Natural Habitat Preserve" portion of the Property as shown on Exhibit B is not necessary for the project. Pinoli testified this that this "natural habitat" area of the Property is a "natural barrier," and it is unnecessary for the project. (CT 1156; RT 270:24-271:25.) Pinoli further testified that MR "had no intention of knocking down trees or disrupting the stream bed so that area was precluded, if you will, from our developing it." (RT 513:27-514:6.)

The taking of Meyer's entire 20 acre parcel represents an abuse of discretion because it exceeds the land necessary for the construction and maintenance of MR's rail facilities, and it does not result in the greatest public good and the least private injury. Pursuant to MR's plan, and

Pinoli's testimony, the Natural Habitat Preserve is not necessary for the railroad project and it represents excess acreage that has value. (RT 513:27-514:6, CT 1156.) The complaint and evidence do not specify why the "Natural Habitat Preserve" as depicted in Exhibit B is necessary for MR's construction and maintenance of its railroad, as required by Public Utilities Code § 611. (CT 14-18, 1156.) Pinoli testified that 5-7 acres of "Natural Habitat Preserve" was not necessary for the Project, and as a result Meyer should be able to retain that portion of his property. (CT 1156; RT 270:24-271:25.)

E. Appellant Cannot Take Excess Property Without Satisfying The Requirements Of Code Of Civil Procedure § 1240.410

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

It is a ground for objection if excess property is sought to be acquired pursuant to Code of Civil Procedure § 1240.410, but the acquisition does not satisfy the requirements of such section. (Code of Civil Procedure § 1250.360(f).) Code of Civil Procedure § 1240.410 allows for the acquisition of a "remnant" that is a "remainder or property

thereof that will be left in such size, shape, or condition as to be of little market value."

When "the property is not needed for the physical construction of the public improvement, the question of public use turns on the determination of whether the taking is justified to avoid the excessive severance or consequential damages. Accordingly, if the court determines that the excess condemnation is not so justified, it must find that it is not for a public use." (*People ex. Rel. Department of Public Works v. Superior Court of Merced County* (1968) 68 Cal. 3d 206, 216.)

In order "to raise an issue of improper excess taking, condemnees must show that the condemnor is guilty of fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it, or that the contemplated use is not a public one." (*Id.*)

The Natural Habitat Preserve is not necessary and it is not a "remnant" pursuant to Code of Civil Procedure § 1240.410, because it has market value and it is useable. (RT 513:27-514:6, CT 1156.) The taking is an abuse of discretion because it exceeds the land necessary for the alleged construction and maintenance of MR's rail facilities, and it does not result

in the greatest public good and the least private injury. At a minimum, Meyer should be able to retain the approximate 5-7 acres of the Natural Habitat Preserve because it is not necessary for the Project. (CT 1156; RT 270:24-271:25.)

IV. Respondent Should Be Awarded Litigation Expenses.

MR argues in its opening brief that if the court reverses the judgment below, it should also reverse the fee order, as Meyer would no longer be the prevailing party. (OB p. 58.)

The court is required to award to the condemnee litigation expenses if "(1) the proceeding is wholly or partially dismissed for any reason; or (2) the final judgment in the proceeding is that the condemnor cannot acquire property it sought to acquire in the proceeding." (Code of Civil Procedure § 1268.610(a).) The Law Revision Commission Comments for Code of Civil Procedure § 1268.610, states that a plaintiff must reimburse a defendant when there is a final judgment which provides that the plaintiff does not have the right to take the property sought to be acquired, and this rule applies to non-public entity plaintiffs.

Code of Civil Procedure § 1268.720 provides that a defendant is entitled to costs on appeal against plaintiff, regardless of whether the

defendant is prevailing party, unless the court directs otherwise. (*Poway Unified School Dist. v. Chow* (1995) 39 Cal. App. 4th 1478, 1485.) Code of Civil Procedure § 1235.140 allows for expenses, including not only those reasonably and necessarily incurred in preparing for and during trial, but also those incurred in any subsequent judicial proceedings; including reasonable attorney fees, appraisal fees, and such other fees reasonable and necessarily incurred to protect a defendant's interest. (Code of Civil Procedure § 1235.140; *City of Oakland v. Oakland Raiders, supra,* at 85-86.)

Meyer requests that the court confirm the award of litigation expenses arising out of the trial court action and also award Meyer litigation expenses for defending the appeal, with the matter to be remanded to the trial court to determine Meyer's reasonable litigation expenses and costs on appeal.

CONCLUSION

Meyer should retain his property and he should be allowed to move on from this unjustified and taxing litigation. MR did not meet its burden of proof, its arguments are not supported by the evidence in the record, and

Meyer's objections to that taking of the Property are justified. There is substantial evidence in the record supporting the court's decision, and the judgment should be affirmed.

Dated: December 2, 2024

MANNON, KING, JOHNSON & WIPF, LLP

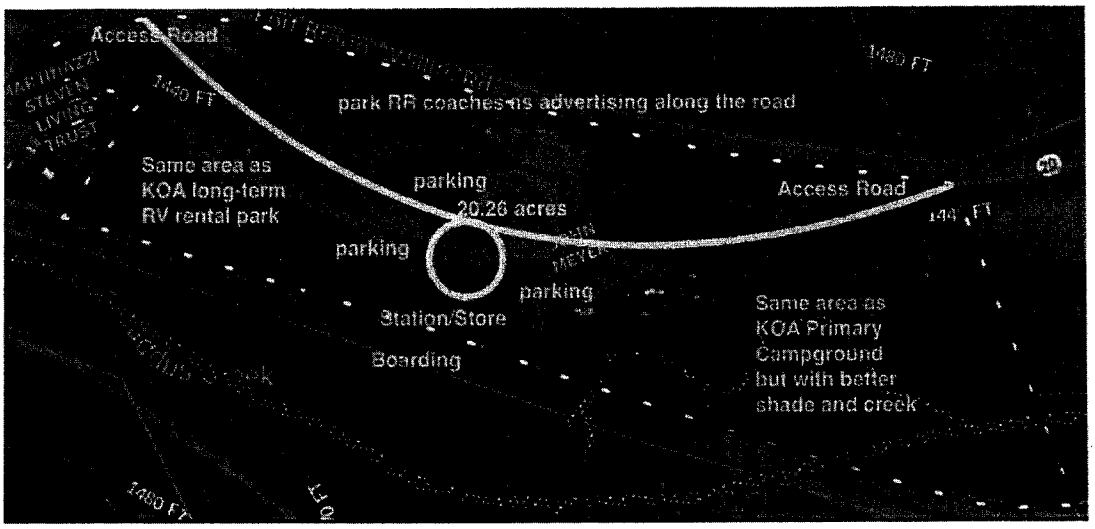
Stephen F. Johnson
Attorneys for Defendant John Meyer

CERTIFICATE OF COMPLIANCE

I, Stephen F. Johnson, hereby certify that the foregoing Respondent's Brief is proportionally spaced, has typeface of 13 points or more and contains 10,975 words.

Dated: December 2, 2024

Stephen F. Johnson



On Jul 19, 2020, at 6:19 PM, Mike Hart <mike@sierraenergy.com> wrote:

Robert, is this revenue supposed to be in addition to the revenue shown in their accounting software? I created a small summary of the data they provided and it would help their value considerably if it was additional, though I would need to also know if it was additive last year as well as it makes a big difference if it is just a couple months a year or all year long. See attached.

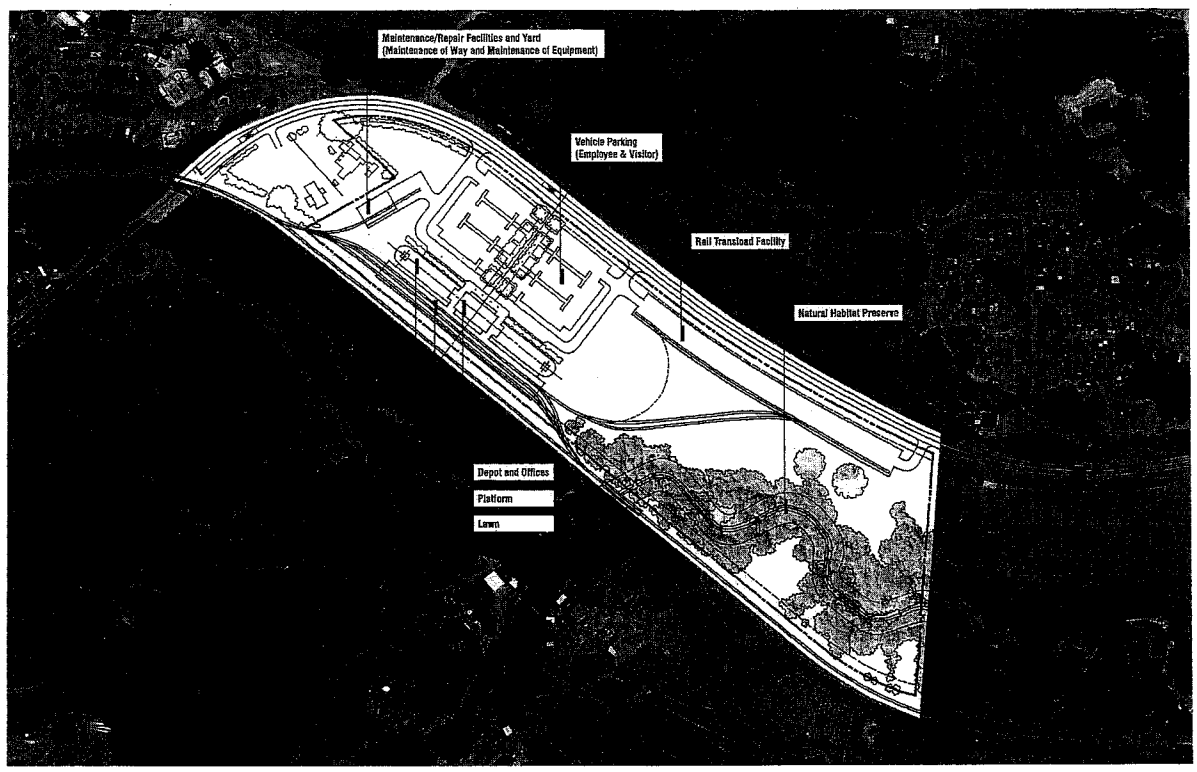
Essentially I took their reported figures and simplified then averaged by month as they have two partial years and only 2019 as complete (unless these other rentals are not reflected). I then modified the categories where I thought we would do better than their current model. Most notably, their entire staff cost is running their front office which we could directly merge with our ticketing office/store so very likely would see a total coverage of this cost. I also agree with the notion that KOA does nothing for us and happy to drop the need for that royalty. If we were to build this from scratch I would definitely cover the parking area with solar shades and that could have a big impact on utility bill.

In brief, if you do not add the long-term rentals, they are worth $1.3M based on 10X EBITDA. If we owned them and did achieve those efficiencies it would be worth $4.2M provided we actually had the train staff covered for our operations and losing KOA didn't harm revenue. I note that at what they report at least, they make about $1,000 per month! This is from their 93 sites for which they paid $3.3M. I don't think they are too happy about it.

Here is an overview of the current KOA site with the constraints of using it for our purposes. Essentially the only way we could possibly get in (without disrupting KOA operations) would be to get a new easement to the north of the property, build a bridge over the river and then come down where it says "Possible Parking". I climbed up to this area and there is a lot of elevation and grading needed to use for parking much less get in here by car or have people hike down to new station site.

I mark the area where we might put in a station but it is quite small and difficult to reach. I think it wise for us not to move the existing camper sites for our use as they cost (on average) $20,000 per site to install water/power/sewer and paving. In short, this will be very challenging.
<DA243D92-EEDD-4A73-AEC5-29B828A0169F_1_105_c.jpeg>

EXHIBIT A



1401 West Highway 20 | Meyer Property
Property ID: 038-180-53-00 Willits, California

Hornberger + Worstell	**Meyer Property Study** | Willits, California	**Preliminary Site Plan**

EXHIBIT 4

EXHIBIT B