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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF FORT BRAGG,

Plaintiff,

v.

MENDOCINO RAILWAY,

Defendant,

CALIFORNIA COASTAL COMMISSION,

Intervenor.

.

Case No. 4:22-cv-06317-JST

INTERVENOR CALIFORNIA COASTAL COMMISSION'S REPLY TO DEFENDANT'S CONSOLIDATED OPPOSITION TO MOTIONS TO REMAND ACTION TO STATE COURT

Date: February 2, 2023
Time: 2 p.m.
Dept: Courtroom 6
Judge: The Hon. Jon S. Tigar
Trial Date: Not Set
Action Filed: October 28, 2021

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INTRODUCTION

The arguments made by Defendant Mendocino Railway ("Defendant") in its Consolidated Opposition to the City of Fort Bragg's and California Coastal Commission's Motions to Remand ("Opposition") are baseless. First, while Defendant argues that the Coastal Commission's Complaint in Intervention, seeking confirmation of the applicability of state and local law to Defendant's activities in the coastal zone, raises a federal question and may be removed under a complete preemption theory, Defendant fails to recognize that the City's Verified Complaint, filed over a year ago, mirrors the Complaint in Intervention. Consequently, Defendant failed to timely remove this action under its purported jurisdictional theories when it first became removable. Second, the Coastal Commission's Complaint in Intervention raises only state law claims, but anticipates Defendant's state and federal preemption defenses, and therefore, does not confer jurisdiction sufficient to remove the City's state court action or the Coastal Commission's Complaint in Intervention on that basis. And third, because this action was improperly removed from state court nearly a month after the City and the Executive Director of the Coastal Commission filed motions to dismiss Defendant's parallel federal action, in the interests of justice and under the *Younger* abstention doctrine, the instant action should be remanded in its entirety to state court.

For the foregoing reasons and those further set forth below, Defendant's arguments fail and the Coastal Commission's motion to remand this matter should be granted.

I. IF REMOVAL OF THIS ACTION WAS EVER PROPER, DEFENDANT FAILED TO TIMELY NOTICE ITS REMOVAL.

Defendant's position is and has always been that the effective relief sought by the City in its Verified Complaint, and later, by the Coastal Commission in its Complaint in Intervention, is completely preempted under federal law, yet it failed to remove this matter to federal court after receiving the City's Verified Complaint, or the City's Opposition to Defendant's Demurrer, or the Superior Court's order overruling its Demurrer, or any of the other filings in this case over the past year that have discussed this federal preemption argument, and therefore, removal is now time-barred.

Defendant now contends it had no basis to remove the City's Verified Complaint and its single cause of action, but at the same time Defendant argues in its Opposition that the Coastal Commission's similar state law causes of action are completely preempted and thus, removable. *See* Opposition, at 16-17. Defendant cannot have it both ways, and if there is any merit to its complete preemption argument, then this argument was applicable to the City's Verified Complaint, and particularly the relief the City seeks, and Defendant failed to timely remove this action, requiring remand.[1]

The City filed its Verified Complaint against Defendant more than 13 months ago, alleging that it was doing so because Defendant refused to comply with local laws and regulations, on the purported grounds that "the City has no authority over a railroad" and that Defendant is "outside the City's jurisdictional boundaries." *See* Defendant's Notice of Removal ("Removal Notice"), Exhibit 1 (Doc. No. 1-1) ¶ 12. Defendant states that the City sought "a declaration that [Defendant] is not a 'public utility' under state law," as well as injunctive relief, "despite the fact that [Defendant] is a railroad within the exclusive jurisdiction of the federal Surface Transportation Board." Opposition, at 10:3-7. In fact, the City stated in its Verified Complaint that the reason it was seeking a declaration that Defendant is not a "public utility" is because Defendant had "claim[ed] its status as a public utility preempts local jurisdiction and provides immunity from the City's Land Use and Development Codes." Removal Notice, Exh. 1 ¶ 15. While Defendant delineates the City's requested injunctive relief as being subject to federal preemption, but not the City's declaratory relief cause of action, for all intents and purposes a ruling in the City's favor that Defendant is not a public utility would be meaningless without an injunction requiring Defendant to comply with the City's laws and regulations. Essentially, Defendant is arguing that, regardless of whether state preemption applies, any attempts by the City to compel Defendant's compliance with its laws and regulations are federally preempted. Defendant argued in its demurrer to the City's Verified Complaint that "[t]he City's injunction,

[1] For the sake of clarity, the Coastal Commission contends that there is no merit to Defendant's complete preemption argument with regard to any of the City's or the Coastal Commission's claims, as discussed in section III below. But if complete preemption is found applicable to any claims in this action, the Coastal Commission argues it would be applicable to all claims, including those in the City's Verified Complaint, as discussed in this section I.

which would confer on it plenary regulatory authority over [Defendant's] operations and facilities, would violate 49 U.S.C. section 10501(b). The authority that the City seeks by way of an injunction is federally preempted." *See* Intervenor's Request for Judicial Notice ("RJN"), filed with its Motion to Remand, Exhibit A, at 16. In its Opposition, Defendant mirrors this language when arguing that the Coastal Commission's Complaint in Intervention is subject to removal under the "complete preemption" doctrine, stating that "the Commission's Complaint ultimately seeks a declaration that it has plenary land-use authority over [Defendant]." Opposition, at 18.

Even after the City disputed Defendant's broad federal preemption claims in the City's opposition to Defendant's demurrer, Defendant still failed to seek to remove the City's state court action to federal court. *See* Intervenor's Second Request for Judicial Notice, filed herewith, Exhibit F, at 15-20 ("[Defendant] is simply wrong that federal law somehow preempts all local regulation of its activities or facilities. [Defendant] knows full well that the law does not support its implied argument that the STB and federal law *exclusively* preempts all local police power, because this is simply *not* the law." *Id.* at 15:12-13.)

"[T]he 30-day period to file a notice of removal either begins when the plaintiff serves the defendant with the initial complaint, unless the complaint is indeterminate about removal, in which case the removal period begins when the defendant receives a paper that demonstrates the case is removable." *Prado v. Dart Container Corp. of California*, 373 F. Supp. 3d 1281, 1286 (N.D. Cal. 2019) "'The [removal] statute provides two thirty-day windows during which a case may be removed.' If either 30-day period expires, the § 1446(b) time limits are 'mandatory [such that] a timely objection to a late petition will defeat removal.'" *Id*. (quoting *Harris v. Bankers Life & Cas. Co*., 425 F.3d 689, 692 (9th Cir. 2005) and *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1141 (9th Cir. 2013)) (internal citations omitted). Despite Defendant's attempts to distinguish the Ninth Circuit's *Cantrell* case, that court explained that, just as here, Defendant cannot "have it both ways, i.e., to permit them to remove the action on the basis of [] preemption but excuse them from compliance with the thirty-day removal period." *Cantrell v. Great Republic Ins. Co*., 873 F.2d 1249, 1255 (9th Cir. 1989). Further, Defendant's active participation in the

underlying litigation, and its receipt of multiple papers discussing federal preemption, precludes it from arguing that the time for removal only began upon the Coastal Commission's intervention.

Here, Defendant was on notice from the filing of the City's Verified Complaint, as well as the subsequent demurrer filings and order which discussed and considered Defendant's federal preemption argument and all of which were filed and served more than six months ago, that removal based on complete preemption would be required within 30 days of receipt of those papers. Yet, Defendant failed to timely notice removal of the case, and this action should be remanded on that basis.

II. THE COASTAL COMMISSION'S COMPLAINT IN INTERVENTION DOES NOT ARISE UNDER FEDERAL LAW, AND ONLY ANTICIPATES A FEDERAL DEFENSE.

Defendant's selective editing and attempts to reframe the Coastal Commission's Complaint in Intervention in order to distinguish it from the City's Verified Complaint are unavailing. Much like the City, the Coastal Commission explains in its Complaint in Intervention that Defendant has violated state and local laws in its activities in the coastal zone and within the City's boundaries, and anticipates Defendant's previously-asserted state and federal preemption defenses. In the Complaint in Intervention, and in alignment with the City, the Coastal Commission seeks declarations that (1) the state law Coastal Act and the City's Local Coastal Program apply to the Railway's activities in the coastal zone, and, (2) (as would be necessary to determine in this action regardless of the Coastal Commission's intervention), that the application of the Coastal Act and the City's Local Coastal Program (LCP) to Defendant's actions are not preempted under state or federal law. Complaint in Intervention, ¶¶ 12, 13, 17, 19; Prayer for Relief ¶¶ 1-2. In its Opposition, Defendant conveniently omits the references in the Coastal Commission's Complaint in Intervention to Defendant's violations of state and local laws that provide the primary basis for the Coastal Commission's intervention and suit against Defendant.

Just like the City's Verified Complaint, the Coastal Commission's Complaint in Intervention alleges causes of action based exclusively on state and local law, and thus, Defendant's claims that the Coastal Commission's causes of action "arise under federal law" and first "put [Defendant] on notice that this action became removable" strain credulity and are not

supported by the record. Opposition, at 13. In fact, the Complaint in Intervention's brief reference to federal law directly tracks the statutes and constitutional provisions cited by Defendant in its Fourth Affirmative Defense of its Answer to the City's Verified Complaint, filed in June 2022, a month and a half before the Coastal Commission sought to intervene in the first place. *See* Complaint in Intervention, Prayer for Relief ¶ 2; *see also* RJN, Exh. C, at 5.

Also similar to the City's Verified Complaint, which Defendant admits could not have been filed in federal court, the Coastal Commission's Complaint in Intervention, seeking application of state and local laws to the activities of Defendant in the coastal zone and within the City, could not have been filed in federal court and thus, is not removable. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."). The lone reference to federal preemption in the Coastal Commission's Complaint in Intervention serves only to anticipate Defendant's already-stated defense from its answer and demurrer, and similarly cannot confer removal jurisdiction. *Id.* at 393 (". . . a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint . . ."); *see also Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 946–47 (9th Cir. 2014) (quoting this same language from *Caterpillar*).

The Complaint in Intervention's reference to Defendant's federal preemption defense does not convert the Coastal Commission's state-law claims to those that arise under federal law. No federal law establishes the Coastal Commission's cause of action for declaratory relief alleging that the California Coastal Act and City's LCP apply to Defendant's activities, which is the focus of the Complaint in Intervention. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013) (explaining that the bulk of suits that "arise under federal law" fall into the category where federal law creates the cause of action asserted). Additionally, the second cause of action in the Complaint in Intervention is asserted to enforce solely state and local laws against Defendant. Complaint in Intervention ¶¶ 17-24. As both of the Coastal Commission's causes of action are not created by federal law, the only way they can be considered as arising under federal law is if they fall into the "slim category" of cases that confer federal jurisdiction because "a federal issue is: (1)

necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). "All four requirements must be met for federal jurisdiction to be proper." *City of Oakland v. BP PLC*, 969 F.3d 895, 904–05 (9th Cir. 2020) (citing *Gunn*).

The focus of this analysis is typically with regard to the third requirement, "the question whether a case 'turn[s] on substantial questions of federal law.' [Citation.] This inquiry focuses on the importance of a federal issue 'to the federal system as a whole.'" *City of Oakland v. BP PLC*, 969 F.3d 895, 905 (9th Cir. 2020), (quoting *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) and quoting *Gunn*, 568 U.S. at 260). "By contrast, a federal issue is not substantial if it is 'fact-bound and situation-specific,' . . . or raises only a hypothetical question unlikely to affect interpretations of federal law in the future." *Id*. at 905 (quoting *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 681 (2006)). Much like the state-law public nuisance claims in *City of Oakland*, the application of the Coastal Act and City's LCP provisions to Defendant's activities are fact-specific, hypothetical, and "fail[] to raise a substantial federal question." *City of Oakland* at 906.

Defendant misrepresents the text of the Coastal Commission's Complaint in Intervention, and particularly paragraph 14, which makes no reference to federal law, stating, in its entirety, "[t]herefore, there exists an actual controversy between the Commission and the Railway as to whether the Railway's development activities in the coastal zone are subject to the Coastal Act and the City's LCP." *See* Opposition, at 16:8-10. While the Complaint in Intervention seeks a declaration that those state and local laws apply to Defendant's activities, as well as a declaration that those laws are not preempted under state or federal law, any such inquiry would be "fact-bound and situation-specific" to Defendant's disputed railroad status and its particular activities and use of its property. *City of Oakland*, at 907. For those reasons, even with its anticipatory reference to Defendant's federal preemption defense, the claims presented by the Coastal Commission in its Complaint in Intervention are "not the type of claims for which federal-question jurisdiction lies" and do not present a substantial federal issue sufficient to confer jurisdiction on this court. *Id*.

Additionally, Defendant misunderstands and misconstrues the holding in *Atay v. Cnty. of Maui*, 842 F.3d 688 (9th Cir. 2016). The "different rule" with regard to declaratory actions is only applicable when the state court Defendant files its own complaint in federal court for declaratory judgment "in essence to assert a defense to an impending or threatened state court action." *Id*. at 697. In those situations, the federal-question jurisdiction of the Defendant's declaratory judgment action in federal court is questioned and the threatened state claim is evaluated to determine if federal question jurisdiction exists for the defensive federal complaint. *See Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952) ("Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.") Here, that jurisdictional analysis does not apply to the instant removed action, but does likely apply to the related federal complaint filed by Defendant (*Mendocino Railway v. Jack Ainsworth, et al.*, Case No. 4:22-cv-04597-JST). Because there is no federal question jurisdiction sufficient to remove the Coastal Commission's Complaint in Intervention (the "threatened cause of action" per *Atay* and *Public Service Commission*), there is also not federal question jurisdiction for Defendant's defensive declaratory relief suit in this same court, which is based solely on its preemption defense. Regardless, *Atay* has no bearing on the instant action or the purported validity of Defendant's removal thereof.

III. THE COASTAL COMMISSION'S CLAIMS ARE NOT COMPLETELY PREEMPTED, AND THEREFORE, THEY MAY NOT BE REMOVED ON THAT BASIS.

Defendant's "complete preemption" argument also fails to confer jurisdiction on this court with regard to the Coastal Commission's state law claims. Complete preemption is only available when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987).) "To have this effect, a federal statute must 'provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" *City of Oakland*, 969 F.3d at 905 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).) None of the cases cited by Defendant held that the ICCTA completely preempts all

state and local land use regulations, or even the specific application of the California Coastal Act to a railroad's activities, and in fact, the U.S. Supreme Court "has identified only three statutes that meet this [complete preemption] criteria," none of which is the ICCTA or any other railroad-related statute. *City of Oakland* at 905-906. (explaining that sections of the Labor Management Relations Act, the Employee Retirement Income Security Act, and the National Bank Act are the only three statutes found by the Supreme Court to satisfy the strict requirements for "complete preemption"). Even in those rare instances where a federal court found that a specific, discrete cause of action was completely preempted by the ICCTA, the court was careful to qualify its holding to only apply to that specific cause of action. *See B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1258 (E.D. Wash. 2012) ("In contrast to adverse possession claims, . . . the Surface Transportation Board declared that certain state and local actions **would not be preempted** on their face as long as they did not prevent or unreasonably interfere with rail transportation.") (emphasis added)). Here, there is no evidence that all state and local regulation of Defendant's activities in the coastal zone would be preempted on their face. Such review for potential preemption would require a specific factual analysis which does not support a finding of complete preemption.

Furthermore, "complete preemption" as a basis for federal jurisdiction would only be available where the preempting federal statute provides a cause of action for the Coastal Commission's claims. *See Californians for Alternatives to Toxics v. N. Coast R.R. Auth.*, No. C-11-04102 JCS, 2012 WL 1610756, at *8 (N.D. Cal. May 8, 2012) ("Whether complete preemption applies in this case depends on whether the ICCTA provides 'the exclusive cause of action'" for a Plaintiff's claims.) Preemption under the ICCTA has at times been found to be broad, but "does not necessarily completely preempt every state law claim," and to find complete preemption, Defendant "must point to some provision in the ICCTA that supplies a federal cause of action amounting to [the Plaintiff's] claims." *Id.*, at *9. Defendant fails to identify any cause of action under the ICCTA that would potentially allow for the Coastal Commission to obtain a declaration that the Coastal Act and the City's LCP apply to Defendant's activities and that it may obtain civil penalties, an injunction, and damages from Defendant for its violations of those state

and local laws. "Because there is no clear-cut federal cause of action for [the Coastal Commission's] claims here," the Coastal Commission urges this Court to find "that Defendants have not satisfied their burden that removal through the 'extreme' and 'unusual outcome' of complete preemption was proper." *Id*. "[W]ith the removal statute strictly construed against removal jurisdiction, the Defendant[] bear[s] the burden of establishing that there is no doubt as to federal jurisdiction. Defendant[] ha[s] not carried that burden as to [its] theory of complete preemption." *Friends of Del Mar Bluffs v. N. Cnty. Transit Dist.*, No. 3:22-CV-503-RSH-BGS, 2022 WL 17085607, at *8 (S.D. Cal. Nov. 18, 2022) (citing to the Northern District's *Californians for Alternatives* case, the District Court for the Southern District explained: "Although Defendants argue that the ICCTA precludes each of Plaintiffs' claims, Defendants do not attempt to show that the ICCTA 'provide[s] the exclusive cause of action for the claim asserted,' a separate requirement for complete preemption.") Such is the case here as well.

In sum, there is no support for Defendant's complete preemption argument as to the Coastal Commission's state law claims, and those claims do not support a finding of a substantial federal question. Therefore, this Court has no jurisdiction over the Coastal Commission's Complaint in Intervention and this action should be remanded to state court.

IV. THIS MATTER SHOULD ALSO BE REMANDED UNDER THE *YOUNGER* ABSTENTION DOCTRINE

While Defendant attempts to discount the applicability of the *Younger* abstention doctrine in its Opposition to this Motion to Remand, Defendant should not be rewarded for its improper removal of the ongoing state proceeding in its effort to overcome the clear mandate of *Younger*.

A. The State Proceeding Was Ongoing as of the Removal to Federal Court and Should Be Remanded

Regardless of its current status, both the state proceeding and Defendant's parallel, related federal action (*Mendocino Railway v. Jack Ainsworth, et al.*, Case No. 4:22-cv-04597-JST) were pending when Defendant filed its Notice of Removal of this action in state court. That is all that is required to satisfy the first prong of the *Younger* abstention analysis. As the Ninth Circuit has repeatedly held, "the critical question is not whether the state proceedings are still 'ongoing' but

whether 'the state proceedings were underway before initiation of the federal proceedings.'" *Wiener v. Cnty. of San Diego*, 23 F.3d 263, 266 (9th Cir. 1994) (quoting *Kitchens v. Bowen*, 825 F.2d 1337, 1341 (9th Cir. 1987)); see also *Richter v. Ausmus*, No. 19-CV-08300-WHO, 2021 WL 3112333, at *6 (N.D. Cal. July 22, 2021) (quoting the same "critical question" language from *Kitchens v. Bowen*); cf. *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014) ("[T]he date for determining whether *Younger* applies is the date the federal action is filed.").

If the opposite were true, and *Younger* abstention were so easily defeated by the filing of a bare notice of removal of the pending state proceeding, a defendant in an ongoing state proceeding might be tempted to file a second action in federal court and then file such a notice of removal (regardless of its merits), and then argue that the state matter is no longer "ongoing." This is exactly the type of forum-shopping and federal court interference with state proceedings that *Younger* abstention seeks to prevent. While such a situation is incredibly rare, at least one federal court noted this specific tactic by a Defendant and determined that a late removal should not defeat the first *Younger* prong. *See City of Chesapeake v. Sutton Enterprises, Inc.*, 138 F.R.D. 468, 474 (E.D. Va. 1990) (". . . but for defendant's removal, . . . state court proceedings would be ongoing. In addition, no proceedings of substance have occurred in this case in the federal court. Therefore, the first requirement of the [*Younger*] abstention doctrine is met.")

Defendant spends considerable time in its Opposition citing to cases where a state proceeding had been removed and potential *Younger* abstention was analyzed by the federal court. However, that time spent in the Opposition is for naught, as all of the cited cases are easily distinguishable from the matter at hand because they all involved just a single state proceeding that was removed to federal court,[2] not a situation where a state proceeding was ongoing and then the defendant in that state proceeding files a second, separate federal suit, and then seeks to remove the state proceeding, as is the case here. The cases cited by Defendant were evaluating

[2] See cases cited in Defendant's Opposition at page 16, lines 1-19. All involved a single removed action except for *Ankenbrandt v. Richards*, 504 U.S. 698 (1992). *Ankenbrandt* is nevertheless inapposite as well because that case involved a single action which was first filed in federal court, and thus, at no time was there ever a state proceeding that was pending or ongoing, in contrast to the instant case. *See id.* at 691-92.

Younger abstention's ongoing state proceeding factor as to the single removed action and were not considering (and could not have considered) the existence of another federal proceeding filed while that state proceeding was still ongoing, which, as discussed above, is the only inquiry necessary under *Younger* and its progeny. Defendant cannot sidestep *Younger* abstention by attempting (improperly) to remove the parallel state action to federal court when it is undisputed that "the state proceedings were underway before the initiation of the federal proceedings." *Kitchens*, 825 F.2d at 1341.

Moreover, as discussed above, Defendant's removal of this proceeding is time-barred and does not confer sufficient jurisdiction on this court. As such, the Coastal Commission contends that the state court proceeding should be remanded to continue in state court, further quashing Defendant's argument that the state court proceeding is not ongoing, and satisfying the first prong of the *Younger* abstention analysis.

B. The Coastal Commission's and City's Actions Are Civil Enforcement Proceedings Subject to *Younger*

Defendant seeks to reframe what are unequivocal civil enforcement proceedings by the City and the Coastal Commission as solely disputes over regulatory authority. While that may be Defendant's focus, this straw man argument misses the forest for the trees, as the Coastal Commission discussed in detail in its Motion to Remand.

In its Opposition, Defendant relies heavily on a recent case involving an insurance conservatorship when discussing the general factors necessary for *Younger* abstention, (*Applied Underwriters, Inc. v. Lara*, 37 F.4th 579 (9th Cir. 2022)), but that case's analysis has little bearing on the applicability of *Younger* to the City's and Coastal Commission's actions against Defendant here. In fact, in the concurring opinion in *Applied Underwriters* (mistakenly labelled as "dissenting" in Defendant's Opposition), Judge Nguyen questioned why the majority concluded that "the conservatorship lacks the requisite 'punitive character' and 'sanctions' to qualify as a civil enforcement proceeding." *Applied Underwriters* at 601. Citing to *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) and *Herrera v. City of Palmdale*, 918 F.3d 1037 (9th Cir. 2019), Judge Nguyen explained that "a state proceeding can

still be subject to *Younger* even if its purpose is to rehabilitate, to deter, or to protect the public" and "proceedings geared towards 'protection,' 'prevention,' and even rehabilitation can have the requisite punitive character." *Id*.

While the Ninth Circuit's dispute over the nature of insurance conservatorships appears murky, not so with nuisance abatement actions, which are much more akin to the City's and Coastal Commission's claims in this action. Specifically, in the context of the Coastal Commission's enforcement of environmental laws, "[c]ontemporary environmental legislation represents an exercise by government of this traditional power to regulate activities in the nature of nuisances. . . . Current legislation for environmental and ecological protection constitutes but a sensitizing of and refinement of nuisance law." *CEEED v. California Coastal Zone Conservation Com.*, 43 Cal. App. 3d 306, 318–19 (Ct. App. 1974) (predecessor to California Coastal Act constitutes a codification of common law of nuisance) (internal citations omitted).

In 2020, the Ninth Circuit in *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 953 F.3d 655 (9th Cir. 2020), reviewed and affirmed this Court's dismissal of a federal complaint stemming from a local land use dispute as a qualifying action under *Younger* abstention. The case arose when Alameda County determined that the group Citizens for Free Speech had erected billboards in violation of the County's local zoning laws and began an abatement proceeding against Citizens for the removal of the billboards. See *Citizens for Free Speech*, at 657. Just as Defendant has done so here, *Citizens* responded by filing a federal complaint against the County in an attempt to "bar[] the County from enforcing its ordinances." *Id.* However, both Judge Saundra Brown Armstrong of the Northern District, (who raised *Younger* abstention *sua sponte*[3]), and the Ninth Circuit on appeal found that "all the elements required for *Younger* abstention are present" and dismissed the federal action. *Id*. Citing to *Huffman v. Pursue, Ltd*., 420 U.S. 592 (1975) and *Herrera, supra*, 918 F.3d 1037 in support of its determination that the County's ongoing abatement proceedings satisfied "the 'quasi-criminal enforcement' element" of *Younger*, the Ninth Circuit found that *Citizens'* federal complaint was properly dismissed under *Younger*.

[3] See *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 338 F. Supp. 3d 995, 1002-1004 (N.D. Cal. 2018), *aff'd*, 953 F.3d 655 (9th Cir. 2020).

Id. The court in *Citizens* also found that the Supreme Court has recognized that such proceedings are "civil enforcement proceedings initiated by the state 'to sanction the federal plaintiff . . . for some wrongful act,'" *Id*. (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79–80 (2013)).

In *Citizens*, the County had only just begun abatement proceedings when the federal complaint was filed and was subsequently dismissed on *Younger* grounds. *Id.* at 657. This is in contrast to the instant matter, where the City had observed and raised Defendant's multiple violations of local law with Defendant over the course of a few years and even red-tagged unpermitted work by Defendant before filing its lawsuit in state court. Removal Notice, Exh. 1 at ¶¶ 12, 13, 15. It was not until well after the City filed its state court complaint, seeking to enforce its local laws and abate the dangerous conditions on Defendant's property, that Defendant filed its separate federal action. If the abatement proceedings in *Citizens* that had just been initiated were sufficient "quasi-criminal enforcement" proceedings initiated "to sanction the federal plaintiff," the City's actions and complaint here should also be found to constitute state proceedings requiring federal court abstention under *Younger*. *Citizens, supra*, at 657.

It its Opposition, Defendant appears to ask this Court to engage in a detailed fact-specific inquiry into the City's and Coastal Commission's motivations for bringing this action against Defendant to determine if it satisfies *Younger*. However, no such inquiry is necessary. As discussed by the Ninth Circuit in *Bristol-Myers Squibb Co. v. Connors*, 979 F.3d 732 (9th Cir. 2020), "[w]hat matters for *Younger* abstention is whether the state proceeding falls within the general class of quasi-criminal enforcement actions—not whether the proceeding satisfies specific factual criteria." *Id.* at 737, cert. denied, 210 L. Ed. 2d 929 (2021). Finding that the civil penalties and punitive damages sought by the State of Hawaii in that case lent support to the conclusion that the action fits within the "quasi-criminal" actions warranting *Younger* abstention, and that the sort of "case-specific inquiry" urged by the Plaintiff in that case, (and by Defendant in the instant matter), "finds no support in precedent," the Ninth Circuit refused to look narrowly at the State's interest in the outcome of a particular case. *Id*. at 737-38. None of the additional cases cited by Defendant in its Opposition, ostensibly as examples of non-qualifying civil enforcement proceedings under *Younger*, involved a *Younger* abstention analysis at all or the

specific penalties and damages sought by the Coastal Commission here and are therefore irrelevant to this inquiry.[4] Because those cases also did not involve an evaluation of the "general class" of proceedings that might fall under *Younger*, they are inapplicable to the Court's analysis of that requirement. See Opposition at page 24, line 15 – page 29, line 11. The Coastal Commission's "ultimate aim," "primary objective," and the specific nature of the relief sought by the Coastal Commission are not relevant inquiries under the second *Younger* prong. The only relevant inquiry is "whether the state proceeding falls within the general class of quasi-criminal enforcement actions" to which *Younger* applies. *Bristol-Myers Squibb* at 737. Accepting Defendant's "invitation to scrutinize the particular facts of a state civil enforcement action would offend the principles of comity at the heart of the *Younger* doctrine." *Id.* Just as this Court and the Ninth Circuit have found in the context of nuisance abatement cases, the City's and Coastal Commission's state court actions, seeking to enforce their local and state laws, particularly in the context of Defendant's use of its property, are of the same general class of quasi-criminal civil enforcement proceedings subject to *Younger*.

C. Protection from Unrestrained Development of the Coastal Zone Is an Overriding State Interest

In its Opposition, Defendant fails to recognize the import of the City's and Coastal Commission's interests in this removed state court action. The Coastal Commission addressed this prong in detail in its Motion to Remand and, for the sake of efficiency, will not restate those arguments here.

However, Defendant's multiple citations to and reliance on federal cases involving tribal law do not negate or in any way alter the existence of the Coastal Commission's important

[4] The inapposite cases first cited by Defendant in this section of its Opposition are: *Ojavan Invs., Inc. v. California Coastal Com.*, 54 Cal. App. 4th 373 (1997) (unconstitutional forfeiture); *Kizer v. Cnty. of San Mateo*, 53 Cal. 3d 139 (1991), *as modified* (Mar. 28, 1991) (penalties and damages under Long-Term Health Act); *City & Cnty. of San Francisco v. Sainez*, 77 Cal. App. 4th 1302, 1315 (2000) (housing code penalties, but acknowledging that they may have "a punitive or deterrent aspect"); *Hale v. Morgan*, 22 Cal. 3d 388 (1978) (due process regarding utility service penalties); *Lent v. California Coastal Com.*, 62 Cal. App. 5th 812 (2021) (constitutionality of public access penalties); *People v. Toomey*, 157 Cal. App. 3d 1 (Ct. App. 1984) (unfair competition and false advertising); *In re Alva*, 33 Cal. 4th 254 (2004) (sex offender registry); and *Humanitarian L. Project v. U.S. Treasury Dep't*, 578 F.3d 1133 (9th Cir. 2009) (due process for terrorism civil penalties).

interests in enforcing the Coastal Act and the City's important interests in enforcing its local laws and regulations. Further, those cases are distinguishable when applied to this element of the *Younger* abstention analysis. Both the *Sycuan* and *Fort Belknap* cases involved a state seeking to criminally prosecute Indians violating state laws on tribal lands, and while the courts in both cases recognized the State would have a legitimate interest in enforcing those laws if not for federal regulations that expressly retained jurisdiction for such prosecutions by the United States, the federal courts determined that they could not abstain from those cases when the federal regulations made it clear that the state had no jurisdiction to pursue those criminal convictions. See *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994) (as amended on denial of reh'g (Apr. 28, 1995)); *Fort Belknap Indian Cmty. of Fort Belknap Indian Rsrv. v. Mazurek*, 43 F.3d 428, 432 (9th Cir. 1994). Similarly, *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202 (10th Cir. 2003) involved another criminal prosecution by a state upon an Indian corporation and its members, invoking tribal immunity questions. *Id.* at 1205. The Tenth Circuit in *Winnebago* explained that the district court was forced to deny *Younger* abstention because "not all aspects of the issues could be properly heard" in the state criminal proceedings and that any ongoing state criminal proceeding "would no longer be just a factor in the analysis, it would end the analysis." *Id*. Not so in the case at bar. First, the City's and Coastal Commission's claims in this matter are not criminal prosecutions but civil enforcement proceedings, and the issues that might be raised in federal court can certainly be raised in the state court as well. Second, the Coastal Commission contends that the preemption argument raised by Defendant is meritless, especially in contrast to the longstanding exclusive and complete jurisdiction of tribal sovereignty and thus, Defendant's unsupported preemption claim cannot defeat an otherwise valid *Younger* abstention argument on its face. And finally, because, if remanded, this action will consider and determine both the merits, or lack thereof, of Defendant's preemption arguments, as well as assess the City's and Coastal Commission's authority over past and future illegal conduct by Defendant, it cannot be said that this proceeding would prevent analysis of these preemption questions and issues, or in any way swallow the preemption analysis that would occur regardless of the venue of this action.

Further, "[a] claim of preemption will only defeat *Younger* abstention when preemption is 'readily apparent.'" *S. California Gas Co. v. Cnty. of Los Angeles, California*, No. CV 17-5140 DSF (JCX), 2017 WL 8793753, at *7 (C.D. Cal. Dec. 4, 2017) (quoting *Woodfeathers, Inc. v. Washington Cnty., Or.*, 180 F.3d 1017, 1021 (9th Cir. 1999)) (internal citations omitted). The Ninth Circuit has held "'preemption to be readily apparent where the Supreme Court had previously decided the issue; where the state law fell under the express preemption clause of [ERISA]; and where the federal regulatory jurisdiction of the employees in a bargaining unit had previously been determined.'" *Id.* As the Eleventh Circuit explained, "only the clearest of federal preemption claims would require a federal court to hear a preemption claim when there are underlying state court proceedings and when that claim can be raised in the state forum." *Hughes v. Att'y Gen. of Fla.*, 377 F.3d 1258, 1265 (11th Cir. 2004). Here, preemption of all state and local laws in favor of Defendant is not readily apparent, and Defendant is not precluded from raising its federal preemption claim in this proceeding in state court on remand, a fact that Defendant already acknowledged by raising preemption as an affirmative defense in answering the City's Verified Complaint. In fact, the state court is well-equipped to analyze and decide that claim. *See* the California Supreme Court's *Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 690 (2017) ("We conclude that the ICCTA is not so broadly preemptive.").

Here, the City's and Coastal Commission's interests in enforcing their local and state laws in the face of broad preemption claims by Defendant are substantial and important, and Defendant's claimed preemption is not sufficiently "readily apparent" to overcome the City's and Coastal Commission's interests in having their local and state law claims heard in state court. For those reasons, this case should be remanded to state court under the *Younger* abstention doctrine.

CONCLUSION

In removing this matter to federal court, Defendant is again forum shopping, doing whatever it can to not litigate the City's and the Coastal Commission's state and local law claims in their proper state court venue. Along with Defendant's reactionary federal complaint in the related matter, premised solely on its alleged federal preemption defense, it again seeks to haul the City and the Coastal Commission into federal court by mischaracterizing and selectively

editing the Coastal Commission's claims. However, Defendant's arguments have no merit and for all of the foregoing reasons, the Coastal Commission respectfully requests that the Court remand this matter in its entirety to the Superior Court of California for the County of Mendocino.

Dated: December 12, 2022

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF FORT BRAGG,

Plaintiff,

v.

MENDOCINO RAILWAY,

Defendant,

CALIFORNIA COASTAL COMMISSION,

Intervenor.

Case No. 4:22-cv-06317-JST

CALIFORNIA COASTAL COMMISSION'S SECOND REQUEST FOR JUDICIAL NOTICE

Date: February 2, 2023
Time: 2 p.m.
Dept: Courtroom 6
Judge: The Hon. Jon S. Tigar
Trial Date: Not Set
Action Filed: October 18, 2021

Intervenor California Coastal Commission respectfully requests that the Court take further judicial notice of the following document filed in the related state court proceedings, pursuant to Federal Rule of Evidence Rule 201:

1. Exhibit F –A true and correct copy of the City of Fort Bragg's Opposition to Demurrer to Verified Complaint for Declaratory and Injunctive Relief, *City of Fort Bragg v. Mendocino Railway*, Mendocino County Superior Court, Case No. 21CV00850, filed February 9, 2022.

The Court may take "judicial notice of court filings and other matters of public record." *Dignity Health v. Dep't of Indus. Rels., Div. of Lab. Standards Enf't*, 445 F. Supp. 3d 491, 495 n. 1 (N.D. Cal. 2020) (quoting *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n. 6 (9th Cir. 2006)). Further, the Court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (quoting *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979)).

Therefore, judicial notice is appropriate and Intervenor California Coastal Commission respectfully requests that this Court grant its second request for judicial notice.

Dated: December 12, 2022

Respectfully submitted,

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DAVID G. ALDERSON
Supervising Deputy Attorney General

s/ Patrick Tuck

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EXHIBIT F

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CITY OF FORT BRAGG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation,

Plaintiff,

v.

MENDOCINO RAILWAY AND DOES 1–10, inclusive

Defendants.

Case No. 21CV00850

CITY'S OPPOSITION TO DEMURRER TO VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

JUDGE: Hon. Clayton Brennan
DEPT.: Ten Mile

DATE: **February 24, 2021**
TIME: **2:00 p.m.**

Plaintiff, City of Fort Bragg ("City"), submits the following in Opposition to the Demurrer to Verified complaint for Declaratory and Injunctive Relief ("Opposition") filed by Defendant Mendocino Railway ("MR"):

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I. INTRODUCTION.

MR, for all of its bravado about what it is or hopes to be, it is not a *public utility*. Its tracks and direct rail activities are subject to the limited safety authority of the California Public Utility Commission ("CPUC"), but not the CPUC's broad regulatory control that would preclude this court's jurisdiction in this case. This statement is neither the City's conjecture nor wishful thinking. Rather, it derives directly from the CPUC's findings – namely, that MR is not a public utility.

This determination is not an isolated or aberrational decision by federal or State authorities. Indeed, when MR is merely and solely providing entertainment or excursion services, it simply is not operating as a common carrier, does not provide transportation as a public utility, does not carry cargo or freight in interstate commerce, and its passengers do not travel except as a very localized form of sightseeing. It is not a component of the national rail system.

MR may wish to one day be more than it is. But, the jurisdictional limitations MR asserts in this matter against this court's authority to hear this case are neither factually nor legally supported. Rather, it is no more than MR's wishful thinking. MR is not a common carrier nor has it been for many years. It carries no passengers other than on a very limited excursion basis and with no national connectivity, which both the CPUC and federal agencies have recognized as precluding broad regulatory preemption. MR also does not provide transportation for purposes of such regulatory authority. The CPUC has recognized that for the very limited scope of MR's activities, it will perform rail safety oversight only, which does *not* foreclose all local regulatory authority, as MR would have this Court believe. The CPUC's limited purview leaves open valid local regulatory authority, including compliance and oversight of the myriad non-rail activities and/or health and safety regulations generally – to which MR improperly asserts that it is categorically exempt from complying. The City's police power over non-rail activities and health and safety is well established.

II. STATEMENT OF FACTS.

MR operates the "Skunk Train" on round-trip services between Fort Bragg and Glen Blair Junction, and Willits and Northspur Junction. It provides no through-service, does not connect to interstate rail or other interstate connections, and it does not provide freight service. The CPUC has already determined that MR's provision of such limited passenger services is not a public utility.

Similarly, the Federal Interstate Commerce Commission ("ICC"), the predecessor to the Surface Transportation Board ("STB") determined on facts nearly identical to those relating to the limited passenger services provided by MR, such activities were *not* federally regulated as solely interstate services. By the Complaint, the City seeks to enforce, as applicable, its local authority over building and safety regulations on MR, but has been rejected any such regulatory authority by MR. Thus, a valid dispute exists between the parties, which is within this Court's jurisdiction and not preempted.

III. STANDARD OF REVIEW ON DEMURRER.

A demurrer should be denied "if the pleading, liberally construed, states a cause of action on any theory." *Covo v. Lobue,* 220 Cal. App. 2d 218, 221 (1963). "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School Dist.*, 53 Cal. 4th 861, 872 (2012). A court must give a complaint a "reasonable interpretation" and "it is error . . . to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." *Aubry v. Tri-City Hospital Dist.*, 2 Cal. 4th 962, 967 (1992). In fact, a demurrer is not proper "where the action *may* be, but is not necessarily, barred." *Commission for Green Foothills v. Santa Clara County Bd. of Supervisors*, 48 Cal. 4th 32, 42 (2010) (changes in original omitted) (emphasis added). A demurrer can "reach only those defects . . . on the face of the complaint or judicially noticeable"; "there is neither propriety nor necessity for the disposition of the matter on demurrer," so even when there is an "irremediable absence of a justiciable cause," "[t]he proper method . . . [to] dispose[] of [an action] [i]s by motion for summary judgment based upon affidavits," *not* by demurrer. *Johnson Rancho County Water Dist. v. County of Yuba*, 223 Cal. App. 2d 681, 684 (1963) (citation omitted).

Further, "'[a] demurrer does not lie to a portion of a cause of action.'" *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 542 (1998). A complaint's "'allegations must be liberally construed, with a view to substantial justice between the parties.'" *Id.* Even if a complaint's "facts may not be clearly stated, . . . or although the plaintiff may demand relief to which he is not entitled," it will stand if "it appears that the plaintiff is entitled to *any* relief." *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1152 (2000) (internal quotations omitted) (emphasis added) (quoting *Matteson v. Wagoner*, 147 Cal. 739, 742 (1905)). Courts "must afford a reasonable interpretation of the complaint read as a whole with its

parts in context." *Charpentier v. L.A. Rams Football Co.*, 75 Cal. App. 4th 301, 307 (1999) (citing *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985); *Quelimane Co. v. Stewart Title Gty Co.*, 19 Cal. 4th 26, 38 (1998)).

In fact, "[t]he California Supreme Court has consistently held that 'a plaintiff is required only to set forth the *essential facts* of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action." *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal. App. 4th 592, 608 (2000) (italics added) (quoting *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d 240, 245 (1969)). The goal of a pleading is notice, not absolute exactitude.

IV. THIS COURT MOST CERTAINLY HAS JURISDICTION OVER THIS ACTION TO *ENFORCE* THE CPUC's FINDING THAT MR IS *NOT A PUBLIC UTILITY.*

The crux of MR's improper demurrer is the claim that this Court has no jurisdiction over *public utilities*, which are exclusively under the jurisdiction of the CPUC. The City does not dispute that the California Constitution (art. XII, § 3) and Public Utilities Code Section 1759 generally grants plenary authority to the CPUC over "public utilities." *But see Vila v. Tahoe Southside Water Util.*, 233 Cal. App. 2d 469, 476-77 (1965) ("It has never been the rule . . . that the commission has exclusive jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities.") (recognizing "concurrent jurisdiction" between CPUC and superior court). In fact, "it is well established that section 1759(a) is not intended to, and does not, immunize or insulate a public utility from any and all civil actions . . . ." *People ex rel. Orloff v. Pac. Bell*, 31 Cal. 4th 1132, 1144 (2003).

Notwithstanding, the key problem here is simply that MR is *not a public utility*.[1] The Court will note that – repeatedly throughout the Opposition, MR gets this one critical fact wrong. To be clear and to reiterate, MR is *not a public utility*. And, this is not a point which the City wishes were true, or even one that the City wishes for this Court to decide. Instead, this is a matter that has *already* been

[1] To the extent the allegations include that MR "has all legal rights of a public utility," this must be read in context, in that the CPUC has found MR is *not* a public utility. In fact, the Complaint, taken as a whole, makes clear the City seeks to have this Court declare – consistent with the CPUC decision, that MR is operating as "an excursion-only railroad . . . [that] is not a public utility." (Complaint, at ¶ 15.) The City seeks to enforce its valid police powers and its regulations "as applicable." (Complaint, at ¶¶ 15, 16, 19; Prayer, ¶¶ 1-2.) Assuming *arguendo* the Court finds some correction is needed for consistency, amendment is proper. A party can "correct a pleading . . . [as to a] mistake or inadvertence." *Lamoreux v. San Diego & A.E.R. Co.*, 48 Cal. 2d 617, 623 (1957); *JPMorgan Chase Bank, v. Ward*, 33 Cal. App. 5th 678, 691 (2019) (amendment allowed to correct errors, ambiguous facts, or conclusions).

decided *by the CPUC*. Thus, no matter how MR construes this action, it most certainly is *not* barred by any CPUC jurisdiction – both because this action does not seek to annul or undermine any CPUC decision, and because MR is not a public utility subject to CPUC's exclusive authority. Indeed, Public Utilities Code Section 1759 makes the former point clear, providing only as follows:

> No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to ***review, reverse, correct, or annul any order or decision of the commission*** or ***to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties***, as provided by law and the rules of court.

Cal. Pub. Util. Code § 1759 (a) (emphasis added). Thus notably, "if an action seeks to *enforce* a rule that clearly sets out the nature of the obligation imposed, … simply deciding whether a defendant's actions did or did not violate that standard *does not hinder or interfere* with the CPUC's jurisdiction," and is not barred. *Goncharov v. Uber Technologies*, 19 Cal. App. 5th 1157 (2018) (italics added). A District Court, construing California opinions, found that claims, including for declaratory and injunctive relief, were proper based on "the rule that so long as a 'suit actually *furthers* policies of [the CPUC],' it is *not barred*." *North Gas Co. v. Pacific Gas & Elec. Co.*, 2016 U.S. Dist. LEXIS 131684 (N.D. Cal. 2016) (citing *Cundiff v. GTE Cal.*, 101 Cal. App. 4th 1395, 1408 (2002)). Synthesizing California cases, the *North Gas* Court found even actions against *regulated utilities* permissible when "seek[ing] to *enforce*, rather than challenge, obligations created by CPUC regulations." *Id.* (italics added). *See also, PegaStaff v. Pac. Gas & Elec. Co.*, 239 Cal. App. 4th 1303, 1321-22 (2015) (not barred if action "complements and reinforces the [CPUC's] regulations" or "in aid of," not "derogation of, the PUC's jurisdiction") (internal quotations and changes omitted). And, despite CPUC jurisdiction, "local municipalities may, pursuant to their police power, regulate utilities to the extent the regulation is *not inconsistent* with law." *Southern Cal. Edison Co. v. City of Victorville*, 217 Cal. App. 4th 218, 231 (2013) (italics added).

Perhaps most importantly, this issue may not be properly decided on demurrer, since it is highly dependent upon specific facts and the particular nature of regulatory enforcement to be shown. As *PegaStaff,* at 1318, recognized, there are several legal issues to be evaluated in determining Section 1759applicability, including "careful assessment of the scope of the [C]PUC's regulatory authority and evaluation of whether the suit would thwart or advance . . . [C]PUC regulation";

although an injunction "may sometimes interfere" with such authority," it does not always, and the court must determine if specific matters "fall outside the PUC's constitutional and statutory powers, [so that] the claim will not be barred by section 1759." Since the Court cannot determine the specific nature of violations still to be shown, a demurrer is invalid -- even if some allegations may fall within the CPUC's authority. *See, e.g., Wilson v. S. Cal. Edison Co.*, 234 Cal. App. 4th 123, 151 (2015) (safety issues as to "stray voltage" not barred in "absence of any indication that the [C]PUC has investigated or regulated the issue," that existing regulations addressed specific issue, or suit "would interfere with or hinder" CPUC policy). Even if only "*some* . . . claims survive the bar of [ ] section" 1759, granting a demurrer is error. *Koponen v. Pac. Gas & Elec. Co.*, 165 Cal. App. 4th 345, 359 (2008) (italics added).

In any event, even assuming *arguendo*, that the CPUC's jurisdiction over *public utilities* is plenary as to all matters touching on or concerning public utilities, MR's demurrer still returns to the same fundamental and unavoidable flaw: MR is *not a public utility* – as determined *by the CPUC*. In fact, MR admits the CPUC has issued the prior opinion about MR's excursion rail services, and the CPUC is unequivocal in its conclusions of fact and law as to its own jurisdiction of MR's predecessor, CWRR:

> CWRR's 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. . . . [But, 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].

1998 Cal. PUC LEXIS 189 (1998) (emphasis added). Even though the CPUC also stated that it should continue regulating CWRR's "safety" operations, such limited jurisdiction does not change the CPUC's underlying conclusion that MR's services do *not* constitute "*transportation*," because the primary purpose is merely "*sightseeing*," which "is *not a public utility function*." *Id.* (emphasis added). Whatever authority the CPUC retained over MR, it was *not* over MR as a *public utility*. And, the CPUC's later dismissal as to any decision on *other* passenger services issues of MR does not change the above findings, nor establish, as MR erroneously asserts, that it somehow now provides "transportation." (Demurrer p. 8, lns. 20-22 & n.4 (citing 1998 Cal. PUC LEXIS 384 (May 21, 1998)).

In fact, the CPUC reflects its rail safety operations regulation "as an arm of the Federal

Railroad Administrative," and that the CPUC thus must "continue to inspect CWRR's track, signal and safety practices" as to "passenger and freight operations," in order "to continue to regulate the upkeep and reliability of *grade crossings and crossing protection devices*." 1998 Cal. PUC LEXIS 189 (italics added). That the CPUC retained some authority over certain safety aspects of MR's excursion train, particularly as to administration of federal law, does *not* mean MR retained status as a *public utility*.

Moreover, the same analysis as above was reiterated in *City of St. Helena v. Public Util. Comm'n.*, 119 Cal. App. 4th 793 (2004). In comparing the "Wine Train" to MR's "Skunk Train," the court explained that the CPUC's decision in the 1998 CWRR/MR decision "declared that the Skunk Train, providing an excursion service between Fort Bragg and Willits, was ***not a public utility***." *Id.* at 798 (emphasis added). The court also cited to the CPUC decision in *Western Travel Plaza,* 7 Cal. P.U.C. 2d 128, 135 (1981), 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 court, in determining "whether the [C]PUC has jurisdiction to regulate the Wine Train *as a public utility*," found it did "not provide 'transportation"' and is "not subject to regulation *as a public utility* because it does not qualify as a common carrier," relying on the CWRR/MR decision:

> the PUC concluded the Skunk Train, providing an excursion service between Fort Bragg and Willits, did not constitute 'transportation' subject to regulation as a public utility. It is difficult to differentiate this service from that provided by the Skunk Train. The Skunk Train's excursion service involves transporting passengers from Fort Bragg to Willits, and then returning them to the point of origin for the purpose of sightseeing. . . . Presently, the Wine Train provides a round-trip excursion that is indistinguishable from the Skunk Train.

Id. at 801-803 (italics added). In fact, although the CPUC may have *some* regulatory authority over various industries – even *non* "public utilities," its only "exclusive jurisdiction [is] over the conditions under which *public utilities* render their *public utility services*." *Harmon v. Pacific Tel. & Tel. Co.*, 183 Cal. App. 2d 1, 2-3 (1960). Thus, MR's ***excursion*** services, which the CPUC has said are *not* ***public utility services***, are *not* subject to CPUC jurisdiction, and thus this Court is not without jurisdiction hereof.

Indeed, the *St. Helena* Court made this same point clear. It concluded the Wine Train – like the Skunk Train, was not a public utility, and yet still found the CPUC could retain certain authority over non-public utility trains. Despite finding the CPUC had exceeded its jurisdiction by finding the

Wine Train was a public utility, the court "express[ed] no opinion as to the [C]PUC's jurisdiction with respect to safety and environmental issues." *Id.* at 801 n.4. Thus, the court recognized the CPUC could retain certain authority over trains, including as pertinent here as to *safety* authority, even if a railroad were still *not a public utility* subject to exclusive CPUC authority. As here, the heart of *St. Helena* was city regulatory authority over trains. The Court emphasized: "not every business that deals with the public or is subject to some form of state regulation is necessarily a public utility." *Id.*

Notably, the definition of a "public utility" in the Public Utilities Code includes many types of specifically named corporations, such as a "toll corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation." Cal. Pub. Util. Code § 216 (a)(1). Absent are *railroad corporations*. The same is true of limitations on the CPUC's exclusive governing authority, which applies to private corporations involved in "the *transportation* of people or property . . . and *common carriers*, [which] are *public utilities*." Cal. Const., art. XII, § 3 (italics added). Further, railroads are specifically defined as all manner of rail, tracks, property, equipment, facilities, etc. ***for public use in the transportation of persons or property.*** Cal. Pub. Util. Code § 229. As the *St. Helena* Court concluded as to the Wine Train, and the CPUC as to the Skunk Train, neither provides *transportation* nor is a *common carrier*.

MR cites to Public Utilities Code Section 211 for its claim that it is a public utility -- contrary to the PUC's findings, but Section 211 supports the City. Section 211 establishes that common carriers are only those entities providing ***transportation***. Since the CPUC has already found that MR does not provide *transportation*, it is not a common carrier and thus is not a public utility. Railroad corporations are included within Section 211 only to the extent they provide *transportation*, which MR does not. The CPUC has already made this finding. Thus, under Section 211 and the CPUC's findings, MR does not provide ***transportation***, it is not a ***common carrier***, and is **not *a public utility.***

Further, the *St. Helena* Court made clear that what services a train might wish to provide in the future does not matter. In *St. Helena*, the Wine Train argued it could or intended to provide stops and connections to buses and other wineries and points of interest, but this was insufficient. *Id.* at 799. In fact, the Court noted the CPUC's dissenting opinion "recognized the Commission

maintained ample jurisdiction in the eventuality that the Wine Train began providing bona fide passenger service in the future." *Id.* at 800. The *St. Helena* 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. Mere avowals or declarations of public service purposes or future intentions "merely provide the capacity to engage in public service" or to "provide transportation" – not that the train does *now* do so, and it cannot maintain that status based on intentions or future proclamations. *Id.* at 803.

Indeed, the *St. Helena* Court rejected common carrier status, finding transportation, or public utility status based on stops along the train's line, since this "would be incidental to the sightseeing service[s]," and "sightseeing is not a public utility function." *Id.* The Court also noted that nothing "preclude[d] the Wine Train from applying for public utility status" if, in the *future*, services changed.

MR's primary "authority" for its assertion that – despite the CPUC's opinion to the contrary, it somehow has public utility status, appears to be a listing of MR on the CPUC's website. First, this purported evidence is improper and inadmissible. *See* Objections to Request for Judicial Notice and Evidence, concurrently filed herewith. Second, even assuming *arguendo* the Court were to consider a mere listing as somehow authoritative or proper – which it is not, that list establishes at most that MR is a "railroad," which does *not* establish it is a *public utility*, which it is not as set forth above. The mere identification as a "railroad" cannot supersede the CPUC's *opinion* discussed above, which is directly contrary as to MR's actual status as a non-public utility, and *St. Helena* which is in accord.

V. INJUNCTIVE RELIEF IS PROPER, NOT SUBJECT TO DEMURRER AND NOT *A SEPARATE CAUSE OF ACTION.*

MR's claims against the City's requested injunctive relief are simply frivolous. The City's complaint does not state any separate cause of action for injunctive relief, and it is thus not properly subject to demurrer. Notably, the City does not assert any "cause of action" for injunctive relief. Further, such relief is most certainly within the Court's authority as to a declaratory relief cause of action, as appropriate. *See James v. Hall*, 88 Cal. App. 528, 535 (1928) (noting injunctive relief can be "ancillary" to declaratory relief and "expressly provided for" within such claim); *Staley v. Board of Med. Exam'rs*, 109 Cal. App. 2d 1, 6 (1952) (quoting *Knox v. Wolfe*, 73 Cal. App. 2d 494, 505 (1946) ("declaratory and coercive or executory relief may be granted in the same action"; "[f]uture rights

may be determined" as part of court's "jurisdiction of the equitable controversy") (internal citations omitted); *Holley v. Hunt*, 13 Cal. App. 2d 335, 337 (1936) (proper for both declaratory and injunctive relief, as appropriate, to be granted); *Hollenbeck Lodge (486) I.O.O.F. v. Wilshire Blvd. Temple*, 175 Cal. App. 2d 469, 476 (1959) ("declaratory and coercive relief may be granted in the same action"; equity court has "coextensive" authority to determine rights and "enforce its decrees"). There is no basis for demurrer due to allegedly improper *relief* requested in a complaint. *See infra*, Part VII. Indeed, an injunction is properly granted as to local regulation violations, such as building and safety. *IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 70 (1983) (public harm "presum[ed]" for "statutory violation").

VI. LOCAL RULES NOT INTERFERING WITH INTERSTATE COMMERCE ARE NOT SUBJECT TO FEDERAL PREEMPTION, AND NOT FOR DEMURRER.

MR is simply wrong that federal law somehow preempts all local regulation of its activities or facilities. MR knows full well that the law does not support its implied argument that the STB and federal law *exclusively* preempts all local police power, because this is simply *not* the law. Although "Congress' authority under the Commerce Clause to regulate the railroads is well established . . . railroad activity of a *local concern*, which is not regulated by federal legislation, and *does not seriously interfere with interstate commerce*, may be regulated by the states under the *police powers reserved* by the federal Constitution." *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1066 (2000) (italics added). In fact, in *Jones*, the Court found that nuisance claims against the railroad were proper, because "state court adjudication . . . *will not result in an undue burden on interstate commerce*." *Id.* (italics added). The claim that ICC (STB predecessor) regulatory authority is *exclusive* of local regulation was rejected in *State ex rel. Okla. Corp. Comm'n v. Burlington N.*, 24 P.3d 368, 371 (2000) (italics added), which found Congress did not preempt local police power "in the absence of evidence that such a requirement has a *significant economic impact on the railroad's operation*." *See also*, Cal. Const., art. XI § 7 (city can "enforce . . . all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.")

At issue in *Burlington* was a local agency's ability to regulate a railroad's fence, even though it was recognized to be railroad "facilities" which are generally subject to federal regulatory authority. The *Burlington* Court noted that "'[u]nless it is the clear and manifest purpose of Congress, whether express or implied, to substitute its law for that of the states, a presumption against pre-emption is

employed out of respect for federalism and to give effect to the historic role of the states as the *primary regulators of matters of health and safety*.'" *Id.* Indeed, "pre-emption cases start with the assumption that the historic police powers of the States were not to be superseded." *Id.* (internal quotations omitted) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)). Specifically, primary federal regulatory authority of railroads is "economic." *Id.* To the point here, there is *no* preemption of local authority if there is no interference with "*interstate* rail operations," as here. The New Jersey Supreme Court noted that "it will be the rare situation when fairly enforced fire, health, plumbing, safety, or construction regulations interfere with a railroad's operations.'" *Id.* (quoting *Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.*, 750 A.2d 57, 66 (N.J. 2000). The *Burlington* Court found that local regulations imposed on a railroad were shown to have no likely impact on operations and would not unreasonably burden interstate commerce. *Id.* This is the standard for preemption, and it most certainly is not an *unlimited* preemption, or even so broad as to foreclose the type of valid local regulatory authority sought to be enforced by the City here. The STB has noted that "state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." *Maumee & Western RR Corp. and RMW Ventures -- Petition for Decl. Order* (STB Finance Docket 34354, March 2, 2004). STB recognizes:

> there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, . . . a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged . . . [by] a railroad . . . [or] [a] railroad that violated a local ordinance involving the dumping of waste . . . . The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Cities of Auburn and Kent, WA--Petition for Decl. Order--Burlington Northern RR Co. --Stampede Pass Line, STB Finance Docket 33200, 1997 STB LEXIS 143, *19-20, 2 S.T.B. 330 (1997). STB further noted: "Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not ***interfere with interstate rail operations***, and localities retain certain police powers to protect public health and safety." *Maumee & Western RR Corp. and RMW Ventures, LLC -- Petition for Decl. Order*, STB Finance Docket 34354, 2004 STB LEXIS 140, *3 (2004) (emphasis added). Perhaps

most importantly, the STB has acknowledged that *courts* may decide these issues: "Questions of federal preemption . . . can be decided by the Board *or the courts*." *Norfolk Southern Railway Co.--Petition for Decl. Order*, Docket FD 35950, 2016 STB LEXIS 61, *9 (2016) (emphasis added).

Indeed, local zoning regulations, "[t]o the extent . . . [the] restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA, but ***only if*** "a particular land use restriction *interferes with interstate commerce* [which] is a *fact-bound* question." *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Western Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999) (italics added). Also, "state and local government entities . . . retain certain police powers . . . to protect public health and safety, [but] their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening *interstate commerce*." *Id.* (italics added). Further, "*interstate* railroads . . . are not exempt from certain local fire, health, safety and construction regulations and inspections"; "local entities can enforce in a non-discriminatory manner electrical and building codes, or fire and plumbing regulations, so long as they do not . . . requir[e] . . . permits as a prerequisite to the construction or improvement of railroad facilities." *Id.* This means that, as to *interstate* railroads, local governmental entities retain some local authority, and such health, safety and zoning regulation as to these railroads is *not* wholesale *preempted* in the manner suggested by MR. And, this, course, says nothing of local regulatory authority as to *intra*state rail lines like MR.

In addition, as noted above, this is simply not a proper issue for demurrer. In fact, "[t]he STB has held that, to decide whether a state regulation is preempted requires a *factual assessment* of whether that action would have the effect of *preventing or unreasonably interfering with railroad transportation*." *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007) (quotations omitted) (italics added). And, preemption is an affirmative defense, for which MR has the burden of production. *Id.* at 1133-1134 (finding error granting summary judgment where railroad failed to meet preemption burden with sufficient evidence). In fact, the *Emerson* Court found it could "not agree that any state or local regulation of such maintenance or disposal . . . is necessarily preempted," since there was no "clear indication of what actions by the Railroad could have prevented the previous flooding and what would be required of the Railroad at this time to remedy the situation"; thus, there

was no sufficient showing of unreasonable interference with railroad transportation. *Id.* at 1134. At issue in *Emerson* were public nuisance claims and local laws, similar to matters here; the railroad discarded ties in a drainage ditch, but STB authority was found only to relate to "*transportation*," "not . . . everything touching on railroads" – just "movement of passengers or property." *Id.* at 1129 (italics added). Federal authority did not reach alleged acts, nor "expressly preempt . . . applicable state common law governing . . . disposal of waste and [ditch] maintenance." *Id.* at 1130.

Thus, the activities of MR not relating to *transportation* or interstate operations, such as MR's refusal to allow the City Building Inspector to inspect the roundhouse for building safety, or MR's refusal to obtain a permit regulating noise as to a special event, and other activities or violations not detailed in the Complaint but subject to proof and evidentiary hearing, are, or at least may be, valid local regulations, but cannot be discarded on demurrer. (Complaint, at ¶ 12.) Indeed, MR has, since the filing of the Complaint in this matter, refused inspection on its property by the County Health Department as to alleged hazardous or other regulated waste potentially impacting health and safety on its property; thus, MR's activities and actions subject to local regulatory authority continue and are subject to demonstration by evidentiary proceedings, not summarily by demurrer. The specific matters about which MR may be subject to regulation, and which are not all in the Complaint – nor are they required to be, are matters subject to proof to this Court; the City must be afforded the opportunity to put forth particular facts, violations, and the specific nature of its regulatory authority by proper evidentiary hearing, not a fact motion, posing as a demurrer. The on-going party disputes deserve this Court's substantive review and decision, as to the extent of permissible local regulation and enforcement outside federal preemption. The City has the right to present such evidence, and to have this Court determine the specific nature of permissible local regulatory authority *not* preempted, which cannot be done by Demurrer. MR's Demurrer seeks to impermissibly obtain a premature and overbroad decision of this Court that the City is preempted in all instances as to any local regulations, and as to all MR activities, whether relating to railroad transportation, interstate commerce, or movement of passengers. No preemption is so broad or sweeping, nor can be decided by demurrer.

Moreover, the STB's authority does *not* reach MR's services at issue here – which are merely *intra*state excursion services. The ICC previously found that MR's train services between Fort Bragg

and Willits, back in 1986 (which services are even more limited now, due to the elimination of through-service between Fort Bragg and Willits) was a "majority of . . . tourists." *Mendocino Coast Railway, Inc. Discontinuance of Train Service in Mendocino County, CA*, 1986 ICC LEXIS 188, Docket No. 30820 (Aug. 15, 1986). In later proceedings, the ICC confirmed MR's services were "purely intrastate." *Mendocino Coast Railway Discont. of Train Service in Mendo. County, CA*, 1986 ICC LEXIS 72, Docket 30820 (Nov. 12, 1986), dissenting opinion, Commissioner Lamboley.[2] Although the ICC had also concluded it had jurisdiction over intrastate passenger operations, this decision was recognized, in a later opinion, to have been overruled by the opinion in *Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989). *Napa Valley Wine Train Petition for Decl. Order*, 7 I.C.C.2d 954, Finance Docket 31156 (July 18, 1991). Critically, the *Wine Train* opinion is directly instructive here. ICC found that there must be a "sufficient nexus" between interstate and intrastate operations, in order for it to have regulatory authority. *Id.* *12. It had to "distinguish[] purely local lines" from those "part of the national rail system," and its authority did not reach to passenger or freight service that "was purely intrastate in nature." *Id.* *13. The ICC rejected the significance of the train's *plan* to provide through service and ticketing with Amtrak or Greyhound buses. *Id.* *15. What mattered was that it did not "currently" have "through ticketing with Amtrak." *Id.* *15-16. The ICC was not persuaded by the "attempt by Wine Train to masquerade as an interstate operation to avoid legitimate State and local regulation." *Id.* *16. The ICC also did not find future connections important because it would be too cumbersome, would require a separate ticket, and no traveler would practically utilize this manner of inconvenient travel for any substantial means of interstate travel. *Id.* * 16, 20. Further, the Wine Train's present passenger services were "designed to be a tourist excursion[,] . . . not as an interstate passenger service." Even the "disembark[ing]" of passengers along the line did not transform services into *interstate* transportation. *Id.* *19 (italics added). The ICC rejected claims as to the train's minimal "interstate freight operations," since such services "ha[d] not been large." *Id.* *22. Primarily scenic passenger services simply were *not* subject to its authority, *despite* ancillary freight services. *Id.* *23-25. Also, "projections" about future increased freight were also insufficient, especially "before any actual

[2] These proceedings were withdrawn when MR's predecessor, CWRR, bought the lines. *Mendocino Coast Railway Discont. of Train Service in Mend. County, CA*, 1987 ICC LEXIS 394, Docket 30820 (Mar. 18, 1987).

operation had begun" and when current passenger services were "essentially local" and freight services were minimal. *Id.* *27-28. ICC found, for all these reasons – equally applicable to MR, that excursion/tourist *intrastate* "passenger operations are not subject to the [federal] jurisdiction." *Id.* *32.

Indeed, the Railroad Retirement Board ("Board") has also specifically found that MR does *not* provide interstate transportation services subject to STB authority, because MR's "passengers are transported solely within one state." B.C.D. 06-42.1 (Sept. 26, 2006) (*See also,* https://secure.rrb.gov/blaw/bcd/bcd06-42.asp; https://secure.rrb.gov/pdf/bcd/bcd06-42.pdf). In finding MR was not an employer under the Railroad Retirement Act, the Board found MR's service is only as "a tourist or excursion railroad operated solely for recreational and amusement purposes." *Id.* Further, the Board concluded that MR "does not and cannot now operate in interstate commerce," based on its finding that "the Skunk Train [ ] operates a round-trip excursion train from Fort Bragg to Northspur, and from Willits to Crowley (Northspur and Crowley are turning points)," and that MR's line

> connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since [MR's] only access to the railroad system is over this line, that access is currently unusable. [MR'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. These findings are consistent with all of the authorities above, which equally lead to the unavoidable conclusion that various agencies have already concluded MR does not conduct common carrier or interstate transportation services over which there is STB authority or preemption, and even if it could in the future, that does not translate into federal regulation now.

VII. MR'S CHALLENGE TO THE SCOPE OF INJUNCTIVE RELIEF REQUESTED IS A WHOLLY IMPROPER GROUND FOR DEMURRER.

Objections to the prayer of a complaint cannot be taken by demurrer. *Grisingher v. Shaeffer*, 25 Cal. App. 2d 5, 9 (1938). Thus, since "a demurrer does not lie to the prayer," MR's demurrer on this basis is invalid. *Hoffman v. Pac. Coast Constr. Co.*, 37 Cal. App. 125, 130 (1918). Further, a prayer is often subject to modification and "may be amended to conform to the proofs at the trial." *Id.* at 132.

The Court of Appeal has found that "[a] demurrer is not the appropriate vehicle to challenge . . . an improper remedy. *Caliber Bodyworks v. Superior Court*, 134 Cal. App. 4th 365, 384-85 (2005), disapproved on other grounds *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 198 (2019) (citing *Kong v. City of Hawaiian Gardens Red. Ag.,* 108 Cal. App. 4th 1028, 1047 (2002) ("demurrer cannot . . . be sustained . . . to a particular type of damage or remedy"). *See also Venice Town Council v. City of L.A.*, 47 Cal. App. 4th 1547, 1562 (1996) ("demurrer tests . . . factual allegations . . . [not] relief . . . in the prayer").

Therefore, it would be premature and improper to grant MR's demurrer merely because, as it claims, a portion of the relief requested might be beyond the Court's jurisdiction. In other words, as set forth above, the City retains -- at very least, some local regulatory authority over MR as to health and safety matters. As such, some injunctive relief may be warranted and proper, and the extent to which MR can be held to particular local regulations is a matter of *proof*, and demurrer is not proper.

Simply, MR's demurrer is wholly improper as to its claim that injunctive relief is too broad and may not be granted as to *all* City regulations or regulatory authority. Indeed, the ultimate scope of any injunction granted can be tailored to the Court's legal and factual findings; the fact that the Court may issue a more limited injunctive order in the end is no reason to dismiss the Complaint in its entirety. In fact, as to affirmative defenses such as preemption, they "must appear clearly and affirmatively"; if not, "there is no ground for general demurrer. The proper remedy is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment." *Roman v. County of Los Angeles*, 85 Cal. App. 4th 316, 324-25 (2000) (internal quotations, omissions and citations omitted). Where there are "ambiguities and conflicting allegations," then it is "error to sustain" a demurrer. *Id.* at 325. And, even assuming *arguendo* the Court found some valid basis for demurrer, the City would at least be entitled to leave to amend; "[i]t is an abuse of discretion to deny leave to amend if there is a *reasonable possibility* that the pleading can be cured by amendment." *Id.* at 322 (italics added) (citing *Goodman v. Kennedy*, 18 Cal. 3d 335, 349 (1976)). The Supreme Court has recognized that "leave to amend is properly granted where resolution of the legal issues does not foreclose the possibility that the plaintiff may supply necessary factual allegations." *City of Stockton v. Superior Court*, 42 Cal. 4th 730, 747 (2007) (internal citation omitted). If there has not yet been "an opportunity to amend . . . leave to amend is [to be] liberally allowed."

VIII. CONCLUSION.

For all of the foregoing reasons, the demurrer must be denied in its entirety, or in the alternative, the City must be permitted leave to amend.

Dated: February 8, 2022

JONES MAYER

By: _____
Krista MacNevin Jee,
Attorneys for Plaintiff
CITY OF FORT BRAGG

Fort Bragg v. Mendocino Railway
Case No. 21CV00850

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca 92835. On February 9, 2022, I served the foregoing document(s) described as **CITY'S OPPOSITION TO DEMURRER TO VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF,** on each interested party **listed below**/on the attached service list.

Paul J. Beard, II
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___ (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary business practices.

I am readily familiar with Jones & Mayer's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at La Habra, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

XX (VIA ELECTRONIC SERVICE) By electronically transmitting the document(s) listed above to the e-mail address(es) of the person(s) set forth above. The transmission was reported as complete and without error. See Rules of Court, Rule 2.251.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 9, 2022 at Fullerton, California.

WENDY A. GARDEA