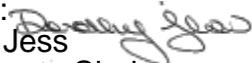


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Superior Court of California
County of Mendocino

By: 
D. Jess
Deputy Clerk

5 Attorneys for Plaintiff
6 CITY OF FORT BRAGG

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

11 CITY OF FORT BRAGG, a California
12 municipal corporation,

13 Plaintiff,

14 v.

15 MENDOCINO RAILWAY AND
DOES 1-10, inclusive

16 Defendants.

Case No. 21CV00850

**OBJECTION TO REQUEST FOR JUDICIAL
NOTICE; EVIDENTIARY OBJECTIONS TO
DECLARATIONS OF PAUL BEARD AND
MIKE HEART IN SUPPORT OF DEMURRER
AND MOTION TO STRIKE**

JUDGE: Hon. Clayton Brennan
DEPT.: Ten Mile

DATE: February 24, 2022
TIME: 2:00 p.m.

21 TO DEFENDANT MENDOCINO RAILWAY AND ITS ATTORNEYS OF RECORD:

22 Plaintiff City of Fort Bragg (“City”) hereby objects to certain evidence submitted by Defendant
23 Mendocino Railway (“MR”) in support of its Demurrer Complaint for Declaratory and Injunctive Relief
24 and MR’s Motion to Strike Complaint for Declaratory and Injunctive Relief, on the following grounds,
25 and asks that the objections be sustained and that the evidence be stricken.

1 **OBJECTIONS TO MR’S REQUEST FOR JUDICIAL NOTICE AND DECLARATIONS**
2 **OF PAUL BEARD AND MIKE HART IN SUPPORT OF DEMURRER AND MOTION TO**
3 **STRIKE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

4 City objects generally to MR’s Request for Judicial Notice and Declarations of Paul Beard and
5 Mike Hart in support of its Demurrer and Motion to Strike. Generally, both a Demurrer and Motion to
6 Strike “reach only those defects . . . on the face of the complaint,” and although this can include matters
7 that are judicially noticeable, judicial notice may not be used to turn a Demurrer or Motion to Strike into a
8 motion on the substance or facts of the Complaint, and cannot be used as to matters for which judicial
9 notice is wholly improper, as here. *Johnson Rancho County Water Dist. v. County of Yuba*, 223 Cal. App.
10 2d 681, 684 (1963). In fact, MR essentially seeks to turns its Demurrer and motion to Strike into an
11 improper and premature Motion for Summary Judgment. Its attempted use of judicial notice in this
12 instance is completely inappropriate and must be rejected by this Court. “‘A demurrer is simply not the
13 appropriate procedure for determining the truth of disputed facts,’ judicial notice of matters upon demurrer
14 will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that
15 which is sought to be judicially noticed.” *Cruz v. County of Los Angeles*, 173 Cal. App. 3d 1131, 1134
16 (1985) (quoting *Ramsden v. Western Union*, 71 Cal. App. 3d 873, 879 (1977)). A demurrer is not “the
17 appropriate procedure for determining the truth of disputed facts or what inferences should be drawn
18 where competing inferences are possible.” *CrossTalk Prods. v. Jacobson*, 65 Cal. App. 4th 631, 635
19 (1998). Indeed, a “demurrer tests the pleading alone and not the evidence or other *extrinsic matters* which
20 do not appear on the face of the pleading or cannot be properly inferred from the factual allegations of the
21 complaint.” *Bach v. McNelis*, 207 Cal. App. 3d 852, 864 (1989) (internal quotations omitted) (italics
22 added). It is *improper* to grant a demurrer on the basis of extrinsic evidence, including exhibits or
23 affidavits. *Id.* And a party may not make expansive and invalid use of judicial notice in order to
24 circumvent this requirement.

25 The Court of Appeal has generally recognized, in no uncertain terms, the impropriety of taking
26 widespread judicial notice of disputed facts, as urged by MR in this matter:

27 “Judicial notice may not be taken of any matter unless authorized or required by law.”
28 (Evid. Code, § 450.) Matters that are subject to judicial notice are listed in Evidence Code
 sections 451 and 452. A matter ordinarily is subject to judicial notice only if the matter is

1 reasonably beyond dispute. (*Post v. Prati* (1979) 90 Cal. App. 3d 626, 633 [153 Cal.
 2 Rptr. 511].) ***Although the existence of a document may be judicially noticeable, the***
 3 ***truth of statements contained in the document and its proper interpretation are not***
 4 ***subject to judicial notice if those matters are reasonably disputable.*** (*StorMedia Inc. v.*
 5 *Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [84 Cal. Rptr. 2d 843, 976 P.2d 214].)
 6 *StorMedia* stated: “In ruling on a demurrer, a court may consider facts of which it has
 taken judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) This includes the existence
 of a document. When judicial notice is taken of a document, however, the truthfulness
 and proper interpretation of the document are disputable. (*Joslin v. H.A.S. Ins. Brokerage*
 (1986) 184 Cal. App. 3d 369, 374 [228 Cal.Rptr. 878].)” (*Ibid.*)

7 “Taking judicial notice of a document is not the same as accepting the *truth of its*
 8 *contents or accepting a particular interpretation of its meaning.* (See *Middlebrook-*
 9 *Anderson Co. v. Southwest Sav. & Loan Assn.* (1971) 18 Cal. App. 3d 1023, 1038 [96
 10 Cal.Rptr. 338].) On a demurrer a court’s function is limited to testing the legal
 11 sufficiency of the complaint. (*Marina Tenants Assn. v. Deauville Marina Development*
 12 *Co.*, *supra.*,] 181 Cal. App. 3d [at p.] 127 [226 Cal.Rptr. 321].) ‘A demurrer is simply not
 13 the appropriate procedure for determining the truth of disputed facts.’ (*Ramsden v.*
 14 *Western Union* (1977) 71 Cal. App. 3d 873, 879 [138 Cal.Rptr. 426].) ***The hearing on***
 15 ***demurrer may not be turned into a contested evidentiary hearing through the guise of***
 16 ***having the court take judicial notice of documents whose truthfulness or proper***
 17 ***interpretation are disputable.*** (See *Del E. Webb Corp. v. Structural Materials Co.* (1981)
 18 123 Cal. App. 3d 593, 605 [176 Cal.Rptr. 824].)” *Joslin, supra.*, at page 375 stated
 19 further, “ ‘judicial notice of matters upon demurrer will be dispositive only in those
 instances where there is not or cannot be a factual dispute concerning that which is
 sought to be judicially noticed.’ (*Cruz v. County of Los Angeles* (1985) 173 Cal. App. 3d
 1131, 1134 [219 Cal.Rptr. 661].)” . . . For a court to take judicial notice of the meaning of
 a document submitted by a demurring party based on the document alone, without
 allowing the parties an opportunity to present extrinsic evidence of the meaning of the
 document, would be improper. ***A court ruling on a demurrer therefore cannot take***
 20 ***judicial notice of the proper interpretation of a document submitted in support of the***
 21 ***demurrer.*** (*StorMedia Inc. v. Superior Court, supra.*, 20 Cal.4th at p. 457, fn. 9; *Joslin v.*
 22 *H.A.S. Ins. Brokerage, supra.*, 184 Cal. App. 3d at p. 374.) ***In short, a court cannot by***
 23 ***means of judicial notice convert a demurrer into an incomplete evidentiary hearing in***
 24 ***which the demurring party can present documentary evidence and the opposing party***
 25 ***is bound by what that evidence appears to show.***

26 *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 113-15 (2007) (emphasis added)
 27 (quoting *Joslin v. H.A.S. Ins. Brokerage*, 184 Cal. App. 3d 369, 374 (1986). Indeed, “the general rule is
 28 that the truthfulness and interpretation of a document’s contents are disputable” and *not* properly the
 subject of judicial notice. *C.R. v. Tenet Healthcare Corp.*, 169 Cal. App. 4th 1094, 1104 (2009).

<u>No.</u>	<u>Material Objected to:</u>	<u>Grounds for Objection:</u>	<u>Ruling:</u>
1.	Exhibit A to the Request for Judicial Notice (“RJN”) (¶ 1) and Declaration of Paul Beard (“Beard Decl.”) (¶ 3) – a website page of the California Public Utilities Commission;	<input type="checkbox"/> Secondary Evidence Rule (Evid. Code § 1521); <input type="checkbox"/> Irrelevant (Evid. Code §§ 210, 350);	<input type="checkbox"/> Sustained: <hr style="width: 20px; margin: 0 auto;"/> <input type="checkbox"/> Overruled: <hr style="width: 20px; margin: 0 auto;"/>

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Declarant has no personal knowledge of the nature of the posting of the information, such as when it was last updated, or the underlying source of the list. Moreover, it is improper to take judicial notice of the contents of a website, particularly where the website does not purport to be any representation of “official action” or any official records. *Scott v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 767 n.6 (2013) (if judicial notice can be taken of website, only proper as to “existence of the Web sites, the same is not true of their factual content”) (quotations omitted); *Searles Valley Minerals Operations v. State Bd. of Equal.*, 160 Cal. App. 4th 514, 519 (2008) (“although it might be appropriate to take judicial notice of the existence of the Web sites, the same is not true of their factual content”) (upholding denial of judicial notice of “Web site pages of the American Coal Foundation and the United States Department of Energy”).

In fact, judicial notice is only proper as to matters not reasonably subject to dispute, and “the mere fact that a statement appears on a Web page does not mean that it is not reasonably subject to dispute.” *Scott, supra*, at 760-761. See also *Jolley v. Chase Home Fin.*, 213 Cal. App. 4th 872, 889 (2013) (there is “no ‘official Web site’ provision for judicial notice in California”); *StorMedia v. Superior Court*, 20 Cal. 4th 449, 463 n.9 (1999) (“When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable.”) (quotations omitted); *Duronslet v. Kamps*, 203 Cal. App. 4th 717, 737 (2012) (denying judicial notice as to California Board of Registered Nursing web site); *Licudine v. Cedars-Sinai Med. Ctr.*, 3 Cal. App. 5th 881, 902 (2016) (report of federal executive agency may be judicially noticeable as official act, i.e. “the fact that the Bureau has published a report . . . , but not the truth of the facts” therein); *Ragland v. U.S. Bank Nat’l Ass’n*, 209 Cal. App. 4th 182, 193 (2012) (“While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true.”); *L.B. Research & Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 171, 182 (2005) (“public information [in websites] . . . plainly subject to interpretation and for that

- Hearsay (Evid. Code § 1200 et seq.), to the extent the content is offered for the truth of the matters asserted therein;
- Lack of personal knowledge/ lack of foundation (Evid. Code §§ 702, 403; *Snider v. Snider* 200 Cal.App.2d 741, 754 (1962).

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	<p>reason not subject to judicial notice”); <i>Love v. Wolf</i>, 226 Cal. App. 2d 378, 403 (1964) (“courts take judicial notice of public records, . . . not . . . the truth of all matters stated therein”; “official character of a document will not make otherwise inadmissible material therein admissible”); <i>Poseidon Development v. Woodland Lane Estates</i>, 152 Cal.App.4th 1106 (2007) (taking judicial notice of “recorded deed or similar document, does not mean [court] may take judicial notice of factual matters stated therein”); <i>Herrera v. Deutsche Bank Nat’l Tr. Co.</i>, 196 Cal. App. 4th 1366, 1374-75 (2011) (judicial notice of “deed of trust” did not include its contents, which are “hearsay and disputed”).</p> <p>In any event, the information is irrelevant, as the listing of MR does not establish its status as a “public entity,” nor does it negate the more directly relevant and legally significant determination by the CPUC in its 1998 Opinion that MR is <i>not</i> a public utility. Indeed, as set forth in the City’s Opposition to the Demurrer, MR may be a “regulated” railroad and yet <i>not</i> be a “public utility,” as the CPUC has found as to MR’s operations.</p>		
<p>2.</p>	<p>Exhibit C to RJN (¶ 3), Beard Decl. (¶ 5) and the Declaration of Mike Hart (“Hart Decl.”) (¶ 2) - January 17, 2019 letter from the City to the California Coastal Commission.</p> <p>Declarant Beard lacks personal knowledge as to the authenticity of the referenced exhibit. More importantly, the contents of a letter are not the proper subject of judicial notice, and merely constitute hearsay as well as being irrelevant to this Court’s determinations of the ultimate issues as a matter of law. <i>See, e.g., Tenet Healthsystem Desert v. Blue Cross of Cal.</i>, 245 Cal. App. 4th 821, 835 (2016) (existent and contents of letter not judicially noticeable). Further, statements of the City’s legal counsel are merely legal opinion, as to issues to be decided by this Court and which cannot substitute for the Court’s findings as a matter of law. <i>Roy Bros. Drilling Co. v. Jones</i>, 123 Cal. App. 3d 175, 185 (1981) (content of letter “is a hearsay statement of opinion with respect to a matter of law”). In addition, counsel’s statements are not judicially</p>	<p><input type="checkbox"/> Lack of personal knowledge/ lack of foundation (Evid. Code §§ 702, 720, 403;</p> <p><input type="checkbox"/> Secondary Evidence Rule (Evid. Code § 1521);</p> <p><input type="checkbox"/> Irrelevant (Evid. Code §§ 210, 350);</p> <p><input type="checkbox"/> Hearsay (Evid. Code § 1200 et seq.), to the extent the content is offered for the truth of the matters asserted therein.</p>	

<p>1 2 3 4 5</p>	<p>noticeable from another context, particularly as to ambiguity in meaning as to the present circumstances, or otherwise made in a manner that is not binding, not under oath, and may have been based on other or incomplete knowledge or facts. <i>Warfield v. Peninsula Golf & Country Club</i>, 214 Cal. App. 3d 646, 661 (1989).</p>		
<p>6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>3. Exhibit D – RJN (¶ 4), Hart Decl. (¶ 2), and Beard Decl. (¶ 6), City’s August 1, 2019, “Coastal Commission Certification.”</p> <p>Declarant Beard lacks personal knowledge as to the authenticity of the referenced exhibit. Also, the asserted grounds for judicial notice are not valid, in that the City is not a “state” for which its official acts may be judicially noticed pursuant to subdivision (c) of Evidence Code Section 452.</p> <p>In addition, even when the existence of official governmental agency records may be judicially noticed, judicial notice is not proper as to their contents. <i>Licudine v. Cedars-Sinai Med. Ctr.</i>, 3 Cal. App. 5th 881, 902 (2016) (report of federal executive agency may be judicially noticeable as official act, i.e. “the fact that the Bureau has published a report . . . , but not the truth of the facts” therein); <i>Ragland v. U.S. Bank Nat’l Ass’n</i>, 209 Cal. App. 4th 182, 193 (2012) (“While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true.”); <i>Love v. Wolf</i>, 226 Cal. App. 2d 378, 403 (1964) (“courts take judicial notice of public records, . . . not . . . the truth of all matters stated therein”; “official character of a document will not make otherwise inadmissible material therein admissible”); <i>Poseidon Development v. Woodland Lane Estates</i>, 152 Cal.App.4th 1106 (2007) (taking judicial notice of “recorded deed or similar document, does not mean [court] may take judicial notice of factual matters stated therein”); <i>Herrera v. Deutsche Bank Nat’l Tr. Co.</i>, 196 Cal. App. 4th 1366, 1374-75 (2011) (judicial notice of “deed of trust” did not include its contents, which are “hearsay and disputed”).</p>	<p><input type="checkbox"/> Lack of personal knowledge/ lack of foundation (Evid. Code §§ 702, 720, 403;</p> <p><input type="checkbox"/> Secondary Evidence Rule (Evid. Code § 1521);</p> <p><input type="checkbox"/> Irrelevant (Evid. Code §§ 210, 350);</p> <p><input type="checkbox"/> Hearsay (Evid. Code § 1200 et seq.), to the extent the content is offered for the truth of the matters asserted therein;</p>	

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Further, the record is irrelevant and hearsay, and cannot constitute statements for all purposes, but only in specific context, which does not apply to this matter, nor to the issues to be decided by this Court as a matter of law. Any statements of City employees as to legal conclusions to be decided by this Court also are not matters which may properly be judicially noticed.		
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Dated: February 8, 2022

JONES MAYER

By: 

Krista MacNevin Jee,
Attorneys for Plaintiff
CITY OF FORT BRAGG

1 *Fort Bragg v. Mendocino Railway*
2 *Case No. 21CV00850*

3 **PROOF OF SERVICE**

4 **STATE OF CALIFORNIA**)
5 **COUNTY OF ORANGE**) ss.

6 I am employed in the County of Orange, State of California. I am over the age of 18 and
7 not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca
8 92835. On February 9, 2022, I served the foregoing document(s) described as **OBJECTION TO
9 REQUEST FOR JUDICIAL NOTICE; EVIDENTIARY OBJECTIONS TO
10 DECLARATIONS OF PAUL BEARD AND MIKE HEART IN SUPPORT OF
11 DEMURRER AND MOTION TO STRIKE**, on each interested party **listed below**/on the
12 attached service list.

13 Paul J. Beard, II
14 Fisherbroyles LLP
15 4470 W. Sunset Blvd., Suite 93165
16 Los Angeles, CA 90027
17 T: (818) 216-3988
18 F: (213) 402-5034
19 Email: paul.beard@fisherbroyles.com

20 — (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary
21 business practices.

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

28 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.

22 
23 _____
24 WENDY A. GARDEA