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 CLOSING TRIAL BRIEF

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A. Introduction

Plaintiff Mendocino Railway, with all of its bluster about being a common carrier that transports freight, and what it hopes to be, the fact, is that it is just an excursion service. Mendocino Railway ("MR") is merely and solely providing entertainment or excursion services, it is not operating as a common carrier, it does not provide transportation as a public utility, it does not carry freight, and its passengers board its trains for a localized form of sightseeing. MR is also not operating as a component of the national rail system. As a result, MR does not have the power to take property by eminent domain. MR's brazen attempt to wield the power of eminent domain does not comply with the law, and the court must stop MR's attempt to illegally acquire Meyer's property by employing the eminent domain process.

MR's President, Robert Pinoli ("Pinoli"), lied regarding the material issues throughout his trial testimony, until he was forced to recant his testimony after a Railroad Retirement Board Decision subsequently came to light. MR's and Pinoli's deceitful and duplicitous testimony represent a fraud on the court, and it cannot be overlooked.

Defendant John Meyer ("Meyer") has been forced to defend MR's wrongful attempt to take his property and the court must award him attorney fees and costs.

B. Relevant Facts

MR filed this action on December 22, 2020, against defendant John Meyer ("Meyer") to take by eminent domain Meyer's 20 acre property 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 allegedly for the "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.)

1. MR's Rail Operation

Pinoli, the President and chief executive officer of MR, testified at trial. (8-23-22, p. 7, line, 11- 15.) Pinoli testified that MR is a privately held corporation that operates a railroad line commonly known as the "California Western Railroad" ("CWR") which is also known as the "Skunk Train." (8-23-33, p. 10, line 10-16; p. 99, line 25- p. 101, line 11.) The railroad line is

approximately 40 miles in length. (8-24-22, p. 112, lines 4-6.)

In 2015 there was a landslide in tunnel number 1 that has prevented the trains from running the full length of the line since that time. (8-24-22, p. 138, line 24- p. 139, line 17.) No freight or passengers have been hauled between Fort Bragg and Willits since at least 2015. (8-29-22, p. 54, line 20- p. 55, line 5.)

MR operates an excursion train for sightseeing purposes on the line. (8-24-22, p. 113, lines 9-22.) The sightseeing train leaves the station in Willits and heads west approximately 7.5 miles on the line and then returns to the Willits station. (8-24-22, p. 122, lines 3-14.) MR also operates a different sightseeing train that leaves a station in Fort Bragg and travels to the east 3.5 miles on the line and then returns to Fort Bragg. (8-24-22, p. 113, line 27- p. 114, line 21.) The excursion Skunk Trains leaving Willits and Fort Bragg return the passengers to their original departing location when the ride is completed, these trains do not actually transport passengers to a different location. (8-24-22, p. 119, line 10- p. 120, line 7; p 122, line 3-14.)

2. Pinoli's Initial Trial Testimony.

Pinoli initially testified that MR believes that it is "without question" a "railroad corporation" and it is "without question" a "common carrier." (8-25-22, p. 291, lines 20-25.) MR also considers itself a "public utility" because it is a "common carrier." (8-25-22, p. 292, lines 13-28.)

Pinoli testified that MR operates railroad commuter passenger and freight services between Fort Bragg and Willits, California, and that it has offered these services since it purchased the CWR in 2004. (8-29-22, p. 46 line 10 - p. 47, line 5.) Pinoli testified that MR transports persons and property, and what "the railroad is doing today is not different than what the railroad has been doing for its 137 years of existence." (8-25-22, p. 294, lines 7-17.)

Pinoli initially testified that MR has provided freight transportation services to the public continuously between January 1, 2008 and January 1, 2022, as reflected in Exhibit 8. (8-24-22, p. 107 line 25 - p. 108, line 5.) Pinoli testified that besides the hauling of approximately 100 loads of aggregate for a restoration project along the line, CWR hauls a very limited amount of freight at the present. (8-24-22, p. 144, lines 6-11.)

Pinoli also initially testified that MR offered passenger rail service pursuant to commuter fares that are available to any member of the public. (8-23-22, p. 60, lines 20 - 25.) Pinoli subsequently testified during cross-examination that commute fares are only applicable to a limited amount of specified families that reside on the railroad line as reflected in the "Commuter Fares" referenced in Exhibit 10. (8-25-22, p. 309 line 2 - p. 310, line 7; Exhibit 10.)

MR did not provide any evidence of MR's revenue or receipts for the respective excursion, freight, or passenger services it allegedly provides. (8-29-22, p. 55, line 17- p. 56, line 16; 11-10-22, p. 53, line 15-24)

3. The Railroad Retirement Board Decision Impeached Pinoli's Trial Testimony On The Material Issues.

After the close of testimony Meyer obtained a copy of the "Employer Status Determination For Sierra Entertainment and Mendocino Railway" issued by the Railroad Retirement Board and dated September 28, 2006 ("Retirement Board Decision") (Exhibit AA.) The information in this document contradicts Pinoli's testimony on significant material issues. The court subsequently reopened the case and heard testimony related to the Retirement Board Decision, which was accepted it into evidence as Exhibit AA.

Specifically the Retirement Board Decision contradicts and impeaches the trial testimony of Pinoli regarding MR's alleged status as a common carrier, its alleged transportation of freight, its alleged transportation of passengers, and its alleged connection to the interstate railroad system. (Exhibit AA.) The Retirement Board Decision states the following:

- "Information regarding these companies [Sierra Entertainment and Mendocino Railway] was provided by Thomas Lawrence III, Weiner Brodsky Sidman Kider PC, outside counsel for Sierra Railroad Company." (Exhibit AA, p. 1, paragraph 3.)
- "Mendocino's line runs between Fort Bragg and Willits, California, and connects to another railway line over which there has been no service for approximately 10 years [since 2006]. Structural problems and bridge problems on the line will prevent service for some time to come. Since Mendocino Railway's only access to the railroad system is over this line, that access is currently unusable. Mendocino's ability to perform common carrier services is thus

limited to the movement of goods between points on its own line, a service it does not perform." (Exhibit AA, p. 1, paragraph 4.)

- "Since Mendocino reportedly does not and cannot now operate interstate commerce, the Board finds that it is not currently an employer under the Acts. If Mendocino commences operations, the Board will revisit this decision." (Exhibit AA, p. 4, paragraph 1.)

The Retirement Board Decision directly contradicts the testimony of Pinoli on many of the main issues in this case, specifically the Retirement Board Decision unequivocally proves that MR is neither a common carrier, nor a public utility, nor a railroad because it does not transport freight or passengers on its line, and is not connected to the interstate railway system. (Exhibit AA.)

The finding that MR was not a common carrier was confirmed by MR's attorney in a letter dated April 27, 2022, written to the Railroad Retirement Board, in which MR stated that "MR believes that it has become a 'carrier' under the Act effective January 1, 2022" ("Retirement Board Letter"). (Exhibit BB.)

Pinoli testified that common carrier services are defined as transportation of passengers or property by a railroad. (11-10-22, p. 49, line 18 - p. 50, line 2.) In direct conflict with his initial testimony, Pinoli finally admitted that MR did not believe that it became a "common carrier" until January 1, 2022, when it took over the freight operations from Sierra Northern Railway. (11-10-22, p. 52, lines 17-23.) This admission is also supported by MR's Freight Tariff charges in Exhibit 8 which states that freight operations were operated by Sierra Northern Railroad from January 1, 2008 until January 1, 2022. (8-23-22, p. 66 line 15 - p. 67, line 1; Exhibit 8; Exhibit 6.)

The Retirement Board Decision, Retirement Board Letter and Pinoli's testimony confirm that MR was neither a railroad, nor common carrier, nor public utility when MR filed this action in 2020. (Exhibit AA; Exhibit BB.) Therefore, MR does not have the power of eminent domain to take the Meyer Property.

C. 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. This is

grounds for Meyer to object to MR's alleged right to take the Property 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 initially claimed that it can take the property through eminent domain because it is a "railroad corporation," "common carrier," and "public utility." (8-25-22, p. 291, lines 20-25; 8-25-22, p. 292, lines 13-28.)

"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.)

The Retirement Board Decision contradicts and impeaches the trial testimony of Pinoli regarding MR's alleged status as a common carrier, its alleged hauling of freight, and its connection to the interstate railroad system. (11-10-22, p. 52, lines 17-23; Exhibit AA; Exhibit BB.)

The evidence establishes that MR does not operate a "railroad" because its trains do not transport persons or property. (11-10-22, p. 49, line 18 - p. 50, lines 2; p. 52, lines 17-23.) Since

MR does not operate a "railroad," it is not a "railroad corporation" with power of 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". (11-10-22, p.52, lines 17-23; p. 49, line 18 - p. 50 line 2; p. 52, lines 17-23; Exhibit AA; Exhibit BB.)

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

A similar analysis as above was employed 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-

[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.

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 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 conclusion clear - the Wine Train, like the Skunk Train does not provide transportation and it is not a public utility. It found that the CPUC had exceeded its jurisdiction by finding that the Wine Train was a public utility, (*Id.* at 801, n.4.) The court recognized that the CPUC may retain safety authority over a railroad, but that did not mean the railroad was a public utility. (*Id.*) It 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 court also made clear that services a train might wish to provide in the future does not matter in the evaluation. 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 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 Wine Train attempted to distinguish itself from the Skunk Train by claiming that it proposed up-valley stops and connections with buses that would transport passengers to wineries and other points of interest. (*Id.* at 799.) The *St. Helena* court stated that "even if an up-valley station were permitted, it could be argued that any transportation provided would be incidental to the sightseeing services provided by the Wine Train. (Id. at 803.)

The 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.*) It also noted that nothing "preclude[d] the Wine Train from applying for public utility status" if, in the future, services changed." (*Id.*)

MR is not authorized by statute to exercise the power of eminent domain because it is an excursion service, not a "railroad corporation," "common carrier," or "public utility." (11-10-22, p. 52, lines 17-23; p. 49, line 18 - p. 50, lines 2; page 52, lines 17-23; Exhibit AA; Exhibit BB.) 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.

D. MR's Purpose For The Property Is Not A "Public Use."

"A railroad corporation may condemn any property *necessary for the construction and maintenance of its railroad.*" (Public Util. Code § 611, italics added.)

While the eminent domain power is broad, it is not unlimited. "The power of eminent domain may be exercised to acquire property only for a public use." (Code of Civil Procedure 1240.010; *City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 69.) "The statutory authorization to utilize the power of eminent domain for a given 'use, purpose, object, or function' constitutes a legislative declaration that the exercise is a 'public use.'" (*City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 69.)

"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 issue of whether a taking is for a public use is justiciable. (*People ex. Rel. Department of Public Works v. Superior Court of Merced County* (1968) 68 Cal. 2d 206, 215.) The question as to whether the land was to be devoted to a public use, as distinguished from

private purposes or to accomplish some purpose which is not public in character, is a proper issue for judicial determination. (*Id.*; *Dept. Of Public Works v. Largiss* (1963) 223 Cal. App. 2d 23, 39.)

1. MR's Proposed Use Of The Property For Its Excursion Train Is Not A Public Use.

In *City & County of San Francisco v. Ross* (1955) 44 Cal 2d 52, 54 ("*Ross*"), the City of San Francisco sought to acquire by eminent domain a site that would subsequently be leased to private individuals who would build a parking structure in accordance with the city's specifications and operate parking and other facilities. The city intended to allow a portion of the ground floor frontage of the proposed building to be leased and occupied by retail stores. The total floor space to be occupied by such retail commercial activity was estimated by the city to be no more than four percent (4%) of building. (*Id.*, at 58-59.)

In *Ross* it was argued that "there is a clear taking of private property for private purposes and [it is] so interwoven with an otherwise questionable exercise of eminent domain as to characterize the whole taking as one without authority." (*Id.*, at 59.)

The *Ross* court cited a Michigan case, *Shizas v. City of Detroit* (1952) 333 Mich. 44, which held invalid a statute authorizing the taking of private lands for automobile parking facilities which allowed 25 percent of the floor area of the structure to be leased for other commercial activities. (*Id.*) The *Ross* court stated, "[w]hile it might be argued in the present case that the percentage area to be used for other commercial activity is small enough to be merely an incident to the parking activity and not in itself enough to invalidate the whole plan, nevertheless it aids in characterizing the whole operation as a private one for private gain." (*Id.*) The court held "[t]he 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. The parking facility contemplated in the present case appears to be narrowed to such an enterprise." (*Id.*)

MR operates an excursion train for sightseeing purposes on the line. (8-24-22, p. 113

lines 9-22.) MR's use of the Property for its private excursion service precludes it from acquiring the Property by eminent domain. Under the holding in *Ross*, MR cannot exercise the power of eminent domain as a means to carry on its private business activities whose primary objective and purpose is private gain from excursion services and not public need.

Even if MR were to later become a common carrier, it would still be operating its line largely for private gain as an excursion service. Under the *Ross* holding, MR would not be able to use eminent domain powers for excursion services because "[t]he 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." (*Id.*)

2. MR's Use Of The Property As A Campground Is Not A Public Use.

Approximately seven months of internal MR emails that were received at trial. (Exhibit D.) The emails reflect a conceptual plan for the Property that consisted of a train station, campground and RV rental park. Pinoli claims there were internal discussions related to freight and transloading during this seven month period, but none of those discussions were reflected in emails. (8-25-22, p. 238, lines 3-11.)

Pinoli testified that there was a concept in mind for the Property, but no formal plan was prepared when MR decided to move forward with the acquisition of the Property by eminent domain. (8-24-22, p. 62, lines 10-16.) Pinoli said he did not think it was necessary to come up with a plan, or conceptual drawing that reflected transloading, freight, pits, and wyes for the Property. (8-25-22, p. 238, lines 12-21.)

There was no specific description or plans for the Project when the eminent domain process began, and no plan was provided to Meyer. (8-25-22, p. 277, line 27-p. 280, line 8.) The only conceptual drawing for the Meyer Property prepared by MR as of the date of filing of the complaint depicted a *station/store*, *campground,* and *long-term RV rental park.* (8-25-22, p. 235, line 13- p. 236, line 4; Exhibit 33-49.)

The preliminary site plan in Exhibit 4 was prepared in June 2022, approximately 18 months after this eminent domain action was filed. (8-25-22, p. 285, lines13- 19.) The plan generally depicts maintenance/repair facilities, a yard, vehicle parking, rail transloading facility, depot, offices, a platform, and a natural habitat preserve.

The evidence shows that at the time of filing the action the proposed Project actually consisted of MR taking the Property for the purpose of constructing a train station, maintenance area, *campground, and recreational vehicle camping area.* (Exhibit 33-75 - 33-76; 8-25-22, p. 228, line 5 - p. 232, line 17.) It also established that MR's focus in its evaluation of the alternative parcels was whether the parcels could be used as a private campground and recreational vehicle camping area. (Exhibit 33-75 - Exhibit 33-76; 8-25-22, p. 228, line 5- p. 232, line 17.)

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.) Pinoli admitted that MR could not take the Property by eminent domain and use it as a campground and RV Park. (8-25-22, p. 290, lines 7-12.) Pinoli also testified that the operation of a campground is not consistent with the operation of railroad. (8-25-22, p. 290, lines 13-15.)

At the time of filing the action MR was attempting to use eminent domain to take 20 acres of private property to carry on a private campground business that also includes a station and excursion service. The primary objective is private gain, not public need. The goal of the proposed Project is to create revenue for MR, not a Project for public use that would justify taking of private property by eminent domain.

E. MR Does Not Intend To Use The Property For The Purpose Stated In The Complaint.

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 using the Property for the purpose stated in the complaint. The court should sustain Meyer's objection to taking of the Property. The evidence shows that the proposed Project consisted of MR taking the Property for a train station, maintenance area, *campground and a recreational vehicle camping area.* (8-25-22, p. 235, line, 13- p. 236, line 4; Exhibit 33-49.) In fact, MR improperly focused its evaluation on parcels that could potentially be used as a private campground and recreational vehicle camping area. (8-25-22, p. 235, line, 13- p. 236, line 4; Exhibit 33-49.) A private campground is not mentioned in the complaint, nor does the complaint reference MR's excursion services operated for private gain, or any type of recreational facilities or other activities. (Complaint, Page 2, Paragraph 2.)

Based upon the description in the complaint, the taking is for the "construction and maintenance of rail facilities." This description is too general for Meyer or the court to have a clear understanding of the natures of the Project. The description of the Project in the complaint definitely does not include operation of a private excursion service, campground, and recreational vehicle camping area. (Complaint, Page 2, Paragraph 2.)

As of December 22, 2020, the date that MR filed the complaint, the only site plan for the Meyer Property reflected a large campground and recreational vehicle parking area. (Exhibit 33-49; 8-25-22, p. 235, lines 16-25.)

In June 2022, nearly a year and a half after the complaint was filed, MR prepared a new

site plan, that does not show a campground or recreational vehicle camping area on the Property. (Exhibit 4; 8-24-22, p. 61, lines 21-23.) The last minute change to the site plan is likely the direct result of this litigation, and does not change the fact that MR's evaluation of the properties was 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.

F. MR Did Not Formulate A Plan For The Project And Failed To Meet The General Prerequisites Applicable To All Condemnations.

Pursuant to Code of Civil Procedure § 1240.030,

"[t]he power of eminent domain may be exercised to acquire property for a proposed project only if all of 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 the least private injury. (c) The property sought to be acquired is necessary for the project.'"

(*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal. App. 4th 452, 468; Code of Civil Procedure § 1240.030.)

In *SFPP v. Burlington Northern & Santa Fe Ry. Co., supra,* at 469-470 ("*SFFP*"), the court analyzed the meaning of subdivision (b) of section 1240.030, which requires that the project be "planned or located in the manner that will be most compatible with the greatest public good and the least private injury." "This limitation which involves essentially a comparison between two or more sites, has also been described as 'the necessity for adopting a particular plan for a given public improvement.'" (*Id.* at 470.)

The court in *SFFP* stated that "[t]he words 'most', 'greatest' and 'least' are comparative terms that relate to both the plans and the location of the project." (*Id.* at 469.) The *SFFP* court continued by stating that these "comparative terms cannot be applied in the abstract, instead they unambiguously show the Legislature's intent that the condemner's proposed location be compared with other potential locations to see how those other locations compare in effect on the public good and private injury resulting project." (*Id.* at 470; *People v. Chevalier* (1959) 52 Cal. 2d 299, 307.)

"[A]n adequate project description is essential to the three findings of necessity that are

required to be made in all condemnation cases. Only by ascertaining what the project is can the governing body make those findings." (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal. App. 4th 93, 113; *Cincinatti v. Vester* (1930) 281 U.S. 439, 448.) "[A] public agency has no right to condemn in the absence of evidence to support the findings or necessity, and such evidence cannot exist without a sufficient project description." (*City of Stockton v. Marina Towers, supra,* at 115; *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal. App. 3d 1121, 1129.)

MR cannot prove 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). There was no specific description or plans for the Project when the eminent domain process began, and no plan was ever provided to Meyer. (8-25-22, p. 277, line, 27-p. 280, line 8.) The only conceptual drawing in place for the Meyer Property as of the date of filing of the complaint depicted a *station/store*, *campground,* and *long-term RV rental park.* (8-25-22, p. 235, line, 13- p. 236, line 4; Exhibit 33-49.)

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.*, *supra* at 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.*)

This Project is not planned or located in a manner that is the most compatible with the greatest public good and least private injury. Internal emails show 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 are not consistent with a railroad project. (Exhibit 33-75; Exhibit 33-76; 8-25-22, p. 228, line 5- p. 232, line 17.)

MR's evaluation of the location for its site was based upon whether or not it was conducive to camping, RV vehicle parking, and use as an excursion service, which are private uses. (Exhibit 33-75; Exhibit 33-76; 8-25-22, p. 228, line 5- p. 232, line 17.) Such private uses are not compatible with properly evaluating whether alternate locations are better, that is, compatible with the greatest public good and the least private injury.

MR's new plan was developed in June 2022, and included the construction of the train maintenance facility right next to two residential houses, one of which is owned by Meyer. (Exhibit 4; 8-25-22, p. 288, lines 20-28.) Pinoli admitted that the idling and operation of trains is loud, but also claimed that the maintenance facility and the operation of such trains directly behind the residences would have no real impact on the residents. (Exhibit 4; 8-25-22, p. 289, lines 8-24.)

Pinoli's testimony is not credible. A site plan with a maintenance facility right next to two residences is not consistent with planning the Project for the greatest public good and the least private injury. Truthfully, the plan for the maintenance facility directly behind Meyer's house may be an attempt to punish Meyer for opposing MR's taking of his property.

G. MR Is Attempting To Take Excess Property Without Satisfying the Requirements of Code of Civil Procedure § 1240.410.

Code of Civil Procedure § 1240.410 permits property excess to the needs of the proposed project to be taken only if it would be left as a remainder in such size, shape, or condition as to be of little market value.

It is a ground for objection if excess property is sought to be acquired pursuant to Code of Civil Procedure § 1240.410, but the acquisition does not satisfy the requirements of such section. (Code of Civil Procedure § 1250.360(f).) When "the property is not needed for the physical construction of the public improvement, the question of public use turns on the determination of whether the taking is justified to avoid the excessive severance or consequential damages. Accordingly, if the court determines that the excess condemnation is not so justified, it must find that it is not for a public use." (*People ex. Rel. Department of Public Works v. Superior Court of Merced County*, *supra*, at 216.)

In order "to raise an issue of improper excess taking, condemnees must show that the condemnor is guilty of fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it, or that the contemplated use is not a public one." (*Id.*)

Public Utilities Code § 611 provides that "[a] railroad corporation may condemn any property necessary for the construction and maintenance of its railroad. Pursuant to the Law Revision Commission Comments for Public Utilities Code § 611, this section "would not, however, permit condemnation by a railroad corporation of land to be used for example, as an industrial park."

The "construction and maintenance of rail facilities" does not require the taking of 20 acres of land. The taking of all of Meyer's 20 acres significantly deprives Meyer from the use and enjoyment of his Property. The taking represents an abuse of discretion because it exceeds the land 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.

Specifically, the substantial acreage (it appears to be about 1/3rd to 1/4th of the Property acreage) referenced as "natural habitat preserve" on the preliminary site map in Exhibit 4 is a natural barrier unnecessary for the project, according to Pinoli. (8-24-22, p. 66, lines 13-25.) Pinoli further testified that MR "had no intention of knocking down trees or disrupting the stream bed so that area was precluded, if you will, from our developing it." (8-25-22, p. 285 line 27 - p. 286, line 6.)

MR's taking of this excess property is illegal and it should not be included in the taking. The property is not going to be developed by MR and Meyer should be able to retain approximately 5-7 acres under the law. (Exhibit 4; 8-24-22, p. 66, lines 13-25.) This natural habitat preserve is not necessary for the railroad project and it represents excess acreage that Meyer can retain. (8-25-22, p. 285 line 27 - p. 286, line 6.)

H. A Final Judgment Should Be Issued Denying MR The Right To Take The Property And Litigation Expenses Should Awarded To Meyer.

MR is illegally attempting to take the 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 find that MR does not have the right to acquire the Property, and should render a final judgment that prevents MR's use of

eminent domain.

The court is required to award to the condemnee 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).) The Law Revision Commission Comments for Code of Civil Procedure § 1268.610, provides that a plaintiff must reimburse a defendant when there is a final judgment which provides that the plaintiff does not have the right to take the property sought to be acquired, and this rule applies to non-public entity plaintiffs.

Therefore, Meyer asks the court to award him reasonable attorney fees, litigations expenses and costs of suit.

MANNON, KING, JOHNSON & WIPF, LLP

Stephen F. Johnson
Attorneys for Defendant John Meyer

PROOF OF SERVICE

Mendocino County Superior Court Case No.: SCUK-CVED-20-74939

I declare that I am over the age of 18 years, employed in the County of Mendocino, and not a party to the within action; my business address is P.O. Box 419, 200 N. School Street, Room 304, Ukiah, CA 95482.

On January 23, 2023, I served the **DEFENDANT JOHN MEYER'S CLOING TRIAL BRIEF** on the interested parties in this action by placing ☐ the original ☒ true copies thereof, as follows:

SEE ATTACHED SERVICE LIST

☐	By E-SERVICE. Pursuant to California Rules of Court Rule 2.251(c), adopted effective July 1, 2013, I am e-Serving the above-listed document(s) to the electronic service address(es) on the attached Service List and e-Filing the document(s) using one of the court's approved electronic service providers. A true and correct copy of the e-Service transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.
☐	By MAIL. I am readily familiar with this law firm's practice for collection and processing of documents for mailing with the U. S. Postal Service. The above-listed document(s) will be deposited with the U. S. Postal Service on the same day shown on this affidavit, to the addressee(s) on the attached Service List in the ordinary course of business. I am the person who sealed and placed for collection and mailing the above-listed document(s) on this date at Ukiah, California, following ordinary business practices.
☒	By E-MAIL. I e-mailed above-listed document(s) to the e-mail address(es) of the addressee(s) on the attached Service List. A true and correct copy of the e-mail transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.
☐	By OVERNIGHT DELIVERY. The above-listed document(s) will be deposited with an Overnight Delivery Service on the same day shown on this affidavit, in the ordinary course of business. I am the person who sealed and placed for collection and overnight delivery the above-listed document(s) on this date at Ukiah, California, to the addressee(s) on the attached Service List following ordinary business practices. A true and correct copy of the overnight delivery service transmittal will be attached to the above-listed document(s) and produced if requested by any interested party.
☐	By PERSONAL SERVICE. I caused to have hand delivered, the above-listed document(s) to the parties indicated on the service list.
☒	(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 23, 2023, at Ukiah, California.

Rochelle Miller, Legal Assistant

SERVICE LIST

Mendocino County Superior Court Case No.: CVED-20-74939

Glenn L. Block Christopher Washington California Eminent Domain Group, APC 3429 Ocean View Blvd., Suite L Glendale CA 91208 glb@caledlaw.com cgw@caledlaw.com	Christian Curtis Brina Blanton Office of Mendocino-Administration Center 501 Low Gap Road, Room 1030 Ukiah, CA 95482 curtisc@mendocinocounty.org blantonb@mendocinocounty.org
Maryellen Sheppard 27200 North Highway 1 Fort Bragg, CA 95437 sheppard@mcn.org	Paul J. Beard, II FisherBroyles LLP 4470 W. Sunset Blvd., Suite 93165 Los Angeles, CA 90027 Paul.beard@fisherbroyles.com
Krista MacNevin Jee Jones Mayer 3777 North Harbor Blvd. Fullerton, CA 92535 kmj@jones-mayer.com	