Case No. A165104

In the Court of Appeal of the State of California
First Appellate District

MENDOCINO RAILWAY,
Petitioner and Defendant,

v.

MENDOCINO COUNTY SUPERIOR COURT,
Respondent,

CITY OF FORT BRAGG,
Real Party in Interest and Plaintiff.

SUPPLEMENTAL OPENING BRIEF IN SUPPORT OF PETITION

From an April 28, 2022, Order Overruling Demurrer and Allowing Action To Proceed Absent Subject Matter Jurisdiction

Mendocino County Superior Court No. 21CV00850
The Hon. Clayton L. Brennan, Dept: "Ten Mile," (707) 964-3192

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I. INTRODUCTION

Petitioner Mendocino Railway ("MR") filed an emergency writ petition with this Court, following the Superior Court's erroneous overruling of MR's demurrer and assumption of jurisdiction over a challenge to MR's "public utility" status. This Court issued an order asking the parties to brief three questions.

First, the Court asks whether the California Public Utilities Commission ("CPUC") is a real party in interest to the writ proceeding. It is not. Because this proceeding concerns only the Superior Court's power to hear the underlying dispute, and would not result in any order commanding the CPUC to do or not do something, the CPUC has no direct interest in this proceeding and would not be directly affected by it. But if the Court deems otherwise, the petition can be timely amended to add the CPUC as a real party.

Second, the Court asks whether the alternative remedy of litigating this case in the Superior Court, then appealing a final judgment, is adequate. The Court relatedly asks whether MR will suffer irreparable harm in the absence of a writ. For the reasons described in detail below, the alternative remedy is *in*adequate, largely because it would compel MR—a currently regulated public utility—to defend its "public utility" status in a forum that lacks subject matter jurisdiction. Further, the demurrer ruling contains premature statements to the effect that MR is no longer a public

utility subject to the CPUC's jurisdiction. If left unreviewed, the ruling will sow confusion and uncertainty in MR's railroad operations, and in its relations with state and local regulatory authorities. If the City's recent actions are any indication, the ruling also will be used to continue to undermine important opportunities that MR is pursuing, including federal funding for rehabilitation of the railroad.

Finally, the petition is meritorious. The petition describes at length why the Court's intervention is necessary. State law precludes Superior Court actions that would interfere with the work of the CPUC. The City's action does just that: By its own admission, it seeks to strip MR of its current status as a CPUC-regulated public utility. It wants to substitute itself for the CPUC as the chief regulator of the railroad in this State. The Superior Court has no subject matter jurisdiction over that kind of challenge.

For these reasons, the petition should be granted. The Court should issue a peremptory writ commanding the Superior Court to vacate its order overruling MR's demurrer and dismiss the City's case with prejudice.

II. ARGUMENT

A. The CPUC Is Not a "Real Party in Interest" to This Writ Proceeding

In its first question to the parties, the Court asks whether the CPUC "should . . . be considered "a 'real party in interest' in this writ proceeding." The answer is "no."

"A petition for writ of mandate must name the real party in interest, who thereafter has a right to notice and to be heard before a trial or appellate court issues a peremptory writ." (*Sonoma County Nuclear Free Zone v. Superior Court* (1987) 189 Cal.App.3d 167, 173.) A "real party in interest" is "any person or entity whose interest will be ***directly affected*** by the proceeding." (*Id.* (internal citation and quotation marks omitted) (emphasis added).) The real party is "usually the other party to the lawsuit or proceeding being challenged," but may also be anyone "in whose favor the acts complained of operates" or "ha[ve] been done," or anyone with "a ***direct interest*** in the result." (*Id.* (internal citation and quotation marks omitted) (emphasis added).)

The act complained of in this writ proceeding—the Superior Court's overruling of MR's demurrer—operates in favor of the City, as the plaintiff. It doesn't operate in favor of the CPUC. Indeed, "due to the limited scope of the relief requested" by MR, the CPUC has no direct interest in and will not be directly

affected by this writ proceeding. (*Gutierrez v. Guam Election Comm'n*, 2011 Guam 3, *24 (2011) (holding that "real party" status rests on the relevant proceeding being shown to *directly* affect the person or entity).)

MR's petition does not go to the question of whether the MR should lose its status as a public utility subject to the CPUC's jurisdiction, in which case the CPUC arguably could be deemed a real party to this proceeding. Rather, MR's petition goes to the question of whether the Superior Court has the power to hear the City's challenge to MR's status as a CPUC-regulated public utility. Neither issuance nor denial of the writ that MR seeks will directly affect—in any way—the interests, rights or obligations of the CPUC:

- If a writ issues, it will require the Superior Court to enter an order sustaining MR's demurrer and dismissing the City's action. A writ will preserve the *status quo ex ante* (i.e., before the City filed this lawsuit). Importantly, the writ will not command the CPUC to do (or not do) anything. Nor will it enlarge or diminish the CPUC's rights or obligations.
- If a writ is denied, the City's action in the Superior Court will proceed to a final judgment. However, resumption of litigation in the Superior Court alone will not directly affect the CPUC. As with the issuance of a

writ, writ denial will not compel the CPUC to do (or not do) anything, and it will not enlarge or diminish its rights or obligations in any way.

Given the nature and limited scope of the writ relief requested, it is little wonder that the CPUC has not been named as a real party in other similar writ proceedings concerning the Superior Court's power *vel non* to hear disputes implicating the CPUC's jurisdiction. *See, e.g.*, *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256 (2002) (CPUC not a real party to writ proceedings challenging Superior Court's subject matter jurisdiction under section 1759); *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893 (same); *Pacific Tel. & Tel. Co. v. Superior Court of San Francisco* (1963) 60 Cal.2d 426 (same).

Of course, the CPUC likely is an indispensable party to *the Superior Court* litigation—which, if allowed to proceed, could lead to a final judgment directly affecting the CPUC.[1] If granted, the declaration and injunction sought by the City will strip MR of its status as a CPUC-regulated public utility, and subject MR to the City's plenary authority and oversight, including in areas that the CPUC currently occupies. (Exh. 1, pp. 4-5, 9 (Complaint admitting that MR currently is CPUC-regulated public utility); Cal. Const., art. XII, § 8. ("A city, county, or other public body

[1] The City failed to join the CPUC to its Complaint. If MR is unable to obtain a writ and is forced to defend against the City's Complaint in the Superior Court, MR will plead nonjoinder of the CPUC as an affirmative defense in its answer.

may not regulate matters over which the Legislature grants regulatory power to the Commission.").) Among other things, such a Superior Court judgment will interfere with the CPUC's continuing authority to regulate, inspect, or surveil MR as a public-utility railroad,[2] including the railroad's facilities, equipment, and operations. (*See, e.g.*, Pub. Util. Code §§ 309.7, 315, 761, 765.5, 768, 7662, 7665.4, 7665.6, 7668.8, 7673, 7711, 7711.1 (charging the CPUC with the duty to regulate, inspect, surveil, etc., the State's railroads).) But, to reiterate, the question is whether the CPUC is a real party to *this writ proceeding*, not the Superior Court proceedings.

Even if the CPUC were a real party to the writ proceeding, the remedy would not be dismissal of the petition. Rather, MR could be given leave to amend its petition to add the CPUC as a real party. (*Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1298 ("Failure to join an indispensable party is not a jurisdictional defect in the fundamental sense; even in the absence of an indispensable party, the court still has the power to render a decision as to the parties before it which will stand." (internal citation and quotation marks omitted).) There is ample time for MR to amend its petition. MR seeks a common law writ

[2] The CPUC currently regulates MR as a public-utility railroad. Exh. 1, p. 5 (City's Complaint acknowledging that MR is "currently listed as a class III railroad by the [CPUC], and as such is subject to CPUC jurisdiction"); Exh. 5, p. 41 (CPUC's current list of regulated railroads, which includes MR).

normally[3] governed by the general 60-day deadline. (*Volkswagen of Am. v. Super. Ct.* (2001) 94 Cal.App.4th 695, 701 (applying 60-day rule to writ from order overruling of demurrer).) The Superior Court entered its order overruling MR's demurrer on April 28, 2022, and MR filed its writ petition five days later, on May 3. Assuming *arguendo* that April 28 is the date from which the 60-day period begins to run, sixty days from April 28 is June 27. MR could easily file and serve an amended petition before June 27.

B. MR Has No Plain, Speedy, or Adequate Remedy at Law

In its second question to the parties, the Court asks whether it should exercise its discretion to review the Superior Court's ruling, which "rais[es] a question of subject matter jurisdiction." The answer, again, is "yes."

1. The Petition Raises an Important Question of Subject Matter Jurisdiction, Rendering an Appeal from a Final Judgment Inadequate

The general rule is that an order overruling a demurrer is not amenable to immediate review by extraordinary writ. (*San Diego Gas & Electric Co. v. Superior Court* (*"Covalt"*) (1996) 13

[3] Imposition of this time limit is discretionary. "An appellate court *may* consider a petition for an extraordinary writ at any time, but has discretion to deny a petition filed after the 60-day period applicable to appeals, and should do so absent extraordinary circumstances justifying the delay." (*Volkswagen*, 94 Cal.App.4th at 701 (internal citation and quotation marks omitted).)

Cal.4th 893, 912-13.) But the California Supreme Court and Courts of Appeal have repeatedly shown special solicitude to writ petitions based on the absence of subject matter jurisdiction. For example, in *Harden v. Superior Court of Alameda County* (1955) 44 Cal.2d 630, the Supreme Court held:

> "It is the general rule that the remedy in the ordinary course of law by an appeal from the judgment at the end of the trial is not adequate when the court has no jurisdiction to proceed with the action and no appeal is available before final judgment."

(*Id.* at 635 (quoting *Providence Baptist Church v. Superior Court* (1952) 40 Cal.2d 55, 60); *see also City & County of San Francisco v. Superior Court* (1951) 38 Cal.2d 156, 160 ("[T]his court may act in a proper case when it appears that otherwise a failure of justice will occur in a matter of public importance by a wrongful or excessive exercise of jurisdiction.").)

More recently, the Supreme Court held that immediate review is proper "when the demurrer raises an important question of subject-matter jurisdiction." (*Covalt*, 13 Cal.4th at 913.) While the Court in *Covalt* did not explain when a jurisdictional question is "important," the facts of *Covalt* and the precedents cited therein offer some critical clues.

In *Covalt*, plaintiffs filed a Superior Court action for damages and injunctive relief against San Diego Gas and Electric Company ("SDG&E"), a CPUC-regulated public utility. (*Id.* at

910-11.) The Superior Court overruled SDG&E's demurrer to the complaint. (*Id.* at 912.) The Court of Appeal granted a writ of mandate directing the Superior Court to vacate its order overruling the demurrer and to instead sustain it without leave to amend. (*Id.* at 915.) The Supreme Court affirmed.

The parties did not dispute—and the Supreme Court did not disagree—that the writ proceedings raised an "important question of subject-matter jurisdiction." (*Id.* at 913.) The Supreme Court cited precedents in which public defendants sought writ relief from the Superior Court's refusal to dismiss for lack of jurisdiction based on sovereign immunity from suit. (*Id.* (citing *County of Sacramento v. Superior Court of Sacramento County ("Federer")* (1972) 8 Cal.3d 479, 481 ("Prohibition is an appropriate remedy where, as here, it is desirable that an important jurisdictional question presented by the defense of sovereign immunity from suit should be speedily determined."); *State of California v. Superior Court ("Perry")* (1984) 150 Cal.App.3d 848, 853 n.4 (same); *County of Santa Barbara v. Superior Court ("Sinclair")* (1971) 15 Cal.App.3d 751, 754-755 (same).)

What *Covalt* and the precedents it cites have in common is this: They all involve Superior Court actions in which *public* or *quasi-public entities*—like public utilities—interposed a jurisdictional objection to the Superior Court's proceedings

against them. (*Pasillas v. Agric. Labor Relations Bd.* (1984) 156 Cal.App.3d 312, 348 (citing *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.* (1979) 24 Cal. 3d 458 ("In California a public utility is in many respects more akin to a government entity . . . .").) Thus, the public character of the jurisdictional defect in the Superior Court appears to render the jurisdictional question sufficiently "important" to merit emergency review. (*Covalt*, 13 Cal.4th at 913.) That this writ proceeding concerns the Superior Court's subject matter jurisdiction to hear a challenge to MR's current status as a public utility[4] renders the jurisdictional question as important as it was in *Covalt*, *Federer*, *Perry*, and *Sinclair*.

Indeed, the writ petitions in *Covalt* and this proceeding, which are based on section 1759, even implicate separation-of-powers concerns. (Cal. Const. art. III, § 3 ("The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").) While a member of one branch of government (the CPUC) may adjudicate a challenge to an entity's status as a public utility, the member of a different branch (the Superior Court) is barred under section 1759(a) from doing so. Indeed, section 1759(a) prohibits all Superior Court actions that would interfere with the CPUC's rights and obligations. Whether a breach of that jurisdictional

[4] Exh. 1, pp. 4-5, 9 (City admitting in Complaint that MR is currently a CPUC-regulated public utility.)

statute has occurred "implicate[s] a constitutional cornerstone of our democracy"— "the separation of powers"—and thus constitutes an important question. (*Smith v. Superior Court* (2020) 52 Cal.App.5th 57, 68.

2. The City's Case Is Not Amenable to a Speedy Resolution, Further Making an Ordinary Appeal Inadequate, and Denial of Writ Review Will Cause MR Irreparable Harm

Citing *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269, this Court asks why an appeal from a final judgment would not be an adequate remedy for MR given that the case "involves a single cause of action for declaratory relief that appears amenable to expeditious resolution in the superior court." Citing *Omaha* and *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 101 n. 1, the Court also asks how MR will be "irreparably harmed by the denial of writ relief."

To start, *Covalt* should govern the propriety of writ review in this proceeding. Because the petition raises an important question of subject-matter jurisdiction, forcing MR to nevertheless pursue litigation in a court without jurisdiction, then appeal from an adverse judgment, is an inadequate remedy. (*Harden*, 44 Cal.2d at 635 (Superior Court's lack of jurisdiction goes to "adequacy" of legal remedy).) MR needs to establish only that its remedy in the ordinary course of law is not plain, speedy, *or* adequate; the absence of one criterion supports the issuance of

a writ. ("The writ must be issued in all cases where there is not a plain, speedy, *and* adequate remedy, in the ordinary course of law.") (emphasis added); *see also Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal.App.4th 200, 206 (legal remedy must meet all three criteria to preclude writ relief).) Given that MR's alternative remedy is inadequate under *Covalt*, MR need not also prove that the alternative remedy is slow. (Civ. Proc. Code § 1086.)[5]

Even if MR had to show that the alternative remedy (i.e., litigating in a forum without jurisdiction, then appealing a final judgment) were not "speedy," or that it would suffer "irreparable harm" without writ review, MR could satisfy both criteria.

The Alternative Remedy Is Not Speedy

While the City alleges a single cause of action for declaratory relief, the underlying allegations are hotly contested, and MR reasonably anticipates that the dispute will generate substantial discovery and motion practice, and necessitate a trial.

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[5] *Omaha* and *Ordway* pre-date *Covalt*. Further, unlike *Covalt* and this case, *Omaha* and *Ordway* concerned claims between private parties, with no obviously-public dimension. (*Omaha*, 209 Cal.App.3d at 1269; *Ordway*, 198 Cal.App.3d at 101.) The petitioners were not government entities or quasi-governmental entities, like a public utility. (*Id.*) And petitioners did not seek relief from the Superior Court's lack of subject matter jurisdiction. (*Id.*) While *Omaha* and *Ordway* identify certain standards for writ review in routine cases involving non-jurisdictional questions in disputes between private parties, they do not displace *Covalt* and similar Supreme Court precedents that state an exception for petitions raising an important question of subject matter jurisdiction.

The City's declaratory-relief claim rests on the allegation that MR is "no longer" a railroad "entitled to status as a public utility" regulated by the CPUC, because "it does not qualify as a common carrier providing 'transportation.'" (Exh. 1, p. 4, ll. 25-26, & p. 5, ll. 12-14.) A "public utility" is defined, in relevant part, as "every common carrier . . . where the service is performed for, or the commodity is delivered to, the public or any portion thereof." (Pub. Util Code § 216(a)(1).; *see also* Cal. Const. art. XII, § 3 ("[C]ommon carriers . . . are public utilities.").) A "common carrier" is, in turn, defined as "every person or corporation providing transportation for compensation to or for the public or any portion thereof." (*Id.* § 211.)

Thus, the City's claim turns on whether, as a factual matter, MR has transported, continues to transport, and will in the foreseeable future will transport persons or freight for compensation. Written discovery and depositions will center on MR's historic, current, and future operations, including the nature and scope of its transportation services. The Complaint contains numerous allegations concerning MR's efforts to restore *full* passenger and freight service. (Exh. 1, pp. 6-7.) Those allegations also will be tested through discovery.

More important in terms of the resources required to litigate this matter to final judgment, the City seeks injunctive relief. Specifically, the City demands a "stay, temporary

restraining order, preliminary injunction, and permanent injunction commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority, as applicable." (Exh. 1, p. 5, ll. 15-18.) The requested stay, TRO and injunction are premised on myriad allegations that MR has violated City laws. (*Id.*, p. 7.) Again, written discovery and depositions will be required to test the City's allegations concerning the alleged violations.

As in most civil cases, this dispute can be expected to generate discovery and pre-trial motion practice. A trial on the merits of the City's declaratory-relief claim *and* injunctive-relief allegations will require the parties to adduce evidence from documents and witnesses who will testify as to MR's historic, current, and planned rail operations, as well as the alleged activities giving rise to the City's claim that MR has violated City laws.

MR Will Suffer Irreparable Harm Without Writ Review

Absent emergency writ review, MR will suffer "irreparable harm." The Superior Court's ruling appears to go far beyond simply deciding the jurisdictional question presented by MR's demurrer. Instead, it purports to reach the merits of the City's declaratory relief claim, writing: "As plaintiff contends, MR is not presently functioning as a public utility and is not subject to CPUC regulation in that capacity." Exh. 13, p. 173. Although this

statement conflicts with the Complaint's admissions that MR is currently a CPUC-regulated public utility, as well as various CPUC documents so confirming (Exh. 1, p. 5; Exh. 5, pp. 41, 44, 48, 51), the ruling's statement—if left unreviewed—will cause MR significant confusion, uncertainty, and operational disruption.

Now that the ruling purports to strip MR of its public utility status, MR cannot know, with any degree of certainty, whether and to what extent it remains subject to the rules, regulations, and inspections of the CPUC—or whether it must, instead, submit to the City's plenary authority and jurisdiction. The ruling also emboldens the City to intensify its efforts at subjecting MR to health, safety, and related regulations that are otherwise within the CPUC's purview.

Further, the ruling likely will interfere with the MR's ongoing efforts to obtain federal funding from the Department of Transportation ("DOT"). MR has applied for a Railroad Rehabilitation & Improvement Financing Express ("RRIF Express") loan to rehabilitate its railroad line. But recently, the City has submitted correspondence to the DOT in an effort to block funding, by claiming in part that MR is not a public-utility railroad. If allowed to stand, the ruling likely will provide additional fodder to the City to continue undermining MR's operations and opportunities.

The harm to MR's operations and reputation as a public-utility railroad are irreparable. And they will continue as long as the Superior Court's ruling stands. Only writ relief can relieve MR of this harm.

C. The Petition Is Meritorious

The Petition explains at length why the Court should grant the writ, commanding the Superior Court to vacate its order overruling the demurrer and dismiss the case.

To summarize, the City seeks a declaration that MR, which currently is classified as a public utility regulated by CPUC, is "no longer" a public utility subject to the CPUC's jurisdiction. Exh. 1, pp. 4, 9. The City does not dispute MR's current status as a CPUC-regulated public utility. To the contrary, the City admits in its Complaint that MR is "*currently* listed as a class III railroad by the [CPUC], and as such is subject to CPUC jurisdiction and has all legal rights of a public utility." Exh. 1, p. 5 (emphasis added). Two CPUC decisions, as well as the CPUC's current list of regulated railroads, also establish—beyond any serious doubt—that the CPUC regulates the rail line at issue, which is owned and operated by MR. Exh. 5, p. 41 (CPUC list); *id.*, pp. 44, 48 (1/21/98 CPUC Decision); *id.*, pp. 61-62 (5/21/98 CPUC Decision).

The CPUC's regulation of MR stands as an obstacle to the City's desire to exercise unfettered power over MR. The City

hopes to eliminate that obstacle by stripping MR of its current "public utility" status and thereby ending the CPUC's jurisdiction over MR, on the ground that MR operates only an "excursion" service that is not a "public utility" function. Exh. 1, pp. 4, 9.

Given the CPUC's ongoing jurisdiction over MR, section 1759(a) bars the Superior Court from hearing any challenge to that agency's jurisdiction. Section 1759(a) provides that a Superior Court cannot "review, reverse, correct, or annul any order or decision of the [CPUC], or [] suspend or delay the execution or operation thereof, or [] enjoin, restrain, or interfere with the [CPUC] in the performance of its official duties." Pub. Util. Code § 1759(a). A Superior Court ruling that ends the CPUC's ongoing jurisdiction over MR by definition hampers performance of CPUC's official duties with respect to MR. "[O]nce assumed," the CPUC's jurisdiction "cannot be hampered or second-guessed by a superior court action addressing the same issue." *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 548.

Further, such a ruling annuls the CPUC's repeated determinations—reflected in numerous official documents (Exh. 5, pp. 41, 48, 62)—that the CPUC has jurisdiction over MR and the rail line that MR owns. Simply put, section 1759(a) bars the Superior Court from adjudicating the City's claim. This is true as a matter of law *regardless* of the merits of the City's claim that

MR "no longer" operates as a public utility that should be regulated by the CPUC; the merits of the City's claim are for the *CPUC* to decide in the first instance, not the Superior Court.

The Superior Court erroneously overruled MR's demurrer. It should have sustained it without leave to amend, and dismissed the action. Having failed to do so, the Superior Court should be directed to comply with section 1759 and dismiss the City's case.

DATED: May 9, 2022. FISHERBROYLES LLP

s/ Paul J. Beard II

Attorneys for Defendant and Petitioner

Certificate of Compliance

I hereby certify that the foregoing SUPPLEMENTAL BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 4057 words.

DATED: May 9, 2022

PAUL J. BEARD II

Declaration of Service

I, Paul Beard II, declare as follows:

I am over the age of 18 years and am not a party to the above-entitled action. My business address is 4470 W. Sunset Blvd., Suite 93165, Los Angeles, CA 90027.

On May 9, 2022, a true copy of SUPPLEMENTAL BRIEF was electronically served on the following counsel for Real Party in Interest City of Fort Bragg via Truefiling.com using counsel's known email address as indicated below::

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Date: May 9, 2022

PAUL BEARD II