JAMES F. KING, SBN 41219
STEPHEN F. JOHNSON, SBN 205244
MICHAELYN P. WIPF, SBN 300428
MANNON, KING, JOHNSON & WIPF, LLP
200 North School Street, Suite 304
Post Office Box 419
Ukiah, California 95482
Telephone: (707) 468-9151
Facsimile: (707) 468-0284

Attorneys for Defendant John Meyer

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MENDOCINO

MENDOCINO RAILWAY, Plaintiff, vs. JOHN MEYER; REDWOOD EMPIRE TITLE COMPANY OF MENDOCINO COUNTY; SHEPPARD INVESTMENTS; MARYELLEN SHEPPARD; MENDOCINO COUNTY TREASURER-TAX COLLECTOR; all other persons unknown claiming an interest in the property; and DOES 1 through 100, inclusive Defendants.	Unlimited Case No. SCUK-CVED 20-74939 DEFENDANT JOHN MEYER'S TRIAL BRIEF Date: August 23, 2022 Time: 9:30 AM Dept.: E

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Appellate Cases: **Page**

California Public Utility Commission (CPUC) Cases:

Mendocino County Superior Court Case:

Statutes:

Secondary Sources:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Appellate Cases: **Page**

California Public Utility Commission (CPUC) Cases:

Mendocino County Superior Court Case:

Statutes:

Secondary Sources:

A. Relevant Facts

Plaintiff Mendocino Railway ("MR") is privately held corporation that operates a commercial tourist sightseeing excursion service commonly known as the "Skunk Train." MR operates a train that leaves a station in Willits and heads west a short distance on the line and then returns to Willits. MR also operates a different train that leaves a station in Fort Bragg and travels to the east a short distance on the line and then returns to Fort Bragg. The total length of the line between Willits and Fort Bragg is approximately 40 miles and there is a unsafe tunnel on the line that for approximately seven years has prevented the trains from running the full length of the line. The Skunk Train returns the passengers to their original departing location when the ride is completed, it does not actually transport passengers to a different location.

MR has filed an action against defendant John Meyer ("Meyer") to take by eminent domain Meyer's 20 acre parcel west of Willits, on Highway 20, commonly known as Mendocino County Assessor Parcel Number 038-180-53 ("the Property").

MR wishes to take the Property for the purpose of allegedly constructing a train station and maintenance facility for its railroad operations. The complaint states: "The project ('Project') for which Mendocino Railway seeks to acquire the Parcel consists of construction and maintenance of rail facilities related to Plaintiff's ongoing and future freight and passenger rail operations and all uses necessary and convenient thereto" ("the Project"). (Complaint, Page 2, Paragraph 2.)

Contrary to the description in the complaint, the Project when this action was filed actually consisted of MR taking the Property for the purpose of constructing a train station, maintenance facility, *campground, pool,* and *recreational vehicle camping area.*

Meyer objects to the taking of the Property.

B. Mendocino Railway Is Not Authorized By Statute Or The California Constitution To Exercise the Power of Domain.

MR is not authorized by statute to exercise the power of eminent domain, and this is grounds for Meyer to object to MR's alleged right to take under Code of Civil

Procedure § 1250.360(a).

The government's right to force the sale of (i.e. take) private property for public use is known as eminent domain. The government's power of eminent domain is balanced with its constitutional obligation to pay "just compensation" to the owner of the property interest being acquired. (Cal. Const. Art I, § 19.) The power of eminent domain is circumscribed and limited by statute. The government's right to take must meet both constitutional and statutory limitations, so that the property owner is assured of his or her right to just compensation for the property taken. (Miller & Starr, California Real Estate (4th Ed.) § 24.1.)

"The power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use." (Code of Civil Procedure § 1240.020.)

MR claims that it can take the property through eminent domain because it is a railroad corporation, common carrier and public utility.

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

MR does not transport passengers. MR claims to haul a little freight on its line, but its freight service is very limited and incidental to its passenger excursion service. Accordingly, the facts will establish that MR does not operate a "railroad" because its trains do not transport persons or property. Since MR does not operate a "railroad," it is not a "railroad corporation" that has the power of taking property by eminent domain.

MR is also not a "public utility" under Public Utilities Code § 229, which by definition includes "every common carrier." A "common carrier" means "every person or

corporation providing transportation for compensation", including "every railroad corporation." (Public Util. Code § 211.) Since MR is not a "railroad corporation" because it does not provide "transportation," it is also not considered a "common carrier" or a "public utility".

This analysis is also supported by the rulings of the California Public Utility Commission ("CPUC") and the California courts.

The CPUC found that MR's predecessor in interest, California Western Railroad, Inc.'s ("CWRR") operation of the "Skunk Train" does not constitute "transportation" under Public Utilities Code § 1007." The CPUC's decision states the following:

> "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. . . . [I]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]." (*In the Matter of Application of California Western Railroad Inc.,* 1998 Cal. PUC LEXIS 189, 7-8, underlining added ("*California Western*")

Moreover, a similar analysis as above was reiterated in *City of St. Helena v. Public Util. Comm'n.* (2004) 119 Cal. App. 4th 793 ("*St. Helena*").[1] In *St. Helena* the court compared the "Wine Train" that takes tourists sightseeing in the Napa Valley to the "Skunk Train." The *St. Helena* court stated that the *California Western* decision "declared that the Skunk Train, providing an excursion service between Fort Bragg and Willits, was not a public utility." (*Id.* at 798.) The *St. Helena* court also cited to the CPUC decision in *Western Travel Plaza* (1981) 7 Cal. P.U.C. 2d 128, 135, which "held sightseeing is . . a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service." (*Id.*) The *St. Helena* court in evaluating "whether the [C]PUC has jurisdiction to regulate the Wine

---

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

Train as a public utility," found the Wine Train did "not provide 'transportation'" and is "not subject to regulation as a public utility because it does not qualify as a common carrier." (*Id.*)

The *St. Helena* court also stated:

> "the [C]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 804.)

The *St. Helena* court made its consclusion clear - the Wine Train, like the Skunk Train does not provide transportion and it is not a public utility. The *St. Helena* court found that the CPUC had exceeded its jurisdiction by finding that 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.) The court recognized that the CPUC could retain safety authority over trains, even if a railroad were not a public utility subject to exclusive CPUC authority. (*Id.*) The *St. Helena* court emphasized that "not every business that deals with the public or is subject to some form of state regulation is necessarily a public utility." (*Id.*)

The *St. Helena* court also made clear that services a train might wish to provide in the future does not matter in the evaluation. 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.) 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.) 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 provides such services now, and it cannot maintain public utility status based on intentions or future proclamations. (*Id.* at 803.)

The *St. Helena* court rejected "common carrier" status, and "public utility" status

even if there were 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." (*Id.*) The CPUC subsequently confirmed the *St. Helena* court's decision in *The City of St. Helena v. Napa Valley Wine Train, Inc.* 2006 Cal. PUC Lexis 132.

MR's primary "authority" for its assertion that — despite the CPUC's opinion to the contrary -- that 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. Second, even assuming arguendo that 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 regulated by the CPUC.

Additionally, there has been no material changes in the operation of the Skunk Train since the CPUC's 1998 decision. The CPUC regulation of MR does not supersede the St. Helena case or the CPUC's opinions discussed above, which conclusively confirm MR's actual status as a non-public utility that does not "transport passengers." The CPUC recently informed MR by letter that it is not considered a common carrier or public utility.

Judge Brennan of the Mendocino County Superior Court reached a similar conclusion when he ruling overuled MR's demurrer in *City of Fort Bragg v. Mendocino Railway*, Mendocino County Case Number 21CV00850. Mendocino Railway recently filed a motion to have the *City of Fort Bragg* action consolidated with this action.

MR is not authorized by statute to exercise the power of eminent domain because it is not a "railroad corporation," "common carrier," or "public utility." Accordingly, Meyer's objection to the wrongful taking of his Property under Code of Civil Procedure § 1250.360(a) is justified and the complaint must be dismissed.

C. Mendocino Railway's Purpose For The Property Is Not A "Public Use."

California's Constitution Art. I, § 19(a) and Civil Procedure § 1240.010 require that the exercise of eminent domain be only for "public use." "The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." (*Council of San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal. App. 4th 473, 494, quoting *City & County of San Francisco v. Ross* (1955) 44 Cal. 2d 52.)

"The California Supreme Court has stated that "public use" within the meaning of California's Constitution "is defined as a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (*Council of San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal. App. 4th 473, 494, quoting *Bauer v. County of Venura* (1955) 45 Cal 2d 276, 284.) Additionally, "[t]o make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish the public with the use intended and the public must be entitled to use or enjoy the property taken." (*Id.*)

The evidence will establish that throughout the eminent domain process the proposed Project actually consisted of MR taking the Property for the purpose of constructing a train station, maintenance area, *campground, recreational vehicle camping area, and pool*. The evidence will further establish that MR's focus in its evaluation of the alternative parcels were whether the parcels could be used as a private campground and recreational vehicle camping area.

A private campground is not a "public use" within the meaning of California's Constitution " which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (Cal. Const., Art. I, § 19(a)*; Council of San Benito County Governments v. Hollister Inn, Inc., supra,* at 494.)

MR is attempting to exercise the power of eminent domain to take 20 acres of private property to carry on a private campground business that also includes a train station. The primary objective and purpose is private gain and not public need. The goal of the proposed Project is to create revenue for MR, it is not a Project for public use that would allow the taking of private property through the eminent domain process.

"A railroad corporation may condemn any property *necessary for the construction and maintenance of its railroad.*" (Public Util. Code § 611, italics added.) The taking of Meyer's 20 acre Property to construct a campground and recreational vehicle camping area is not *necessary* for MR's construction and maintenance of its railroad, as required by Public Utilities Code § 611.

D. Mendocino Railway Does Not Intend On Devoting The Property Described In The Complaint To The Stated Purpose.

A defendant may object to the right to take if "plaintiff does not intend to devote the property described in the complaint to the stated purpose." (Code of Civil Procedure § 1250.360(c).) Specifically, "the owner can object to the condemnation on the ground that the agency does not intend to put the property to the identified use." (Miller & Starr California Real Estate (4th Ed.) § 24:7; *People ex rel. Dept. of Public Works v. Garden Grove Farms* (1965) 231 Cal. App. 2d 666, 671.)

The complaint provides that "[t]he project ('Project') for which Mendocino Railway seeks to acquire the Parcel consists of construction and maintenance of rail facilities related to Plaintiff's ongoing and future freight and passenger rail operations and all uses necessary and convenient thereto." (Complaint, Page 2, Paragraph 2.)

MR did not intend on devoting the Property to the purpose stated in the complaint, and the court should grant Meyer's objection to the taking of his property. The evidence will establish that the proposed Project throughout the eminent domain process consisted of MR taking the Property for the purpose of constructing a train station, maintenance area, *a pool, campground and a recreational vehicle camping area.* The evidence will

further establish that MR improperly focused its evaluation on parcels for the Project that could potentially be used as a private campground and recreational vehicle camping area. A private campground is not mentioned in the complaint, nor does the complaint reference any type of recreational facilities or activities.

Based upon the description in the complaint the taking is for the "construction and maintenance of rail facilities". This description of the Project is too general for the owner or the court to have a clear understanding of the natures of the Project. Additionally, the description of the Project in the complaint definitely does not encompass taking Meyer's Property to construct and operate a private campground and recreational vehicle camping area.

The evidence will also establish that the "construction and maintenance of rail facilities" does not require the taking 20 acres of land because the taking of so much acreage is only necessary to develop a private campground and recreational vehicle camping area.

As of Robert Pinoli's deposition on April 26, 2022, the only site plan for the Meyer property reflected a large campground and recreational vehicle parking area. On June 24, 2022, MR forwarded a site plan that does note reflect a campground or recreational vehicle camping area. The last minute change to the plan is likely the direct result of this litigation, and does not change the fact that the evaluation of the properties and the Project were based upon taking a parcel with acreage and amenities sufficient to support a private campground and a recreational vehicle camp area, not just a train station.

E. Mendocino Railway Has Not Met The Required Conditions Precedent To Exercise The Power Of Eminent Domain.

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

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

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

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

The Project does not comply with these requirements.

1. Public Interest And Necessity Do Not Require The Project.

The Project is being pursued for the private gain of MR, and public interest and necessity do not require the Project.

"A railroad corporation may condemn any property *necessary* for the construction and maintenance of its railroad." (Public Util. Code §§ 611; 7526, italics added.) The complaint fails to describe or specify why the Property is necessary for MR's construction and maintenance of its railroad, as required by Public Utilities Code § 611. Additionally, the taking of Meyer's Property in order to construct a campground and recreational vehicle camping area is not *necessary* for MR's construction and maintenance of its railroad as required by Public Utilities Code § 611.

The complaint fails to provide an allegation of necessity for the taking as required by Code of Civil Procedure § 1240.030(a), as referenced in Code of Civil Procedure § 1250.310(d)(2). The complaint fails to state with any specificity the nature of the Project, and it otherwise fails to specify the use to be made by MR on the Property. The failure to reference any specific details prevents Meyer and the court from evaluating whether the condemnation of the Property is necessary.

MR cannot establish that either public interest or necessity require the Project. As mentioned earlier, MR is attempting to exercise the power of eminent domain to take 20 acres of private property to carry on a private campground business that also includes a train station. The evidence will establish that the main goal of the Project is to create revenue for MR, the actual use is not the type of use that would allow the taking of private property through the eminent domain process by a railroad or otherwise.

2. The Project Is Not Planned Or Located In A Manner That Will Be Most Compatible With The Greatest Public Good And The Least Private Injury.

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

A "finder of fact inquiring into the greatest public good and least private injury should consider all the facts and circumstances." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452, 473.) The finder of fact may evaluate whether alternate locations are better, i.e., were compatible with the greatest public good and the least private injury. (*Id.*)

The Project is not planned or located in a manner that is the most compatible with the greatest public good and least private injury. There are other parcels available that if taken, would be compatible with the greatest public good and the least private injury. Additionally, the evidence will establish that MR improperly focused its evaluation on parcels for the Project that could potentially be used as a private campground and recreational vehicle camping area, which is not consistent with a railroad project. The Project is also not planned or located in the manner that will be most compatible with the greatest public good and the least private injury, nor was there a proper evaluation of these issues by MR.

The evidence will also show that the "construction and maintenance of rail facilities" does not require the taking 20 acres of land, the taking of so much acreage is only necessary because MR intends on developing a private campground and recreational vehicle camping area. The taking of all 20 acres significantly deprives Meyer from the use and enjoyment of his Property. The taking exceeds that necessary for the construction and maintenance of MR's rail facilities, and it does not result in the greatest public good and the least private injury.

3. The Property Is Not Necessary For Mendocino Railway's Project.

MR cannot establish that "property sought to be acquired is necessary for the project," as required by Code of Civil Procedure § 1240.030(c). The complaint fails to state with any specificity the nature of the Project, and it otherwise fails to specify the use to be made by the MR on the Property. The failure to reference any specific details prevents Meyer and the court from evaluating whether the condemnation of the Property, or only a portion of the Property, is necessary for the Project.

MR cannot establish that the Property is necessary for the Project. Additionally, there is no reason why MR requires all 20 acres of the Property for the Project. The evidence will establish that the MR's shareholders found "an absolutely perfect parcel" for the Project that is 12 acres in size. That being the case, it is quite evident that it is not necessary for MR to take all of Meyer's 20 acre parcel. The taking of Meyer's 20 acre pacel is not necessary for a train station.

F. This Action Should Be Immediately Dismissed And Litigation Expense Should Awarded To Meyer.

MR is illegally attempting to take Meyer's Property by eminent domain without the constitutional or statutory power to do so. MR has also failed to comply with the legal requirements of the eminent domain process.

The court should determine that MR does not have the right to acquire the Property through eminent domain and order the immediate dismissal of the proceeding or conditional dismissal of the proceeding. (Code of Civil Procedure § 1260.120(c).)

Under such circumstances the court is required to award to the condemnee his or her litigation expenses if "(1) the proceeding is wholly or partially dismissed for any reason; or (2) the final judgment in the proceeding is that the condemnor cannot acquire property it sought to acquire in the proceeding." (Code of Civil Procedure § 1268.610(a).) Accordingly, upon dismissal, Meyer should be awarded his litigation expenses.

DATED: August 19, 2022.

MANNON, KING, JOHNSON & WIPF, LLP

Stephen F. Johnson
Attorney for Defendant John Meyer