No. 23-15857

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MENDOCINO RAILWAY,

Plaintiff-Appellant,

v.

JACK AINSWORTH; CITY OF FOR BRAGG

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 4:22-cv-04597-JST
Hon. Jon S. Tigar

APPELLEE CITY OF FORT BRAGG'S SUPPLEMENTAL EXCERPTS OF RECORD
Vol. 1 of 1

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation

Plaintiff,

v.

MENDOCINO RAILWAY and DOES 1-10, inclusive,

Defendants.

Case No.: 21CV00850

[Assigned to the Hon. Clayton Brennan]

DEFENDANT MENDOCINO RAILWAY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFF CITY OF FORT BRAGG'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Hearing Date: February 10, 2022

Hearing Time: 2:00 p.m.

Complaint Filed: October 28, 2021

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I. INTRODUCTION

This case is about an extraordinary attempt by Plaintiff City of Fort Bragg ("City") to have the Court terminate a well-established railroad's legal status as a California public utility—long recognized and regulated as such by the California Public Utilities Commission ("CPUC"). The City's attempt is doomed from the start because the Court has no subject matter jurisdiction to do the City's bidding. California law unequivocally bars all Superior Court actions—like the City's—that purport to second-guess or interfere with the CPUC's ongoing jurisdiction over a railroad long deemed by that state agency to be a public utility.

As the City admits, Defendant Mendocino Railway "is currently listed as a class III railroad by the California Public Utilities Commission (CPUC)" and, "as such," it "is subject to CPUC jurisdiction and has all legal rights of a public utility." Complaint at 2:5-7. The CPUC has broad authority to assert jurisdiction over and regulate the State's public utilities, including railroads like Mendocino Railway. But while the City has long trumpeted Mendocino Railway's "public utility" status, the City now objects.

In a single cause of action for declaratory relief, the City asks the Court to nullify Mendocino Railway's status as a CPUC-regulated public utility because the City thinks that the railroad no longer qualifies as such. If somehow successful in convincing the Court to terminate Mendocino Railway's status—and, with it, the CPUC's jurisdiction over it—the City hopes to also convince the Court to grant a sweeping injunction compelling Mendocino Railway to submit to "all" of the City's "ordinances, regulations, . . . codes, jurisdiction and authority." Complaint at 6:12-14, 6:15-18.

The objective of the City's cause of action for declaratory relief is crystal clear: To substitute the City for the California Public Utilities Commission, and seize unfettered control over a state-regulated, public-utility railroad.

The City's lawsuit fails as a matter of law. The CPUC has assumed jurisdiction over and regulated Mendocino Railway as a "*public utility*" for years. Complaint at 2:7 (emphasis added). A 1998 decision of the CPUC unequivocally affirms jurisdiction over Mendocino Railway. This Superior Court action asks the Court to unlawfully second-guess that CPUC decision and directly interfere with the agency's continuing jurisdiction over it. But the law clearly bars such Superior Court actions. *See, e.g.*, Pub. Util. Code § 1759 (precluding Superior Court actions that interfere with CPUC). The Court has no

subject matter jurisdiction to convert a CPUC-regulated public utility into a nonpublic utility and thereby strip a state agency of its decades-long regulatory authority over that entity. Since the City has no cognizable claim, it can obtain no relief—whether it be a declaration or an injunction.

The City may argue it has an independent cause of action for "injunctive relief" that somehow survives dismissal of its "declaratory relief" claim. But injunctive relief is a remedy, not a cause of action. And even if a request for an injunction constituted a cause of action, it would be barred. The City's injunction purports to subject Mendocino Railway to "all" of the City's laws, jurisdiction, and authority. Complaint at 6:15-18. Such an injunction would give the City unlimited control over a CPUC-regulated public utility in violation of California law. Further, as the City has conceded, Mendocino Railway is also a *federally* recognized railroad subject to the jurisdiction of the federal Surface Transportation Board. The unlimited control that the City seeks would therefore be federally preempted.

The Court should sustain Mendocino Railway's demurrer and dismiss the Complaint in its entirety without leave to amend.

II. LEGAL AND FACTUAL BACKGROUND

A. Legal Background

The only cause of action in this lawsuit is a claim for declaratory relief, which purports to challenge Mendocino Railway's status as a public utility under California law.[1] This demurrer does not turn on whether Mendocino Railway continues to qualify as a public utility, because the Court lacks jurisdiction to decide the question in the first place. Nevertheless, for context, it is helpful to understand how public utilities are defined and regulated in California.

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 and corporation providing transportation for compensation

[1] As explained in the "Standard of Review" section, while the City titles its only cause of action as a "Cause of Action" for "Declaratory and/or Injunctive Relief," there is no such thing as a cause of action for injunctive relief. Injunctive relief is a remedy, not a cause of action. *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 65.

to or for the public or any portion thereof." *Id.* § 211. A "common carrier" includes "[e]very railroad corporation." *Id.* § 211(a).

Formerly called the Railroad Commission, the CPUC has plenary jurisdiction to "supervise and regulate" California public utilities, including railroads. Pub. Util. Code § 701; *see also Public Utilities Comm. v. Superior Court* (2010) 181 Cal.App.4th 364, 368-69 (recounting history of CPUC and its regulation of railroads). It "is a state agency of constitutional origin with far-reaching duties, functions and powers." *San Diego Gas & Elec. Co. v. Super. Ct.* (1996) 13 Cal.4th 893, 914-15 (internal quotes and citations omitted); *see also* Cal. Const. art. XII (establishing the CPUC). The CPUC's jurisdiction includes an expansive police power to "require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public." Pub. Util. Code § 768; *see also Sutter Butte Canal Company Co. v. Railroad Comm.* (1927) 202 Cal.179, 184 (holding that to the CPUC "has been committed the execution of this police power"—i.e., all power "necessary for the protection of the public health, safety, morals and welfare"— "over public utilities in California"). "In particular, the commission has comprehensive jurisdiction over questions of public health and safety arising from utility operations." *San Diego Gas & Electric Co.*, 13 Cal.4th at 924. In matters over which the CPUC has jurisdiction, its jurisdiction is "exclusive." *City of Anaheim v. Pacific Bell Telephone Co.* (2004) 119 Cal.App.4th 838, 842 (citing Cal. Const. art. XII, § 8 ("A city … may not regulate matters over which the Legislature grants regulatory power to the [Public Utilities] Commission.")).

Further, the CPUC has the judicial power to determine in the first instance "that the status of [an entity] is that of a public utility subject to regulation as contemplated by the Constitution of this state." *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 629-30. "That [the CPUC] . . . possesses judicial powers"—such as the power to determine whether and how an entity should be regulated as a public utility—"may not be questioned." *Id.* at 630. "When its determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings." *Id.*

B. Factual Background

Mendocino Railway is a railroad that has operated between the City of Fort Bragg and Willits, in the County of Mendocino. Complaint at 2:19-20. The railroad owns real property in the City. *Id.* at

2:9-10.

As the Complaint admits, Mendocino Railway "is currently listed as a Class III railroad by the California Public Utilities Commission." Complaint at 2:5-6. The railroad therefore "is subject to CPUC jurisdiction and has all legal rights of *a public utility*." *Id.* at 2:6-7 (emphasis added). Consistent with those admissions, the CPUC's official website lists Mendocino Railway as a regulated railroad. Declaration of Paul Beard II ("Beard Decl."), Exh. A (CPUC webpage); Defendants' Request for Judicial Notice ("RJN") at 2:6-17.

The Complaint cites to a January 21, 1998, decision of the CPUC regarding the railroad, which also confirms the CPUC's decades-long history of recognizing and regulating it as a public utility. *Id.* 2:2. There, at the request of the rail line's prior owner, California Western Railroad ("CWRR"), the CPUC agreed to deregulate fares for the railroad's "excursion passenger service" only, which the CPUC did not deem to be a "public utility" function. *In the Matter of the Application* Calif. Western R.R., Inc. ("*In Re CWRR #1*"), 1998 Cal. PUC LEXIS 189, *11 (Jan. 21, 1998).[2] But in the same decision, the CPUC reaffirmed its jurisdiction over the safety of the entire rail line (including its excursion service), as well as all aspects of the railroad's commuter service:

> "The Commission currently regulates the safety of the operation of all services provided by CWRR. . . . The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission. This proceeding shall remain open to consider CWRR's request to reduce its commuter service."

Id. at **10-11.[3] Soon after the CPUC's decision, the CPUC granted CWRR's motion to withdraw its request to reduce commuter service. *In the Matter of the Application of* Calif. Western R.R., Inc. 1998 Cal. PUC LEXIS 384 (May 21, 1998) ("*In Re CWRR #2*") (noting that CWRR "transports passengers and freight).[4]

Every decision of the CPUC has only *reaffirmed* its jurisdiction over the railroad as a public utility.

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[2] *See* Beard Decl., Exh. B, p. 4 (Jan. 21, 1998 CPUC Decision); RJN at 2:18-21.

[3] In its Complaint, the City grossly mischaracterizes the CPUC's 1998 decision as somehow stripping the railroad of its "public utility" status. Complaint ¶ 6. The City's self-serving description in the Complaint is belied by the decision itself, which expressly affirms the CPUC's plenary jurisdiction over the railroad, with the limited exception that it no longer regulates its excursion fares.

[4] *See* Beard Decl. Exh. E (May 21, 1998 CPUC Decision); RJN at 3:9-12.

The City concedes that, following the CPUC's 1998 decision, Mendocino Railway "did or may have had the capacity to carry freight and passengers from point-to-point." Complaint at 3:1-3. But the City claims that "no rail lines presently have any such capacity."[5] *Id.* The City alleges Mendocino Railway operates only "sightseeing excursions." *Id.* at 3:26. The City attributes the railroad's alleged loss of freight and passenger service to two events: (1) the 2013 "partial collapse of Tunnel No. 1, which buried nearly 50 feet of its 1,200 feet of track under rocks and soil," and (2) the 2016 re-closure of Tunnel No. 1, purportedly following "damage from the 2015-16 El Niño." *Id.* at 3:7-9, 3:16-17. Yet despite those 2013 and 2016 tunnel closures, the City readily defended Mendocino Railway's "public utility" status *as late as August 2019*. Beard Decl., Exh. C (1/17/19 Letter from City) & Exh. D (8/1/19 City Analysis); Declaration of Mike Hart, ¶ 2; RJN at 2:22—3:7.

In a January 17, 2019, letter from the City Attorney to the California Coastal Commission, the City defended Mendocino Railway's right, *as a public utility*, to proceed with a land purchase without having to first obtain a state land-use permit. *This defense came after the 2013 and 2016 tunnel closures that interrupted the railroad's full freight and passenger servic*e. As the City explained in its letter, the CPUC has "recognized the Mendocino Railway as a regulated public utility" with the right to proceed with the transaction without a permit. Beard Decl., Exh. C, p. 2. The City also admitted that "[a]s an established railroad, the question of whether or not the Mendocino Railway is *federally* regulated has not been in question." *Id.* (emphasis added).

Similarly, in an August 1, 2019, letter, the City supported Mendocino Railway's application for a U.S. Department of Transportation grant to repair Tunnel No. 1, and thereby "restore freight and passenger operations over Mendocino Railway's entire 40-mile rail line" ("the Project"). Beard Decl., Exh. D, p. 2. *Again, the letter came years after the tunnel closures that the City claims disqualified Mendocino Railway of its "public utility" status.* In its letter, the City touted Mendocino Railway's long history of providing, not just excursions, but freight and general passenger service as well—service that,

[5] Mendocino Railway disputes any and all allegations that cast doubt on the railroad's uninterrupted and continued status as a "public utility" under state law and as a federally recognized railroad under federal law. But said allegations are legally irrelevant for purposes of this demurrer. As explained in the Argument, *infra*, even if those allegations were true (which they are not), the Superior Court has no subject matter jurisdiction to adjudicate whether the CPUC should continue to recognize and regulate a railroad as a public utility.

as the City readily acknowledged in the letter, Mendocino Railway was ready, willing, and able to fully restore upon the collapsed tunnel's reopening:

> The Project would ***renew*** freight services, increase passenger offerings, and improve railroad safety and operations. . . . Mendocino Railway has a storied legacy of transporting freight and passengers and being the economic engine for the rural areas of Fort Bragg and greater Mendocino County. Various industries are eagerly awaiting ***reopening*** of Mendocino Railway's Line for freight services. . . . Additionally, it is anticipated that the ***reopening*** of the approximately 40-mile rail Line for passenger services should generate 25,000 or more passenger trips to be taken over the Line.

Beard Decl., Exh. D, pp. 2-3 (emphasis added).

Interestingly, the Complaint alleges no new facts or circumstances since the City's admissions in August 2019 that would cast the slightest doubt on Mendocino Railway's status as a public utility.

Nevertheless, the City now complains that Mendocino Railway has previously invoked its right as a CPUC-regulated public utility to rebuff City attempts to impose plenary control over the railroad and its facilities. As examples, the Complaint cites City efforts, in 2017 and 2019, to regulate the use and repair of a roundhouse[6] and storage shed located on Mendocino Railway's land. Complaint at 4:1-8. The Complaint also cites a more recent example from August 2021, when the City allegedly demanded that Mendocino Railway obtain a "special event" permit for an unspecified late-night event. *Id.* at 4:8-10. In each instance, claims the City, Mendocino Railway declined to subject itself to local inspections and permit requirements because of its "public utility" status. *Id.* at 4:-1-12. Curiously, the City in the first two instances attempted to assert regulatory authority over the railroad at a time when the City did not dispute—and even vigorously *defended*—Mendocino Railway's status as a public utility exempt from just such local regulation.

The City has had a sudden change of heart regarding Mendocino Railway's "public utility" status. In a single cause of action, the City purports to seek "declaratory and/or injunctive relief" to the effect that (1) "Mendocino Railway is not subject to regulation [by the CPUC] as a public utility" and (2) Mendocino Railway must "comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority." Complaint at 4:27-28, 6:12-18. Mendocino Railway brings this demurrer on

[6] A "roundhouse" is defined as a "a circular building for housing and repairing locomotives." *See* Merriam-Webster, available at https://www.merriam-webster.com/dictionary/roundhouse.

the grounds that the Court lacks subject matter jurisdiction to adjudicate the City's claim and grant the relief it seeks.

III. STANDARD OF REVIEW

A defendant may object to a complaint by demurrer when the court lacks subject matter jurisdiction. Code of Civ. Proc. § 430.10(a). A general demurrer serves to test the sufficiency of the complaint as a matter of law. *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 306. While courts "assume the truth of all material facts properly pleaded in the complaint" (*B&P Dev. Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 953), they "do not . . . assume the truth of contentions, deductions, or conclusions of fact or law" contained in the complaint (*Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 125). Moreover, courts must "disregard allegations that are contrary to law or to facts that may be judicially noticed." *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 178). "In cases when the pleading conflicts with facts judicially noticed, . . . the theory is that the pleader should not be allowed to bypass a demurrer by suppressing facts that the court will judicially notice." *Williams v. Southern California Gas Co.* (2009) 176 Cal.App.4th 591.

The City alleges a cause of action for "declaratory and/or injunctive relief." Complaint at 4:25. Although section 1060 of the Code of Civil Procedure authorizes a cause of action for declaratory relief, the law does not authorize a "cause of action for injunctive relief." An "injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action." *County of Del Norte*, 71 Cal.App.4th at 973. "A cause of action must exist before a court may grant a request for injunctive relief." *Allen*, 234 Cal.App.4th at 65. Thus, if the City's declaratory-relief claim falls, its request for an injunction falls with it.

IV. ARGUMENT

The Court lacks subject matter jurisdiction over the City's declaratory-relief action, which seeks to eliminate Mendocino Railway's status as a CPUC-regulated public utility and substitute the City for the CPUC as the railroad's regulatory overseer. As explained in detail below, entertaining this action directly undermines the CPUC's already-assumed jurisdiction and regulatory authority over Mendocino Railway, which the CPUC has long recognized as a public utility. The requested injunction also seeks local authority over an admittedly CPUC-regulated utility and federally recognized railroad, even though

such local authority is preempted. For these reasons, and as explained in detail below, the Complaint must be dismissed with prejudice.

A. The Court Has No Jurisdiction Over the City's Declaratory-Relief Claim

The Public Utilities Code "vests the commission with broad authority to supervise and regulate every public utility in the State and grants the commission numerous specific powers for the purpose." *San Diego Gas*, 13 Cal.4th at 915 (quoting Pub. Util. Code § 701) (internal quotation marks omitted). To protect the CPUC's broad mandate and limit judicial interference with the CPUC's work, the Legislature enacted section 1759 of the Public Utilities Code. Subsection (a) of that statute states:

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

Pub. Util. Code § 1759(a) (emphasis added).

"By its plain language, section 1759 deprives the superior court of jurisdiction to entertain an action that could undermine the CPUC's authority." *Anchor Lighting v. Southern California Edison Co.* (2006) 142 Cal.App.4th 541, 548. Thus, apart from the limited review procedures in section 1759 of the Public Utilities Code, "no other court has jurisdiction either to review or suspend the commission's decisions or to enjoin or otherwise interfere with the commission's performance of its duties." *San Diego Gas*, 13 Cal.4th at 916. Further, "after the commission has assumed jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the commission has exclusive jurisdiction over the regulation and control of said utility." *Pacific Tel. & Tel. Co. v. Superior Court of San Francisco* (1963) 60 Cal.2d 426, 430. "The CPUC has exclusive jurisdiction over the regulation and control of utilities and that jurisdiction, once assumed, cannot be hampered or second-guessed by a superior court action addressing the same issue." *Anchor Lighting*, 142 Cal.App.4th at 548.

Again, the sole cause of action in this case is for declaratory relief. "Injunctive relief" is "not a cause of action." *County of Del Norte*, 71 Cal.App.4th at 973. With respect to the declaratory relief claim, the City seeks a "judicial declaration regarding the validity of the Mendocino Railway's status as a public utility." Complaint 1:19-21. Specifically, the City demands "a declaration that the Mendocino

Railway is not subject to regulation [by the CPUC] as a public utility." *Id.* at 6:12-14. There can be no serious question that this Court lacks subject matter jurisdiction to issue a declaration to that effect, because it would eliminate Mendocino Railway's status as a public utility, long recognized as such by the CPUC, and thereby remove the railroad from the CPUC's jurisdiction.

The City's own allegations are fatal the City's challenge. As the City admits, Mendocino Railway "is currently listed as a class III railroad by the California Public Utilities Commission," "is subject to CPUC jurisdiction," and "has all legal rights of a public utility." Complaint at 2:3-7. That fact is confirmed by the CPUC's official list that includes Mendocino Railway among "regulated California railroads." Beard Decl., Exh. A ("CPUC regulates ***all*** railroads in California." (emphasis added)). Further, it is confirmed in a final decisions of the CPUC, in which the CPUC expressly affirmed continuing jurisdiction and regulatory authority over the railroad. *In Re CWRR #1*, 1998 Cal. PUC LEXIS 189, *11 Beard Decl., Exh. B, p. 5 ("The safety of the operation of all services, including excursion passenger service, shall remain subject to regulation by the Commission."). "When [the CPUC's] determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings." *Western Air Lines, Inc.*, 42 Cal.2d at 629-30. As the Complaint concedes, the CPUC has "assumed jurisdiction over a public utility [i.e., Mendocino Railway] for the purpose of administering the law applicable to the activities of the utility." *Pacific Tel. & Tel. Co.*, 60 Cal.2d at 430. Consequently, the CPUC's "regulation and control of said utility" is "exclusive" (*id.*), and "that jurisdiction . . . cannot be hampered or second-guessed by a superior court action." *Anchor Lighting*, 142 Cal.App.4th at 548.[7]

Yet the City's declaratory-relief action does just that. It second-guesses the CPUC's clear determination that Mendocino Railway is a public utility and tries to eliminate that agency's long-established jurisdiction over it. Since the CPUC's jurisdiction over Mendocino Railway is based on its being a public-utility railroad, and no other legal basis for the CPUC's jurisdiction over that railroad exists, a Superior Court judgment divesting Mendocino Railway of its "public utility" status would divest

[7] The CPUC amply regulates public-utility railroads like Mendocino Railway under numerous provisions of the Public Utilities Code, including without limitation: Public Utilities Code sections 309.7, 315, 421, 761, 765.5, 768, 7661, 7662, and 7665.2.

the CPUC of its jurisdiction over the railroad. If Mendocino Railway is no longer a public utility by declaration of the Court, then contrary to CPUC's decisions and actions over the years, the railroad is no longer subject to regulation by the CPUC. It is difficult to imagine a clearer interference with the CPUC's authority and a clearer violation of section 1759 of the Public Utilities Code.

In sum, the City is barred from obtaining a declaration nullifying Mendocino Railway's status as a CPUC-regulated public utility. Because the City has no valid cause of action, its request for an injunction compelling Mendocino Railway to submit to its total and unfettered regulatory authority is also precluded. *Allen*, 234 Cal.App.4th at 65 ("A cause of action must exist before a court may grant a request for injunctive relief.").

B. <u>If Deemed a "Cause of Action," The City's Request for an Injunction Is Also Barred</u>

Because the City has no cognizable claim, *all* the relief it requests—including its demand for an injunction—is categorically precluded. As explained above, an injunction "is an equitable remedy, not a cause of action" that is subject to demurrer; without a valid cause of action, there can be no injunctive relief. *County of Del Norte*, 71 Cal.App.4th at 973. As a result, the Court need not separately consider the viability of the City's request for an injunction.[8]

However, if the Court decides to treat the request for injunction as a "cause of action" subject to demurrer, then the Court should also dismiss it under both state and federal law.

1. Injunctive Relief Is Barred by State Law

The City wants an injunction "commanding the Mendocino Railway to comply with all City ordinances, regulations, and lawfully adopted codes, jurisdiction and authority." Complaint at 6:15-18. The City makes clear it wants full regulatory control over all railroad "property" and "operations." *Id.* at 5:25-26. The Court lacks jurisdiction to grant such a sweeping injunction for the same reason it lacks jurisdiction to nullify, through a declaration, Mendocino Railway's "public utility" status: The injunction would substitute the City for the CPUC, and thereby undermine the CPUC's ongoing jurisdiction over and regulation of the railroad. *Id.* at 2:4-7 (Mendocino Railway "is subject to CPUC jurisdiction"); Pub.

[8] If the Court overrules this demurrer, then it should strike the City's "injunctive relief" allegations including the prayer for an injunction, as requested in Mendocino Railway's concurrently filed Motion to Strike.

Util. Code § 1759 (barring Superior Court actions to "enjoin, restrain, or interfere with the commission in the performance of its official duties," which include regulating public-utility railroads).

Also, the injunction requested by the City flies in the face of the California Constitution's mandate that "[a] city . . . may not regulate matters over which the Legislature grants regulatory power to the [CPUC]." Cal. Const. art. XII, § 8. "[T]he commission has comprehensive jurisdiction over questions of public health and safety arising from utility operations." *San Diego Gas & Electric Co.*, 13 Cal.4th at 924. For example, the CPUC has the broad and exclusive power to "require every public utility to construct, maintain, and operate its line, plant, system, equipment, apparatus, tracks, and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers, and the public." Pub. Util. Code § 768; *City of Anaheim*, 119 Cal.App.4th at 842 (CPUC jurisdiction is "exclusive"). In its 1998 decision, the CPUC invoked that same broad authority over the railroad. *In Re CWRR #1*, 1998 Cal. PUC LEXIS 189, *11; Beard Decl., Exh. B, p. 5. Yet an injunction purporting to give the City unfettered regulatory authority over a CPUC-regulated public utility, including its operations and rail facilities, would unlawfully encroach upon the CPUC's exclusive jurisdiction.

2. Injunctive Relief Is Barred by Federal Law

Independent of its status as a public utility under California law, the City does not dispute that Mendocino Railway is a *federally* recognized railroad. Beard Decl., Exh. C, p. 2 (City declaring that "[a]s an established railroad, the question of whether or not the Mendocino Railway is federally regulated has not been in question"). Mendocino Railway's status as a federally recognized railroad carries with it federally protected prerogatives that the City's broad injunction would purport to extinguish.

To be a federally recognized railroad is to be regulated by the federal Surface Transportation Board ("STB" or "Board") under the Interstate Commerce Commission Termination Act ("ICCTA"). That law gives plenary and exclusive power to the STB to regulate federally recognized railroads:

> "The jurisdiction of the Board over—
>
> > (1) transportation by rail carriers, and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> >
> > (2) the construction, acquisition, operation, abandonment, or

> discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is *exclusive*. Except as otherwise provided in this part [49 USCS §§ 10101 et seq.], the remedies provided under this part [49 USCS §§ 10101 et seq.] with respect to regulation of rail transportation are *exclusive* and preempt the remedies provided under Federal or State law."

49 U.S.C. § 10501(b) (emphasis added).

The STB's exclusive jurisdiction over a federally recognized railroad means that state and local regulatory and permitting requirements are broadly preempted. U.S. Const. art. VI, cl. 2 (Supremacy Clause); 49 U.S.C. § 10501(b); *City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1030-31 (The ICCTA's preemptive scope is "broad."); *Friends of Eel River v. North Coast R.R. Auth'y* (2017) 3 Cal.5th 677, 703 (holding that "state environmental permitting or preclearance regulation that would have the effect of halting a private railroad project pending environmental compliance would be categorically preempted").

The injunction sought in this case would grant the City *unlimited* power over a federally recognized railroad. The injunction would require Mendocino Railway to submit to "*all*" local laws and regulations, as well as to the total "jurisdiction and authority" of the City. Complaint at 6:15-18 (emphasis added). With such vast power, the City could force Mendocino Railway to halt or delay rail-related activities pending compliance with local permitting and other preclearance requirements. Indeed, the Complaint itself cites examples of the City purporting to exercise authority to inspect and permit certain of Mendocino Railway's rail-related facilities (i.e., its roundhouse and storage shed). Complaint ¶ 12; *see also* 49 U.S.C. § 10501(b) (STB has exclusive jurisdiction over rail "facilities"); *id.* § 10102(9) (STB's exclusive jurisdiction reaches "property" or "equipment … related to the movement of passengers or property, or both, by rail," including "services related to that movement"). The City's injunction, which would confer on it plenary regulatory authority over Mendocino Railway's operations and facilities, would violate 49 U.S.C. section 10501(b). The authority that the City seeks by way of an injunction is federally preempted.

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/ / /

V. CONCLUSION

For all the reasons described above, the Court should dismiss the City's action in its entirety without leave to amend.

DATED: January 14, 2022

/s/ Paul Beard II

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF FORT BRAGG,

Plaintiff,

v.

MENDOCINO RAILWAY,

Defendant,

CALIFORNIA COASTAL COMMISSION,

Intervenor.

.

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

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Dated: December 12, 2022

Respectfully submitted,

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