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EXEMPT FROM FILING FEES
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MENDOCINO RAILWAY,

Plaintiff,

v.

JACK AINSWORTH, et al.,

Defendants.

Case No. 4:22-CV-04597-JST

Assigned for all purposes to:
Hon . John S. Tigar, Ctrm. 6

Action Filed: August 9, 2022

CITY OF FORT BRAGG'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF MENDOCINO RAILWAY'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[FED. RULES CIV. PROC. 12(B).]

[Filed concurrently with [Proposed] Order]

Date: December 22, 2022
Time: 2:00 p.m.
Crtrm.: 6

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

PLEASE TAKE NOTICE that on December 22, 2022 at 2:00 p.m. or as soon thereafter as the matter may be heard in Courtroom 6, of the above-entitled Court, located at Oakland Courthouse, Courtroom 6 – 2nd Floor, 1301 Clay Street, Oakland, California

94612, although civil motion hearings in this Courtroom are held by Zoom webinar, unless otherwise ordered, Defendant CITY OF FORT BRAGG will and does hereby move to dismiss Plaintiff MENDOCINO RAILWAY'S Complaint pursuant to Federal Rule of Civil Procedure Rule 12 (b)(1), (b)(6) and (h)(3), as the Complaint fails to state a claim upon which relief can be granted based on the following grounds:

Plaintiff's first and only Claim for Relief, for Declaratory Judgment pursuant to Fed. Rules Civ. Proc. 57 and 28 U.S.C. § 2201 provides an insufficient and improper basis for this Court's jurisdiction, in that there is no federal subject matter jurisdiction merely for a claimed federal preemption defense, and this Court may decline declaratory judgment under the circumstances; the claims in the Complaint are subject to abstention by this Court; and there is no federal preemption as alleged by Plaintiff.

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

Dated: September 22, 2022

JONES MAYER

By: s/Krista MacNevin Jee
Krista MacNevin Jee
Attorneys for Defendant,
CITY OF FORT BRAGG

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

At its heart, this Declaratory Judgment action is merely Plaintiff Mendocino Railway's additional attempt, among several previous ones, at forum/judge shopping. Further, Plaintiff Mendocino Railway attempts to avoid any local regulatory authority of Defendant City of Fort Bragg by expansively overstating the City's pending State court action against Plaintiff, and attempting to leave no room for local jurisdiction of its multi-varied activities that are *not* limited to rail activities – even assuming *arguendo* that this limitation were to apply. Perhaps most importantly, Mendocino Railway far overstates its own status and authority – ignoring State and Federal agency conclusions that the trains it operates are *only* tourist excursion trains, its rail activities are *not* conducted in interstate commerce, and it does *not* act as a common carrier.

Mendocino Railway's action herein in this matter seeks primarily to directly interfere with and curtail *pending State court* jurisdiction in *City of Fort Bragg v. Mendocino Railway*, Mendocino County Superior Court Case No. 21CV00850, on claimed federal preemption by the Surface Transportation Board ("STB"), which is an improper basis for any exercise of jurisdiction by this Court, is not the proper subject of Declaratory Judgment, as to matters for which this Court should abstain to exercise any jurisdiction, and to which Mendocino Railway is not even entitled as a matter of law. Indeed, Mendocino Railway desperately seeks merely to avoid Judge Brennan, whose only ruling to date has been to deny its demurrer in the above-referenced State court action. Its desperation extends to unwarranted appeals and effort possible to attempt to move the case anywhere but Judge Brennan's court -- meritless appeals, alleging relation to another case where the only similarity is both cases involve Mendocino Railway as a party, and potential federal defense of preemption that does not exist, or its public utility status under State law, which is not a federal question at all. Our judicial system is not a grocery store where one can select the judge one prefers.

In sum, no valid claim is stated, this Court does not have valid federal jurisdiction and this Court should decline it in any event. The matter should be dismissed entirely.

II. STATEMENT OF FACTS AND CASE.

The City commenced an action against Plaintiff Mendocino Railway in *City of Fort Bragg v. Mendocino Railway*, Mendocino County Superior Court Case No. 21CV00850 ("Mendocino County Action") on October 28, 2021. This action is for Declaratory Judgment as to the City's regulatory authority of Mendocino Railway. Although the authority at issue in that matter is stated broadly as "whether [Mendocino Railway] is subject to the City's ordinances, regulations, codes, local jurisdiction, local control, local police power, and other City authority," the City seeks "a stay, temporary restraining order, preliminary injunction, and permanent injunction commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority," but *only* "as applicable." *See* Request for Judicial Notice, filed concurrently herewith ("City's RJN"), Exhibit A. A related issue to the City's regulatory authority is Mendocino Railway's status as a public utility under the authority of the California Public Utilities Commission ("CPUC"), which has determined that Mendocino Railway does not function as a "public utility" pursuant to State law.

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

Thereafter, Mendocino Railway proceeded to challenge the demurrer ruling to the Court of Appeal and the Supreme Court. There is no right of appeal as to a denial of a demurrer, so Mendocino Railway filed a Petition for Writ of Mandate in the California Court of Appeal, which was denied, and then a Petition for Review with the California

Supreme Court, which was also denied. The trial court proceedings were briefly stayed by the Court of Appeal pending decision, until June 9, 2022. *See* Declaration of Krista MacNevin Jee ("Jee Decl."), filed concurrently herewith, at ¶ 2.

Between Mendocino Railway's filing of its Petition for Review with the California Supreme Court on June 20, 2022, and the Supreme Court's summary denial of the Petition on June 23, 2022, Mendocino Railway also filed a Notice of Related Case in another case pending in Mendocino County Superior Court, in which Mendocino Railway had been participating as a party for nearly two years, *Mendocino Railway v. John Meyer, et al.*, Mendocino County Superior Court Case No. SCUK-CVED-20-74939 ("Eminent Domain Action"). (Jee Decl., at ¶ 3.) The Eminent Domain Action relates to Mendocino Railway's attempt to take the private property of an individual, Defendant John Meyer, in the City of Willits by eminent domain. *Id.* Testimony before Judge Nadel has already concluded as to a bifurcated trial in the Eminent Domain Action on or about August 29, 2022. (Jee Decl., at ¶ 4.)

Given its lack of success with the appellate courts and in order to avoid the demurrer ruling issued the Mendocino County Action by Judge Brennan, Mendocino Railway apparently sought to avoid Judge Brennan by attempting to have the earlier Eminent Domain Action deemed related to the Mendocino County Action, thereby necessitating the transfer of the latter from Judge Brennan in the Ten Mile Courthouse in Mendocino County to the Honorable Jeanine Nadel in the Ukiah Courthouse. (Jee Decl., at ¶¶ 2-3.) The Notice of Related Case is still pending and currently set for hearing on September 30, 2022. (Jee Decl., at ¶ 3.)

After a case management conference in the Mendocino County Action, Mendocino Railway filed a Request for Disqualification of Judge Brennan, on September 12, 2022, for which no hearing is yet scheduled with a neutral judge pursuant to California Civil Procedure Code Section 170.3. Judge Brennan had disclosed that he had a permit application currently pending before Mendocino County for development in the coastal zone, which could be subject to California Coastal Commission appeal authority. (Jee

Decl., at ¶ 4.) He concluded that this did not pose any conflict of interest or basis for him to recuse himself from the matter. *Id.* At the time of Judge Brennan's oral disclosure to the parties, the City had notified the Court and the parties that the Commission had expressed its intention to file a Motion to Intervene in the Mendocino County Action, which it thereafter filed on or about September 8, 2022. *Id.* This motion is scheduled to be heard on September 30, 2022.

Mendocino Railway commenced the above-captioned matter on August 9, 2022, naming the Executive Director to the California Coastal Commission, and the City of Fort Bragg. The sole cause of action is for Declaratory Judgment.

Plaintiff acknowledges that the City has a pending "state-court action" against Mendocino Railway, which is the Mendocino County Action. (Complaint, at ¶ 4.) Plaintiff asserts a very broad scope of that action, although the actual scope and nature of the City's claims in the Mendocino County Action, and the Superior Court's actual exercise of authority, has not yet moved past initial pleading stages, due to the delay of Mendocino Railway's appellate challenges.

Plaintiff alleges that it is a "federally regulated railroad with preemption rights," and by the within action, it seeks "[t]o avoid the unlawful enforcement of federally-preempted regulation, the concomitant disruption of its railroad operations and projects, and the uncertainty generated by this dispute. (Complaint, at ¶¶ 4-5.) Specifically, Plaintiff claims that it is "subject to the STB's jurisdiction," that it "was and continues to be a federally licensed railroad subject to the STB's jurisdiction," and that it is a "common-carrier railroad subject to the STB's jurisdiction." (Complaint, at ¶¶ 9, 18.) Plaintiff's primary claim is that it "is a federally regulated common carrier that is part of the interstate rail network under the STB's exclusive jurisdiction." (Complaint, at ¶ 30.) It "seeks a declaration that the actions of the Commission and the City to regulate Mendocino Railway's operations, practices and facilities are preempted . . . and that Mendocino Railway's activities are subject to the STB's exclusive jurisdiction."

None of these matters establish any valid claim or any valid basis for federal subject matter jurisdiction, and are, in fact, false. Further, this Court should abstain from exercising jurisdiction in this matter due to comity and the fact that Declaratory Judgment is not warranted under the facts and circumstances.

III. LEGAL STANDARD.

The City of Fort Bragg seeks dismissal of the Complaint in this matter based on Federal Rules of Civil Procedure, Rule 12 (b)(1) for lack of subject matter jurisdiction, 12 (b)(6) for failure to state a claim upon which relief can be granted, and 12 (h)(3).

Generally, a complaint must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*. at 679. "[N]either legal conclusions nor conclusory statements are themselves sufficient, and such statements are not entitled to a presumption of truth. *Wicks v. Chrysler Group, LLC*, 2011 U.S. Dist. LEXIS 98439, *4 (E.D. Cal. August 31, 2011) (citing to *Iqbal*, 556 U.S. at 678-679).

Dismissal under Federal Rule of Civil Procedure 12 (b)(6) is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the Complaint. *See* B*ig Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999); *Newman v. Universal Pictures*, 813 F.2d 1519, 1521-22 (9th Cir. 1987). A court should dismiss a claim if it lacks a cognizable legal theory or if there are insufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008).

In ruling on a motion to dismiss, the Court must view all allegations in the complaint in the light most favorable to the non-movant and must accept all material allegations - as well as any reasonable inferences to be drawn from them - as true. *See Big Bear Lodging Ass'n*, 182 F.3d at 1101; *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A plaintiff must allege

"enough facts, taken as true, to allow a court to draw a reasonable inference that the defendant is liable for the alleged conduct." *Iqbal*, 556 U.S. at 697 (citations omitted).

If an amendment cannot cure a defect, the district court can deny leave to amend. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). Further, leave to amend "need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." *Ascon Properties, v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989).

Rule 12 (h)(3) provides that, "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." A motion under Rule 12 may be made at any time and if the court lacks subject matter jurisdiction, the suit must be dismissed. *See Augustine v. United States*, 704 F.2d 1074, 1075 n. 3 (9th Cir. 1983); *Csibi v. Fusto*, 670 F.2d 134, 136 n. 3 (9th Cir. 1982). Where a case meets the criteria for *Younger* abstention, subject matter jurisdiction cannot be retained. *Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th Cir. 1988).

Finally, "in deciding a motion to dismiss for failure to state a claim, courts must [normally] limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint. However, courts may also consider matters of which they may take judicial notice." *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (citing Fed. Rules Evid., Rule 201(f) ("Judicial notice may be taken at any stage of the proceeding."). *See also, e.g., Bowers Inv. Co., LLC v. United States*, 104 Fed. Cl. 246, 258 n.9 (2011) ("the court may consider materials outside the pleadings—for example, matters of public record of which the court can take judicial notice—under a Rule 12(b)(6) motion to dismiss").

IV. ARGUMENT.

A. THIS CASE MUST BE DISMISSED BECAUSE THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THE CLAIMS.

The United States Constitution establishes that federal courts have authority to hear cases "arising under [the] Constitution, the laws of the United States, and treaties." U.S.

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

Federal question jurisdiction under Title 28 United States Code section 1331 exists in two types of cases: (1) when it is apparent on the face of plaintiff's complaint that the plaintiff's cause of action was created by federal law; or (2) when the plaintiff's cause of action was created by state law, but resolution requires determination of a substantial question of federal law and the implicated federal law provides the plaintiff with a cause of action. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (there is a federal question if the law creates the cause of action); *Merrell Dow*, 478 U.S. at 817 (federal question exists if an element of the state cause of action is a federal statute that creates a federal cause of action for plaintiff).

Notably, the Complaint does not rely upon a cause of action created by federal law. Instead, it relies on the Declaratory Judgment Act to assert subject matter jurisdiction in this Court. To be sure, the Act creates a federal remedy in a case of actual controversy, but it "does not provide an independent jurisdictional basis for suits in federal court. *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74 (1950). As here, "where the complaint in an action for declaratory judgment seeks in essence to assert a defense to [a] state court action, it is the character of the . . . action, and not of the defense, which will determine federal-question jurisdiction in the District Court." *Public Service Comm. v. Wycoff Co.*, 344 U.S. 237, 248 (1952). If a claim in federal court "does not itself involve a claim under federal

law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a . . . cause of action." *Id.*

As the Eighth Circuit has recognized, "[t]he Declaratory Judgment Act is procedural; it does not expand federal court jurisdiction. Federal-question jurisdiction may not be created by a declaratory-judgment plaintiff's 'artful pleading [that] anticipates a defense based on federal law.'" *Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011) (change in original) (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950).

The Ninth Circuit has also found similarly, in circumstances that are instructive here: "In an effort to engineer federal jurisdiction, the Stillaguamish Tribe of Indians ('the Tribe') sued the State of Washington in federal court, seeking a declaration that the Tribe's sovereign immunity barred any lawsuit arising from a particular contract with Washington. The trouble with this approach is that the Tribe's anticipatory defense to a state court lawsuit does not net federal jurisdiction." *Stillaguamish Tribe of Indians v. Washington*, 913 F.3d 1116, 1118 (9th Cir. 2019). The Ninth Circuit found "the district court lacked subject matter jurisdiction" as to the "Tribe's sovereign immunity defense." *Id.* The court concluded that "[n]either a defense based on federal law nor a plaintiff's anticipation of such a defense is a basis for federal jurisdiction." *Id. See also, Chicago Tribune Co. v. Board of Trs. of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("it is blackletter law that a federal defense differs from a claim arising under federal law").

As for the second basis for jurisdiction stated above, save for the remedy provided by the declaratory judgment procedure, the Complaint only arises as a defense to the Mendocino County Action already pending in State court, and which relates to state-created actions therein. Thus, it is directly prohibited by the principles states above. It is well-established that anticipation of a federal defense does not establish federal jurisdiction. *See Louisville & Nashville Rd. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *City Nat'l Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982) (anticipation of federal

defense does not establish federal jurisdiction). The claims in the Complaint simply do *not* arise directly from a federal cause of action or implicate a federal law that provides Plaintiff with any valid, independent cause of action, and thus federal question jurisdiction under section 1331 does not exist. There is no federal cause of action to support the derivative declaratory relief sought under the Declaratory Judgment Act. The Court thus lacks subject matter jurisdiction over the Complaint and it must be dismissed.

B. THIS CASE SHOULD ALSO BE DISMISSED BECAUSE IT RAISES QUESTIONS FROM WHICH THIS COURT SHOULD ABSTAIN.

Under the *Younger* doctrine, federal courts should abstain from enjoining or interfering with pending state judicial actions. *Younger v. Harris*, 401 U.S. 37 (1971). Indeed, this action improperly seeks to do just that, although it is indirectly stated as seeking a declaration or prohibition against the *City* interfering with Plaintiff, by the City's local regulatory authority. Although this action does not seek to directly restrict the Superior Court from continuing the Mendocino County Action, the practical effect is no different, in that this action will necessarily directly interfere with the Superior Court's exercise of jurisdiction that is already underway. Plaintiff seeks to have this Court issue a declaratory judgment and/or enjoin the City from exercising certain local regulations assertedly preempted by federal law, and such declaration or injunction necessarily includes the City's continuing prosecution of the Mendocino County Action. Importantly, whether those regulations are subject to federal preemption is a fact-intensive issue that has yet to be decided at any substantive level by the Mendocino County Superior Court.

Indeed, Mendocino Railway impermissibly seeks to have this Court intervene, as mere forum shopping, and in circumstances where this Court's involvement is not even warranted under the law. Federal law supports the fact that local regulations are permissible where they do not interfere with interstate rail operations – *assuming* any such operations would even be implicated in the Mendocino County Action. *See, e.g., Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Wester Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999) ("Many

rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track."); ("preemption does not apply to operations that are not part of the national rail network" or "to state or local actions under their retained police powers so long as they do not interfere with railroad operations or the Board's regulatory programs") (citing *Hi Tech Trans, LLC-- Petition for Declaratory Order--Hudson County, NJ*, STB Finance Docket No. 34192, 2003 STB LEXIS 475 at *10-11, 2003 WL 21952136 (2003), *aff'd Hi-Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004) ("no preemption for activity that is not part of 'rail transportation'"). Thus, Plaintiff seeks to avoid these limitations by claiming to this Court that preemption under 49 U.S.C. § 10501(b) subsumes and prohibits *all* local regulatory efforts, but this is an inaccurate statement of the law.

Further, such claim does not serve to negate the fact that Plaintiff has an adequate opportunity to litigate its preemption defense in state court. To permit Plaintiff's matter to proceed would be a violation of the principles laid down in *Younger*. "As a matter of comity, federal courts should maintain respect for state functions and should not unduly interfere with the state's good faith efforts to enforce its own laws in its own courts." *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994).

Younger abstention is appropriate where, as here, three factors are present: (1) at the time the federal action was filed, state judicial proceedings were ongoing; (2) the proceedings implicate an important state interest; and (3) the federal plaintiff maintains an adequate opportunity to raise federal questions in the state court proceedings. *Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 814 (9th Cir. 1989) (citing *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir. 1987). Based on satisfaction of these standards here, this Court should dismiss this within action.

First, state judicial proceedings were pending in the Mendocino County Action at the time Plaintiff filed this action, these proceedings have yet to be concluded. Since the

Mendocino County Action is a pending judicial proceeding within the meaning of the *Younger* factors, this Court should exercise its abstention discretion under the circumstances and the first factor is met. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998).

In fact, the very purpose of this action is to have a federal court issue declaratory relief before the state court can adjudicate the underlying issues in the City's State action and/or for Plaintiff to obtain an alternative forum and/or judge, since Plaintiff was not satisfied with Judge Brennan's ruling on the demurrer and the lack of intervention by writ of mandate from the state appellate courts. This action is just the last among a string of attempts by Plaintiff to try to escape Judge Brennan's court.

Second, the state court proceedings in the Mendocino County Action that are challenged by this action implicate important state interests. It is well-established that states have an important stake in administering their judicial system and seeing that their "orders and judgments are not rendered nugatory." *Lebbos v. Judges of the Superior Court*, 883 F.2d 810, 814-815 (9th Cir. 1989). As well, "municipal interests in land-use regulation qualify as important 'state' interests." *San Remo*, at 1104; *see also Rancho Palos Verdes Corp v. City of Laguna Beach*, 547 F.2d 1092, 1094-95 (9th Cir. 1976) (recognizing California municipalities' interest in land-use regulation). Similarly, "[t]he Supreme Court has . . . recognized that a state nuisance proceeding may warrant *Younger* abstention from federal claims." *Herrera v. City of Palmdale*, 918 F.3d 1037, 1044 (9th Cir. 2019) (citing *Huffman v. Pursue*, 420 U.S. 592, 607 (1975)).

In fact, because Mendocino Railway operates a sightseeing excursion service only, with no service connection to interstate commerce, its railway activities are limited, and not subject to federal preemption. Indeed, the federal Railroad Retirement Board has so held as to Mendocino Railway's operations. *See* City's RJN, Exhibit D. The Board issued a decision in B.C.D. 06-42 in 2006, finding that, even though the STB authorized Mendocino Railway's acquisition in 2004 of the assets of California Western Railroad, Mendocino's rail lines "between Fort Bragg and Willits . . connects to another railway

line over which there has been no service for approximately ten years," and significant "problems on the line will prevent service for some time to come." The line was, at that time, "unusable" – and it remains so today.[1] The Board concluded that "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." *Id.* Further, its services were "characterized as a tourist or excursion railroad operated solely for recreational and amusement purposes. Since passengers are transported solely within one state, under section 10501 (a)(2)(A), above, Sierra Entertainment [, Plaintiff's parent company,] would not be subject to [STB] jurisdiction. . . ." The Board concluded that "[s]ince Mendocino reportedly does not and cannot now operate in interstate commerce, the Board finds that it is not currently an employer under the Acts." *Id.*

In the Mendocino County Action, the City seeks to exercise legitimate police powers not within the jurisdiction of the STB and not subject to federal preemption. Further, as noted above, the Railroad Retirement Board concluded, since 2006, that Mendocino Railway does *not* conduct activities in interstate commerce, is *not* a common carrier, and is *not* subject to STB authority or jurisdiction. Thus, the allegations Plaintiff has asserted as to STB exclusive authority and preemption are also simply false. This Court both lacks jurisdiction over the matters asserted, as well as *Younger* abstention being warranted, so that the City may further its significant interest in its local regulatory authority, particularly when there is no federal preemption at issue in any event.

Even to the extent Plaintiff's assertion of preemption remains to be decided, or factual or legal issues relating thereto, Plaintiff seeks to avoid those altogether by merely asserting in the Complaint by bare allegation, its purported legal status (e.g. as a common carrier, acting in interstate commerce, etc.), which is contradicted by judicially noticeable

[1] As alleged in the City's Complaint in the Mendocino County Action, this line has had a collapsed tunnel since in or about 2016, and Plaintiff admits that the further connection of its line at the Willits Depot end of the Fort Bragg-Willits disconnected line has been "temporarily" under federal embargo (since in or about 1998, *see* FRA Emergency Order No. 21, Northwestern Pacific Railroad) (Jee Decl., Ex. A, ¶ 9; Complaint, at ¶ 22.)

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matter. Their bald and unproven essential allegation is insufficient as a matter of law to establish either this Court's jurisdiction, or any grounds for this Court to refuse to abstain.

As to the third *Younger* factor, Plaintiff will have an adequate opportunity to raise questions of alleged federal preemption in the Mendocino County Action. Compliance with this element is established by the fact that Plaintiff has already addressed its federal preemption claims in its Answer, and it also did so in its demurrer. (Jee Decl., at ¶ 2.) Even though the demurrer posed insufficient grounds for dismissal of the entire action at an early stage, this does not mean that Plaintiff will not be able to adequately address any preemption defense as the action proceeds, or that the Superior Court cannot properly determine those issues. *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976) ("State courts, like federal courts, have a constitutional obligation . . . to uphold federal law.").

Indeed, since the case is still in its early stages, federal authority and jurisdiction has not yet been substantively decided. Further, the action may not end up implicating federal law or preemption at all. Plaintiff's action is not only insufficient but premature, and may be ultimately unnecessary.

To be sure, "[w]here vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of constitutional claims.'" *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (internal citation omitted). Since no constitutional claims are at stake in the Mendocino County Action and the City's claims have yet to be fully litigated or fleshed out, abstention is eminently proper. In fact, ascertainment of the validity of disputed facts in the Mendocino County Action is no bar to the asserted preemption defense set forth in this matter.

Abstention may only be overcome if "federal preemption of the state law at issue is readily apparent," meaning that the specific matter at issue has been the Supreme Court has already decided such issue. *Woodfeathers v. Wash. County*, 180 F.3d 1017, 1021 (9th Cir. 1999) (internal changes and quotations omitted). Not only is there no such readily apparent decision, but the matters in the Mendocino Court Action implicate *State law*, and are likely to be heavily fact laden, whereas the preemption declaration and/or injunction

Plaintiff seeks herein would be far too broad and would likely be overinclusive as to many, if not all, matters subject to local authority and/or valid State court jurisdiction.

Moreover, the likelihood of success in state court proceedings is immaterial for *Younger* purposes. *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 224 (9th Cir. 1994) (lack of opportunity to raise federal claims only demonstrated when *procedural bar* prevents presentation of federal claims.). The superior court has not denied Plaintiff's federal preemption claims, and may yet still even be required to decide such defenses. In fact, disputed facts have yet to be fully adjudicated, which means that Plaintiff still possesses an adequate opportunity to raise its federal defenses and litigate its claims in this matter in the Mendocino County Action. This Court should thus not prematurely interfere with that process, as sought to be done by Plaintiff's broad and unwarranted Complaint in this matter. Therefore, the third factor for *Younger* abstention is satisfied.

Since this case meets the three elements required for *Younger* abstention, this Court should dismiss the within action against the City. The Ninth Circuit has expressly held that, "where a case is properly within the *Younger* category of cases, there is no discretion to grant relief." *Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1356 (9th Cir. 1986) (citing *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 816 n. 22 (1976), internal quotations omitted). Accordingly, this Court should abstain in this matter, refuse jurisdiction, and dismiss the Complaint in its entirety.

Further, it is also appropriate for this Court to defer to the Mendocino County Action under similar principles in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Even when a case may not fall within one of the recognized grounds for abstention, the United States Supreme Court recognized that "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado*

River, 424 U.S. at 817 (internal quotation omitted). Although noting that no one factor was determinative, the Court listed several instances warranting deferral to state action, including: the court first assuming jurisdiction over the property; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 818.

Further, the preemption Plaintiff claims does not appear nearly as broach as Plaintiff would like. "Congress narrowly tailored the ICCTA pre-emption provision to displace only regulation, i.e., those state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010) (internal quotations and changes omitted) (citing *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)). *Franks* distinguished *categorical* preemption, which is what Plaintiff seeks herein, with *as applied* preemption, which cannot yet be determined because the State court action has not yet proceeded. *See also, e.g., Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1131-1132 (10th Cir. 2007) (regarding disposal of "detritus or maintain[ance of] drainage ditch vegetation not preempted by ICCTA; also, not nuisance due to water pooling from "railroad's construction of an earthen berm," as not "directly relate[d]" to rail activities or federal economic regulation of railroads) (citing *Rushing v. Kansas City So. Railway Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001)). In point of fact, "'not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety.'" *Id.* at 1133-1134. Most importantly, this is a *factual* issue. *Id.*

In this matter, the Mendocino County Action was filed long before this action. The possibility of piecemeal litigation exists if both state and federal forums are contemporaneously construing state law issues and/or federal defenses, which the State court is equally able to determine. Thus, abstention is necessary and appropriate.

C. THIS CASE IS NOT APPROPRIATE FOR DECLARATORY RELIEF AND THIS COURT SHOULD REFUSE SUCH RELIEF.

Plaintiff seeks a declaration of its rights regarding federal preemption under 49 U.S.C. § 10501(b), and bases its request on the Declaratory Relief Act in 28 U.S.C. § 2201. As noted above, the Declaratory Relief Act creates a federal remedy and is not an independent basis for federal jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). As a result, declaratory relief is not available and this Court does not have subject matter jurisdiction over this case, but even assuming *arguendo* that it did, it may still deny such relief as improper.

Federal courts are empowered to abstain from requests for declaratory relief when there is a pending state court action involving the same issues and parties. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-289 (1995); *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (federal courts should generally decline to here "reactive declaratory actions"). In fact, the superior court's ruling on the demurrer merely found that Plaintiff's preemption argument was overly broad, not that federal preemption did not apply to the broad set of "railroad activities" included under 49 U.S.C. § 10501(b). *See* City's RJN, Exhibit B. Indeed, the superior court concluded that "the applicability of preemption is necessarily a 'fact-bound question,' not suitable to resolution by demurrer." *Id.* Thus, the question of preemption could not be answered in the abstract, or until the parties have been afforded the opportunity to more fully litigate the underlying issues pending in the superior court relating to local jurisdiction. As the superior court properly determined, Mendocino Railway's preemption argument

> fails to account for the fact that Mendocino Railway's is not involved in any interstate rail operations. As discussed above, from a regulatory standpoint, Mendocino Railway is simply a luxury sightseeing excursion service with no connection to interstate commerce. As a result, its 'railroad activities' , for purposes of federal preemption, are extremely limited. [¶] Not all state and local regulations that affect railroads are preempted. State and local regulation is permissible where it does not interfere with interstate rail operations.

Id. Consequently, this Court should not entertain declaratory relief while a parallel state action is pending. In particular, the state court has not yet decided any substantive matters, including the scope and applicability of the very federal preemption Plaintiff seeks to enforce in this Court, in such overbroad and abstract manner.

Further, declaratory relief is inappropriate to adjudicate past conduct. *See, e.g.*, *American Civil Liberties Union v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) ("With limited exceptions, … issuance of a declaratory judgment deeming past conduct illegal is … not permissible as it would be merely advisory."); *Gruntal & Co. v. Steinberg*, 837 F. Supp. 85, 89 (D.N.J. 1993) (declaratory relief inappropriate solely to adjudicate past conduct). Thus, to the extent Plaintiff seeks a declaration from this Court as to past acts of the City that have been completed, declaratory relief is improper.

Injunctive relief is also inappropriate for similar reasons. "'A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'" Younger, 401 U.S. at 40. *See also, Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) ("the intrusive effect of declaratory relief will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid") (internal quotations omitted).

For all of these reasons, this Court should refrain from exercising jurisdiction for either declaratory or injunctive relief, assuming *arguendo* that such claims were even proper in the first instance.

V. CONCLUSION.

Mendocino Railway has not stated any valid federal cause of action, and thus this Court has no subject matter jurisdiction over this matter and, absent subject matter jurisdiction. This action should be dismissed. In addition, principles of comity require that the state court, in which the City's Mendocino County Action is already pending, be given an opportunity to resolve questions relating to the scope of its own jurisdiction and the applicability and scope of claimed federal preemption by Plaintiff. The City must be

permitted the opportunity for its action, which precedes this one, to proceed, and that the state court that has already exercised jurisdiction be permitted to resolve questions regarding the validity and scope of the City's local authority, which may have no implications as to federal law or federal preemption, or which can properly be determined by the state court. For these reasons, Mendocino Railway's misguided attempt to obtain an alternate forum to avoid valid State court authority, and in essence to enjoin its exercise of jurisdiction at all, should be rejected and this case should be dismissed in its entirety.

Dated: September 22, 2022

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