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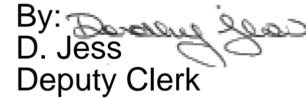
By: 
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MENDOCINO

CITY OF FORT BRAGG, a California municipal corporation, Plaintiff, v. MENDOCINO RAILWAY AND DOES 1–10, inclusive Defendants.	Case No. 21CV00850 **CITY'S OPPOSITION TO DEMURRER TO VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **JUDGE:** Hon. Clayton Brennan **DEPT.:** Ten Mile **DATE:** **February 24, 2021** **TIME:** **2:00 p.m.**

Plaintiff, City of Fort Bragg ("City"), submits the following in Opposition to the Demurrer to Verified complaint for Declaratory and Injunctive Relief ("Opposition") filed by Defendant Mendocino Railway ("MR"):

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TABLE OF CONTENTS

I. INTRODUCTION 7

II. STATEMENT OF FACTS 7

III. STANDARD OF REVIEW ON DEMURRER 8

IV. THIS COURT MOST CERTAINLY HAS JURISDICTION OVER THIS ACTION TO ENFORCE THE CPUC's FINDING THAT MR IS NOT A PUBLIC UTILITY 9

V. INJUNCTIVE RELIEF IS PROPER, NOT SUBJECT TO DEMURRER AND NOT A SEPARATE CAUSE OF ACTION 14

VI. LOCAL RULES NOT INTERFERING WITH INTERSTATE COMMERCE ARE NOT SUBJECT TO FEDERAL PREEMPTION, AND NOT FOR DEMURRER. 15

VII. MR'S CHALLENGE TO THE SCOPE OF INJUNCTIVE RELIEF REQUESTED IS A WHOLLY IMPROPER GROUND FOR DEMURRER 20

VIII. CONCLUSION 21

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES

Page(s)

Cases

Aubry v. Tri-City Hospital Dist.,
2 Cal. 4th 962 (1992) 8

C.A. v. William S. Hart Union High School Dist.,
53 Cal. 4th 861 (2012) 8, 9

Caliber Bodyworks v. Superior Court,
134 Cal. App. 4th 365 (2005) 21

Charpentier v. L.A. Rams Football Co.,
75 Cal. App. 4th 301 (1999) 9

Chazen v. Centennial Bank,
61 Cal. App. 4th 532 (1998) 8

City of St. Helena v. Public Util. Comm'n.,
119 Cal. App. 4th 793 (2004) 12, 13, 14

City of Stockton v. Superior Court,
42 Cal. 4th 730 (2007) 21

Commission for Green Foothills v. Santa Clara County Bd. of Supervisors,
48 Cal. 4th 32 (2010) 8

Covo v. Lobue,
220 Cal. App. 2d 218 (1963) 8

Emerson v. Kan. City S. Ry. Co.,
503 F.3d 1126 (10th Cir. 2007) 17, 18

Goncharov v. Uber Technologies,
19 Cal. App. 5th 1157 (2018) 10

Grisingher v. Shaeffer,
25 Cal. App. 2d 5 (1938) 20

Harmon v. Pacific Tel. & Tel. Co.,
183 Cal. App. 2d 1 (1960) 12

Hoffman v. Pac. Coast Constr. Co.,
37 Cal. App. 125 (1918) 20

Hollenbeck Lodge (486) I.O.O.F. v. Wilshire Blvd. Temple,
175 Cal. App. 2d 469 (1959) 15

1 *Holley v. Hunt*,
2 13 Cal. App. 2d 335 (1936) 15

3 *Illinois Commerce Comm'n v. ICC*,
879 F.2d 917 (D.C. Cir. 1989). *Napa Valley Wine Train Petition for Decl. Order*, 7
4 I.C.C.2d 954 19

5 *IT Corp. v. County of Imperial*,
35 Cal. 3d 63 (1983) 15
6
James v. Hall,
7 88 Cal. App. 528 (1928) 14

8 *Johnson Rancho County Water Dist. v. County of Yuba*,
223 Cal. App. 2d 681 (1963) 8
9
10 *Jones v. Union Pac. R.R. Co.*,
79 Cal. App. 4th 1053 (2000) 15
11
JPMorgan Chase Bank, v. Ward,
12 33 Cal. App. 5th 678 (2019) 9

13 *Koponen v. Pac. Gas & Elec. Co.*,
165 Cal. App. 4th 345 (2008) 11
14
Lamoreux v. San Diego & A.E.R. Co.,
15 48 Cal. 2d 617 (1957) 9
16
Ludgate Ins. Co. v. Lockheed Martin Corp.,
17 82 Cal. App. 4th 592 (2000) 9

18 *Mendocino Coast Railway Discont. of Train Service in Mend. County, CA*,
1987 ICC LEXIS 394, Docket 30820 (Mar. 18, 1987) 19
19
Mendocino Coast Railway Discont. of Train Service in Mendo. County, CA,
20 1986 ICC LEXIS 72, Docket 30820 (Nov. 12, 1986) 19

21 *Mendocino Coast Railway, Inc. Discontinuance of Train Service in Mendocino County, CA*,
22 1986 ICC LEXIS 188, Docket No. 30820 (Aug. 15, 1986) 19

23 *North Gas Co. v. Pacific Gas & Elec. Co.*,
2016 U.S. Dist. LEXIS 131684 (N.D. Cal. 2016) 10
24
State ex rel. Okla. Corp. Comm'n v. Burlington N.,
25 24 P.3d 368 (2000) 15

26 *People ex rel. Orloff v. Pac. Bell*,
31 Cal. 4th 1132 (2003) 9
27
PegaStaff v. Pac. Gas & Elec. Co.,
28 239 Cal. App. 4th 1303 (2015) 10

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28

Roman v. County of Los Angeles,
85 Cal. App. 4th 316 (2000) 21

Schnall v. Hertz Corp.,
78 Cal. App. 4th 1144 (2000) 8

Southern Cal. Edison Co. v. City of Victorville,
217 Cal. App. 4th 218 (2013) 10

Staley v. Board of Med. Exam'rs,
109 Cal. App. 2d 1 (1952) 14

Venice Town Council v. City of L.A.,
47 Cal. App. 4th 1547 (1996) 21

Vila v. Tahoe Southside Water Util.,
233 Cal. App. 2d 469 (1965) 9

Western Travel Plaza,
7 Cal. P.U.C. 2d 128 (1981) 12

Wilson v. S. Cal. Edison Co.,
234 Cal. App. 4th 123 (2015) 11

ZB, N.A. v. Superior Court,
8 Cal. 5th 175 (2019) 21

Constitution and Statutes

Cal. Const., art. XI § 7 .... 15, 6

Cal. Const., art. XII, § 3 .... 9, 13

Cal. Pub. Util. Code § 211 13

Cal. Pub. Util. Code § 216 (a)(1) 13

Cal. Pub. Util. Code § 229 13

Cal. Pub. Util. Code §1759 .... 9, 10, 11

Other Authorities

In the Matter of the Application California Western Railroad, Inc., 1998 Cal. PUC LEXIS
189, 78 CPUC2d 292, Decision 98-01-050 (January 21, 1998) 11, 12

Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Western Railway Corp., STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999) 17

Cities of Auburn and Kent, WA--Petition for Decl. Order--Burlington Northern RR Co. -- Stampede Pass Line,
STB Finance Docket 33200, 1997 STB LEXIS 143, 2 S.T.B. 330 (1997) 16

Maumee & Western RR Corp. and RMW Ventures, LLC -- Petition for Decl. Order,
STB Finance Docket 34354, 2004 STB LEXIS 140 (2004) 16

Norfolk Southern Railway Co.--Petition for Decl. Order,
Docket FD 35950, 2016 STB LEXIS 61 (2016) 17

I. INTRODUCTION.

MR, for all of its bravado about what it is or hopes to be, it is not a *public utility*. Its tracks and direct rail activities are subject to the limited safety authority of the California Public Utility Commission ("CPUC"), but not the CPUC's broad regulatory control that would preclude this court's jurisdiction in this case. This statement is neither the City's conjecture nor wishful thinking. Rather, it derives directly from the CPUC's findings – namely, that MR is not a public utility.

This determination is not an isolated or aberrational decision by federal or State authorities. Indeed, when MR is merely and solely providing entertainment or excursion services, it simply is not operating as a common carrier, does not provide transportation as a public utility, does not carry cargo or freight in interstate commerce, and its passengers do not travel except as a very localized form of sightseeing. It is not a component of the national rail system.

MR may wish to one day be more than it is. But, the jurisdictional limitations MR asserts in this matter against this court's authority to hear this case are neither factually nor legally supported. Rather, it is no more than MR's wishful thinking. MR is not a common carrier nor has it been for many years. It carries no passengers other than on a very limited excursion basis and with no national connectivity, which both the CPUC and federal agencies have recognized as precluding broad regulatory preemption. MR also does not provide transportation for purposes of such regulatory authority. The CPUC has recognized that for the very limited scope of MR's activities, it will perform rail safety oversight only, which does *not* foreclose all local regulatory authority, as MR would have this Court believe. The CPUC's limited purview leaves open valid local regulatory authority, including compliance and oversight of the myriad non-rail activities and/or health and safety regulations generally – to which MR improperly asserts that it is categorically exempt from complying. The City's police power over non-rail activities and health and safety is well established.

II. STATEMENT OF FACTS.

MR operates the "Skunk Train" on round-trip services between Fort Bragg and Glen Blair Junction, and Willits and Northspur Junction. It provides no through-service, does not connect to interstate rail or other interstate connections, and it does not provide freight service. The CPUC has already determined that MR's provision of such limited passenger services is not a public utility.

Similarly, the Federal Interstate Commerce Commission ("ICC"), the predecessor to the Surface Transportation Board ("STB") determined on facts nearly identical to those relating to the limited passenger services provided by MR, such activities were *not* federally regulated as solely interstate services. By the Complaint, the City seeks to enforce, as applicable, its local authority over building and safety regulations on MR, but has been rejected any such regulatory authority by MR. Thus, a valid dispute exists between the parties, which is within this Court's jurisdiction and not preempted.

III. STANDARD OF REVIEW ON DEMURRER.

A demurrer should be denied "if the pleading, liberally construed, states a cause of action on any theory." *Covo v. Lobue,* 220 Cal. App. 2d 218, 221 (1963). "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School Dist.*, 53 Cal. 4th 861, 872 (2012). A court must give a complaint a "reasonable interpretation" and "it is error . . . to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory." *Aubry v. Tri-City Hospital Dist.*, 2 Cal. 4th 962, 967 (1992). In fact, a demurrer is not proper "where the action *may* be, but is not necessarily, barred." *Commission for Green Foothills v. Santa Clara County Bd. of Supervisors*, 48 Cal. 4th 32, 42 (2010) (changes in original omitted) (emphasis added). A demurrer can "reach only those defects . . . on the face of the complaint or judicially noticeable"; "there is neither propriety nor necessity for the disposition of the matter on demurrer," so even when there is an "irremediable absence of a justiciable cause," "[t]he proper method . . . [to] dispose[] of [an action] [i]s by motion for summary judgment based upon affidavits," *not* by demurrer. *Johnson Rancho County Water Dist. v. County of Yuba*, 223 Cal. App. 2d 681, 684 (1963) (citation omitted).

Further, "'[a] demurrer does not lie to a portion of a cause of action.'" *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532, 542 (1998). A complaint's "'allegations must be liberally construed, with a view to substantial justice between the parties.'" *Id.* Even if a complaint's "facts may not be clearly stated, . . . or although the plaintiff may demand relief to which he is not entitled," it will stand if "it appears that the plaintiff is entitled to *any* relief." *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1152 (2000) (internal quotations omitted) (emphasis added) (quoting *Matteson v. Wagoner*, 147 Cal. 739, 742 (1905)). Courts "must afford a reasonable interpretation of the complaint read as a whole with its

1 parts in context." *Charpentier v. L.A. Rams Football Co.*, 75 Cal. App. 4th 301, 307 (1999) (citing *Blank v.*
2 *Kirwan*, 39 Cal. 3d 311, 318 (1985); *Quelimane Co. v. Stewart Title Gty Co.*, 19 Cal. 4th 26, 38 (1998)).
3 In fact, "[t]he California Supreme Court has consistently held that 'a plaintiff is required only
4 to set forth the *essential facts* of his case with reasonable precision and with particularity sufficient to
5 acquaint a defendant with the nature, source and extent of his cause of action." *Ludgate Ins. Co. v.*
6 *Lockheed Martin Corp.*, 82 Cal. App. 4th 592, 608 (2000) (italics added) (quoting *Youngman v. Nevada*
7 *Irrigation Dist.*, 70 Cal. 2d 240, 245 (1969)). The goal of a pleading is notice, not absolute exactitude.

8 **IV. THIS COURT MOST CERTAINLY HAS JURISDICTION OVER THIS ACTION**
9 **TO *ENFORCE* THE CPUC's FINDING THAT MR IS *NOT A PUBLIC UTILITY*.**

10 The crux of MR's improper demurrer is the claim that this Court has no jurisdiction over
11 *public utilities*, which are exclusively under the jurisdiction of the CPUC. The City does not dispute
12 that the California Constitution (art. XII, § 3) and Public Utilities Code Section 1759 generally grants
13 plenary authority to the CPUC over "public utilities." *But see Vila v. Tahoe Southside Water Util.*, 233
14 Cal. App. 2d 469, 476-77 (1965) ("It has never been the rule . . . that the commission has exclusive
15 jurisdiction over any and all matters having any reference to the regulation and supervision of public
16 utilities.") (recognizing "concurrent jurisdiction" between CPUC and superior court). In fact, "it is
17 well established that section 1759(a) is not intended to, and does not, immunize or insulate a public
18 utility from any and all civil actions . . . ." *People ex rel. Orloff v. Pac. Bell*, 31 Cal. 4th 1132, 1144 (2003).
19 Notwithstanding, the key problem here is simply that MR is *not a public utility*.[1] The Court will
20 note that – repeatedly throughout the Opposition, MR gets this one critical fact wrong. To be clear
21 and to reiterate, MR is *not a public utility*. And, this is not a point which the City wishes were true, or
22 even one that the City wishes for this Court to decide. Instead, this is a matter that has *already* been
23

24 [1] To the extent the allegations include that MR "has all legal rights of a public utility," this must be read in context, in
that the CPUC has found MR is *not* a public utility. In fact, the Complaint, taken as a whole, makes clear the City
25 seeks to have this Court declare – consistent with the CPUC decision, that MR is operating as "an excursion-only
railroad . . . [that] is not a public utility." (Complaint, at ¶ 15.) The City seeks to enforce its valid police powers and
26 its regulations "as applicable." (Complaint, at ¶¶ 15, 16, 19; Prayer, ¶¶ 1-2.) Assuming *arguendo* the Court finds
some correction is needed for consistency, amendment is proper. A party can "correct a pleading . . . [as to a]
27 mistake or inadvertence." *Lamoreux v. San Diego & A.E.R. Co.*, 48 Cal. 2d 617, 623 (1957); *JPMorgan Chase Bank,*
v. Ward, 33 Cal. App. 5th 678, 691 (2019) (amendment allowed to correct errors, ambiguous facts, or conclusions).
28

decided *by the CPUC*. Thus, no matter how MR construes this action, it most certainly is *not* barred by any CPUC jurisdiction – both because this action does not seek to annul or undermine any CPUC decision, and because MR is not a public utility subject to CPUC's exclusive authority. Indeed, Public Utilities Code Section 1759 makes the former point clear, providing only as follows:

> 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.

Cal. Pub. Util. Code § 1759 (a) (emphasis added). Thus notably, "if an action seeks to *enforce* a rule that clearly sets out the nature of the obligation imposed, … simply deciding whether a defendant's actions did or did not violate that standard *does not hinder or interfere* with the CPUC's jurisdiction," and is not barred. *Goncharov v. Uber Technologies*, 19 Cal. App. 5th 1157 (2018) (italics added). A District Court, construing California opinions, found that claims, including for declaratory and injunctive relief, were proper based on "the rule that so long as a 'suit actually *furthers* policies of [the CPUC],' it is *not barred*." *North Gas Co. v. Pacific Gas & Elec. Co.*, 2016 U.S. Dist. LEXIS 131684 (N.D. Cal. 2016) (citing *Cundiff v. GTE Cal.*, 101 Cal. App. 4th 1395, 1408 (2002)). Synthesizing California cases, the *North Gas* Court found even actions against *regulated utilities* permissible when "seek[ing] to *enforce*, rather than challenge, obligations created by CPUC regulations." *Id.* (italics added). *See also, PegaStaff v. Pac. Gas & Elec. Co.*, 239 Cal. App. 4th 1303, 1321-22 (2015) (not barred if action "complements and reinforces the [CPUC's] regulations" or "in aid of," not "derogation of, the PUC's jurisdiction") (internal quotations and changes omitted). And, despite CPUC jurisdiction, "local municipalities may, pursuant to their police power, regulate utilities to the extent the regulation is *not inconsistent* with law." *Southern Cal. Edison Co. v. City of Victorville*, 217 Cal. App. 4th 218, 231 (2013) (italics added).

Perhaps most importantly, this issue may not be properly decided on demurrer, since it is highly dependent upon specific facts and the particular nature of regulatory enforcement to be shown. As *PegaStaff,* at 1318, recognized, there are several legal issues to be evaluated in determining Section 1759applicability, including "careful assessment of the scope of the [C]PUC's regulatory authority and evaluation of whether the suit would thwart or advance . . . [C]PUC regulation";

although an injunction "may sometimes interfere" with such authority," it does not always, and the court must determine if specific matters "fall outside the PUC's constitutional and statutory powers, [so that] the claim will not be barred by section 1759." Since the Court cannot determine the specific nature of violations still to be shown, a demurrer is invalid -- even if some allegations may fall within the CPUC's authority. *See, e.g., Wilson v. S. Cal. Edison Co.*, 234 Cal. App. 4th 123, 151 (2015) (safety issues as to "stray voltage" not barred in "absence of any indication that the [C]PUC has investigated or regulated the issue," that existing regulations addressed specific issue, or suit "would interfere with or hinder" CPUC policy). Even if only "*some* . . . claims survive the bar of [ ] section" 1759, granting a demurrer is error. *Koponen v. Pac. Gas & Elec. Co.*, 165 Cal. App. 4th 345, 359 (2008) (italics added).

In any event, even assuming *arguendo*, that the CPUC's jurisdiction over *public utilities* is plenary as to all matters touching on or concerning public utilities, MR's demurrer still returns to the same fundamental and unavoidable flaw: MR is *not a public utility* – as determined *by the CPUC*. In fact, MR admits the CPUC has issued the prior opinion about MR's excursion rail services, and the CPUC is unequivocal in its conclusions of fact and law as to its own jurisdiction of MR's predecessor, CWRR:

> 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].

1998 Cal. PUC LEXIS 189 (1998) (emphasis added). Even though the CPUC also stated that it should continue regulating CWRR's "safety" operations, such limited jurisdiction does not change the CPUC's underlying conclusion that MR's services do *not* constitute "*transportation*," because the primary purpose is merely "*sightseeing*," which "is *not a public utility function*." *Id.* (emphasis added). Whatever authority the CPUC retained over MR, it was *not* over MR as a *public utility*. And, the CPUC's later dismissal as to any decision on *other* passenger services issues of MR does not change the above findings, nor establish, as MR erroneously asserts, that it somehow now provides "transportation." (Demurrer p. 8, lns. 20-22 & n.4 (citing 1998 Cal. PUC LEXIS 384 (May 21, 1998)).

In fact, the CPUC reflects its rail safety operations regulation "as an arm of the Federal

Railroad Administrative," and that the CPUC thus must "continue to inspect CWRR's track, signal and safety practices" as to "passenger and freight operations," in order "to continue to regulate the upkeep and reliability of *grade crossings and crossing protection devices*." 1998 Cal. PUC LEXIS 189 (italics added). That the CPUC retained some authority over certain safety aspects of MR's excursion train, particularly as to administration of federal law, does *not* mean MR retained status as a *public utility*.

Moreover, the same analysis as above was reiterated in *City of St. Helena v. Public Util. Comm'n.*, 119 Cal. App. 4th 793 (2004). In comparing the "Wine Train" to MR's "Skunk Train," the court explained that the CPUC's decision in the 1998 CWRR/MR decision "declared that the Skunk Train, providing an excursion service between Fort Bragg and Willits, was ***not a public utility***." *Id.* at 798 (emphasis added). The court also cited to the CPUC decision in *Western Travel Plaza,* 7 Cal. P.U.C. 2d 128, 135 (1981), which "held sightseeing is . . . a luxury service, as contrasted with regular route, point-to-point transportation between cities, commuter service, or home-to-work service.'" *Id.* The court, in determining "whether the [C]PUC has jurisdiction to regulate the Wine Train *as a public utility*," found it did "not provide 'transportation'" and is "not subject to regulation *as a public utility* because it does not qualify as a common carrier," relying on the CWRR/MR decision:

> the 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 801-803 (italics added). In fact, although the CPUC may have *some* regulatory authority over various industries – even *non* "public utilities," its only "exclusive jurisdiction [is] over the conditions under which *public utilities* render their *public utility services*." *Harmon v. Pacific Tel. & Tel. Co.*, 183 Cal. App. 2d 1, 2-3 (1960). Thus, MR's ***excursion*** services, which the CPUC has said are *not* ***public utility services***, are *not* subject to CPUC jurisdiction, and thus this Court is not without jurisdiction hereof.

Indeed, the *St. Helena* Court made this same point clear. It concluded the Wine Train – like the Skunk Train, was not a public utility, and yet still found the CPUC could retain certain authority over non-public utility trains. Despite finding the CPUC had exceeded its jurisdiction by finding the

Wine Train was a public utility, the court "express[ed] no opinion as to the [C]PUC's jurisdiction with respect to safety and environmental issues." *Id.* at 801 n.4. Thus, the court recognized the CPUC could retain certain authority over trains, including as pertinent here as to *safety* authority, even if a railroad were still *not a public utility* subject to exclusive CPUC authority. As here, the heart of *St. Helena* was city regulatory authority over trains. The Court emphasized: "not every business that deals with the public or is subject to some form of state regulation is necessarily a public utility." *Id.*

Notably, the definition of a "public utility" in the Public Utilities Code includes many types of specifically named corporations, such as a "toll corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation." Cal. Pub. Util. Code § 216 (a)(1). Absent are *railroad corporations*. The same is true of limitations on the CPUC's exclusive governing authority, which applies to private corporations involved in "the *transportation* of people or property . . . and *common carriers*, [which] are *public utilities*." Cal. Const., art. XII, § 3 (italics added). Further, railroads are specifically defined as all manner of rail, tracks, property, equipment, facilities, etc. ***for public use in the <u>transportation</u> of persons or property.*** Cal. Pub. Util. Code § 229. As the *St. Helena* Court concluded as to the Wine Train, and the CPUC as to the Skunk Train, neither provides <u>*transportation*</u> nor is a <u>*common carrier*</u>.

MR cites to Public Utilities Code Section 211 for its claim that it is a public utility -- contrary to the PUC's findings, but Section 211 supports the City. Section 211 establishes that common carriers are only those entities providing ***transportation***. Since the CPUC has already found that MR does not provide *transportation*, it is not a common carrier and thus is not a public utility. Railroad corporations are included within Section 211 only to the extent they provide *transportation*, which MR does not. The CPUC has already made this finding. Thus, under Section 211 and the CPUC's findings, MR does not provide ***transportation***, it is not a ***common carrier***, and is **not *a public utility.***

Further, the *St. Helena* Court made clear that what services a train might wish to provide in the future does not matter. In *St. Helena*, the Wine Train argued it could or intended to provide stops and connections to buses and other wineries and points of interest, but this was insufficient. *Id.* at 799. In fact, the Court noted the CPUC's dissenting opinion "recognized the Commission

maintained ample jurisdiction in the eventuality that the Wine Train began providing bona fide passenger service in the future." *Id.* at 800. The *St. Helena* Court found that "[t]he fact that the Wine Train could provide transportation in the future does not entitle it to public utility status now." *Id.* at 803. Mere 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 does *now* do so, and it cannot maintain that status based on intentions or future proclamations. *Id.* at 803.

Indeed, the *St. Helena* Court rejected common carrier status, finding transportation, or public utility status based on stops along the train's line, since this "would be incidental to the sightseeing service[s]," and "sightseeing is not a public utility function." *Id.* The Court also noted that nothing "preclude[d] the Wine Train from applying for public utility status" if, in the *future*, services changed.

MR's primary "authority" for its assertion that – despite the CPUC's opinion to the contrary, it somehow has public utility status, appears to be a listing of MR on the CPUC's website. First, this purported evidence is improper and inadmissible. *See* Objections to Request for Judicial Notice and Evidence, concurrently filed herewith. Second, even assuming *arguendo* the Court were to consider a mere listing as somehow authoritative or proper – which it is not, that list establishes at most that MR is a "railroad," which does *not* establish it is a *public utility*, which it is not as set forth above. The mere identification as a "railroad" cannot supersede the CPUC's *opinion* discussed above, which is directly contrary as to MR's actual status as a non-public utility, and *St. Helena* which is in accord.

V. INJUNCTIVE RELIEF IS PROPER, NOT SUBJECT TO DEMURRER AND NOT *A SEPARATE CAUSE OF ACTION.*

MR's claims against the City's requested injunctive relief are simply frivolous. The City's complaint does not state any separate cause of action for injunctive relief, and it is thus not properly subject to demurrer. Notably, the City does not assert any "cause of action" for injunctive relief. Further, such relief is most certainly within the Court's authority as to a declaratory relief cause of action, as appropriate. *See James v. Hall*, 88 Cal. App. 528, 535 (1928) (noting injunctive relief can be "ancillary" to declaratory relief and "expressly provided for" within such claim); *Staley v. Board of Med. Exam'rs*, 109 Cal. App. 2d 1, 6 (1952) (quoting *Knox v. Wolfe*, 73 Cal. App. 2d 494, 505 (1946) ("declaratory and coercive or executory relief may be granted in the same action"; "[f]uture rights

may be determined" as part of court's "jurisdiction of the equitable controversy") (internal citations omitted); *Holley v. Hunt*, 13 Cal. App. 2d 335, 337 (1936) (proper for both declaratory and injunctive relief, as appropriate, to be granted); *Hollenbeck Lodge (486) I.O.O.F. v. Wilshire Blvd. Temple*, 175 Cal. App. 2d 469, 476 (1959) ("declaratory and coercive relief may be granted in the same action"; equity court has "coextensive" authority to determine rights and "enforce its decrees"). There is no basis for demurrer due to allegedly improper *relief* requested in a complaint. *See infra*, Part VII. Indeed, an injunction is properly granted as to local regulation violations, such as building and safety. *IT Corp. v. County of Imperial*, 35 Cal. 3d 63, 70 (1983) (public harm "presum[ed]" for "statutory violation").

VI. <u>LOCAL RULES NOT INTERFERING WITH INTERSTATE COMMERCE ARE NOT SUBJECT TO FEDERAL PREEMPTION, AND NOT FOR DEMURRER.</u>

MR is simply wrong that federal law somehow preempts all local regulation of its activities or facilities. MR 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. Although "Congress' authority under the Commerce Clause to regulate the railroads is well established . . . railroad activity of a *local concern*, which is not regulated by federal legislation, and *does not seriously interfere with interstate commerce*, may be regulated by the states under the *police powers reserved* by the federal Constitution." *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1066 (2000) (italics added). In fact, in *Jones*, the Court found that nuisance claims against the railroad were proper, because "state court adjudication . . . *will not result in an undue burden on interstate commerce*." *Id.* (italics added). The claim that ICC (STB predecessor) regulatory authority is *exclusive* of local regulation was rejected in *State ex rel. Okla. Corp. Comm'n v. Burlington N.*, 24 P.3d 368, 371 (2000) (italics added), which found Congress did not preempt local police power "in the absence of evidence that such a requirement has a *significant economic impact on the railroad's operation*." *See also*, Cal. Const., art. XI § 7 (city can "enforce . . . all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.")

At issue in *Burlington* was a local agency's ability to regulate a railroad's fence, even though it was recognized to be railroad "facilities" which are generally subject to federal regulatory authority. The *Burlington* Court noted that "'[u]nless it is the clear and manifest purpose of Congress, whether express or implied, to substitute its law for that of the states, a presumption against pre-emption is

employed out of respect for federalism and to give effect to the historic role of the states as the *primary regulators of matters of health and safety*.'" *Id.* Indeed, "pre-emption cases start with the assumption that the historic police powers of the States were not to be superseded." *Id.* (internal quotations omitted) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)). Specifically, primary federal regulatory authority of railroads is "economic." *Id.* To the point here, there is *no* preemption of local authority if there is no interference with "*interstate* rail operations," as here. The New Jersey Supreme Court noted that "it will be the rare situation when fairly enforced fire, health, plumbing, safety, or construction regulations interfere with a railroad's operations.'" *Id.* (quoting *Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.*, 750 A.2d 57, 66 (N.J. 2000). The *Burlington* Court found that local regulations imposed on a railroad were shown to have no likely impact on operations and would not unreasonably burden interstate commerce. *Id.* This is the standard for preemption, and it most certainly is not an *unlimited* preemption, or even so broad as to foreclose the type of valid local regulatory authority sought to be enforced by the City here. The STB has noted that "state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." *Maumee & Western RR Corp. and RMW Ventures -- Petition for Decl. Order* (STB Finance Docket 34354, March 2, 2004). STB recognizes:

> there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, . . . a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged . . . [by] a railroad . . . [or] [a] railroad that violated a local ordinance involving the dumping of waste . . . . The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Cities of Auburn and Kent, WA--Petition for Decl. Order--Burlington Northern RR Co. --Stampede Pass Line, STB Finance Docket 33200, 1997 STB LEXIS 143, *19-20, 2 S.T.B. 330 (1997). STB further noted: "Federal preemption does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not ***interfere with interstate rail operations***, and localities retain certain police powers to protect public health and safety." *Maumee & Western RR Corp. and RMW Ventures, LLC -- Petition for Decl. Order*, STB Finance Docket 34354, 2004 STB LEXIS 140, *3 (2004) (emphasis added). Perhaps

most importantly, the STB has acknowledged that *courts* may decide these issues: "Questions of federal preemption . . . can be decided by the Board *or the courts*." *Norfolk Southern Railway Co.--Petition for Decl. Order*, Docket FD 35950, 2016 STB LEXIS 61, *9 (2016) (emphasis added).

Indeed, local zoning regulations, "[t]o the extent . . . [the] restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA, but ***only if*** "a particular land use restriction *interferes with interstate commerce* [which] is a *fact-bound* question." *Borough of Riverdale Petition for Decl. Order the New York Susquehanna and Western Railway Corp.*, STB Finance Docket 33466, 1999 STB LEXIS 531, 4 S.T.B. 380 (1999) (italics added). Also, "state and local government entities . . . retain certain police powers . . . to protect public health and safety, [but] their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening *interstate commerce*." *Id.* (italics added). Further, "*interstate* railroads . . . are not exempt from certain local fire, health, safety and construction regulations and inspections"; "local entities can enforce in a non-discriminatory manner electrical and building codes, or fire and plumbing regulations, so long as they do not . . . requir[e] . . . permits as a prerequisite to the construction or improvement of railroad facilities." *Id.* This means that, as to *interstate* railroads, local governmental entities retain some local authority, and such health, safety and zoning regulation as to these railroads is *not* wholesale *preempted* in the manner suggested by MR. And, this, course, says nothing of local regulatory authority as to *intra*state rail lines like MR.

In addition, as noted above, this is simply not a proper issue for demurrer. In fact, "[t]he STB has held that, to decide whether a state regulation is preempted requires a *factual assessment* of whether that action would have the effect of *preventing or unreasonably interfering with railroad transportation*." *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007) (quotations omitted) (italics added). And, preemption is an affirmative defense, for which MR has the burden of production. *Id.* at 1133-1134 (finding error granting summary judgment where railroad failed to meet preemption burden with sufficient evidence). In fact, the *Emerson* Court found it could "not agree that any state or local regulation of such maintenance or disposal . . . is necessarily preempted," since there was no "clear indication of what actions by the Railroad could have prevented the previous flooding and what would be required of the Railroad at this time to remedy the situation"; thus, there

was no sufficient showing of unreasonable interference with railroad transportation. *Id.* at 1134. At issue in *Emerson* were public nuisance claims and local laws, similar to matters here; the railroad discarded ties in a drainage ditch, but STB authority was found only to relate to "*transportation*,'" "not . . . everything touching on railroads" – just "movement of passengers or property." *Id.* at 1129 (italics added). Federal authority did not reach alleged acts, nor "expressly preempt . . . applicable state common law governing . . . disposal of waste and [ditch] maintenance." *Id.* at 1130.

Thus, the activities of MR not relating to *transportation* or interstate operations, such as MR's refusal to allow the City Building Inspector to inspect the roundhouse for building safety, or MR's refusal to obtain a permit regulating noise as to a special event, and other activities or violations not detailed in the Complaint but subject to proof and evidentiary hearing, are, or at least may be, valid local regulations, but cannot be discarded on demurrer. (Complaint, at ¶ 12.) Indeed, MR has, since the filing of the Complaint in this matter, refused inspection on its property by the County Health Department as to alleged hazardous or other regulated waste potentially impacting health and safety on its property; thus, MR's activities and actions subject to local regulatory authority continue and are subject to demonstration by evidentiary proceedings, not summarily by demurrer. The specific matters about which MR may be subject to regulation, and which are not all in the Complaint – nor are they required to be, are matters subject to proof to this Court; the City must be afforded the opportunity to put forth particular facts, violations, and the specific nature of its regulatory authority by proper evidentiary hearing, not a fact motion, posing as a demurrer. The on-going party disputes deserve this Court's substantive review and decision, as to the extent of permissible local regulation and enforcement outside federal preemption. The City has the right to present such evidence, and to have this Court determine the specific nature of permissible local regulatory authority *not* preempted, which cannot be done by Demurrer. MR's Demurrer seeks to impermissibly obtain a premature and overbroad decision of this Court that the City is preempted in all instances as to any local regulations, and as to all MR activities, whether relating to railroad transportation, interstate commerce, or movement of passengers. No preemption is so broad or sweeping, nor can be decided by demurrer.

Moreover, the STB's authority does *not* reach MR's services at issue here – which are merely *intra*state excursion services. The ICC previously found that MR's train services between Fort Bragg

and Willits, back in 1986 (which services are even more limited now, due to the elimination of through-service between Fort Bragg and Willits) was a "majority of . . . tourists." *Mendocino Coast Railway, Inc. Discontinuance of Train Service in Mendocino County, CA*, 1986 ICC LEXIS 188, Docket No. 30820 (Aug. 15, 1986). In later proceedings, the ICC confirmed MR's services were "purely intrastate." *Mendocino Coast Railway Discont. of Train Service in Mendo. County, CA*, 1986 ICC LEXIS 72, Docket 30820 (Nov. 12, 1986), dissenting opinion, Commissioner Lamboley.[2] Although the ICC had also concluded it had jurisdiction over intrastate passenger operations, this decision was recognized, in a later opinion, to have been overruled by the opinion in *Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989). *Napa Valley Wine Train Petition for Decl. Order*, 7 I.C.C.2d 954, Finance Docket 31156 (July 18, 1991). Critically, the *Wine Train* opinion is directly instructive here. ICC found that there must be a "sufficient nexus" between interstate and intrastate operations, in order for it to have regulatory authority. *Id.* *12. It had to "distinguish[] purely local lines" from those "part of the national rail system," and its authority did not reach to passenger or freight service that "was purely intrastate in nature." *Id.* *13. The ICC rejected the significance of the train's *plan* to provide through service and ticketing with Amtrak or Greyhound buses. *Id.* *15. What mattered was that it did not "currently" have "through ticketing with Amtrak." *Id.* *15-16. The ICC was not persuaded by the "attempt by Wine Train to masquerade as an interstate operation to avoid legitimate State and local regulation." *Id.* *16. The ICC also did not find future connections important because it would be too cumbersome, would require a separate ticket, and no traveler would practically utilize this manner of inconvenient travel for any substantial means of interstate travel. *Id.* * 16, 20. Further, the Wine Train's present passenger services were "designed to be a tourist excursion[,] . . . not as an interstate passenger service." Even the "disembark[ing]" of passengers along the line did not transform services into *interstate* transportation. *Id.* *19 (italics added). The ICC rejected claims as to the train's minimal "interstate freight operations," since such services "ha[d] not been large." *Id.* *22. Primarily scenic passenger services simply were *not* subject to its authority, *despite* ancillary freight services. *Id.* *23-25. Also, "projections" about future increased freight were also insufficient, especially "before any actual

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[2] These proceedings were withdrawn when MR's predecessor, CWRR, bought the lines. *Mendocino Coast Railway Discont. of Train Service in Mend. County, CA*, 1987 ICC LEXIS 394, Docket 30820 (Mar. 18, 1987).

1 operation had begun" and when current passenger services were "essentially local" and freight
2 services were minimal. *Id.* *27-28. ICC found, for all these reasons – equally applicable to MR, that
3 excursion/tourist *intrastate* "passenger operations are not subject to the [federal] jurisdiction." *Id.* *32.
4 Indeed, the Railroad Retirement Board ("Board") has also specifically found that MR does *not*
5 provide interstate transportation services subject to STB authority, because MR's "passengers are
6 transported solely within one state." B.C.D. 06-42.1 (Sept. 26, 2006) (*See also,*
7 *https://secure.rrb.gov/blaw/bcd/bcd06-42.asp*; *https://secure.rrb.gov/pdf/bcd/bcd06-42.pdf*). In finding MR
8 was not an employer under the Railroad Retirement Act, the Board found MR's service is only as "a
9 tourist or excursion railroad operated solely for recreational and amusement purposes." *Id.* Further,
10 the Board concluded that MR "does not and cannot now operate in interstate commerce," based on
11 its finding that "the Skunk Train [ ] operates a round-trip excursion train from Fort Bragg to
12 Northspur, and from Willits to Crowley (Northspur and Crowley are turning points)," and that MR's
13 line
14
15 > connects to another railway line over which there has been no service for approximately ten years. Structural problems and bridge problems on the line will prevent service for some time to come. Since [MR's] only access to the railroad system is over this line, that access is currently unusable. [MR's] ability to perform common carrier service is thus limited to the movement of goods between points on its own line, a service it does not perform.
16
17
18 *Id.* These findings are consistent with all of the authorities above, which equally lead to the
19 unavoidable conclusion that various agencies have already concluded MR does not conduct common
20 carrier or interstate transportation services over which there is STB authority or preemption, and
21 even if it could in the future, that does not translate into federal regulation now.
22 **VII. <u>MR'S CHALLENGE TO THE SCOPE OF INJUNCTIVE RELIEF REQUESTED</u>**
23 **<u>IS A WHOLLY IMPROPER GROUND FOR DEMURRER</u>.**
24 Objections to the prayer of a complaint cannot be taken by demurrer. *Grisingher v. Shaeffer*, 25
25 Cal. App. 2d 5, 9 (1938). Thus, since "a demurrer does not lie to the prayer," MR's demurrer on this
26 basis is invalid. *Hoffman v. Pac. Coast Constr. Co.*, 37 Cal. App. 125, 130 (1918). Further, a prayer is
27 often subject to modification and "may be amended to conform to the proofs at the trial." *Id.* at 132.
28

The Court of Appeal has found that "[a] demurrer is not the appropriate vehicle to challenge . . . an improper remedy. *Caliber Bodyworks v. Superior Court*, 134 Cal. App. 4th 365, 384-85 (2005), disapproved on other grounds *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 198 (2019) (citing *Kong v. City of Hawaiian Gardens Red. Ag.,* 108 Cal. App. 4th 1028, 1047 (2002) ("demurrer cannot . . . be sustained . . . to a particular type of damage or remedy"). *See also Venice Town Council v. City of L.A.*, 47 Cal. App. 4th 1547, 1562 (1996) ("demurrer tests . . . factual allegations . . . [not] relief . . . in the prayer").

Therefore, it would be premature and improper to grant MR's demurrer merely because, as it claims, a portion of the relief requested might be beyond the Court's jurisdiction. In other words, as set forth above, the City retains -- at very least, some local regulatory authority over MR as to health and safety matters. As such, some injunctive relief may be warranted and proper, and the extent to which MR can be held to particular local regulations is a matter of *proof*, and demurrer is not proper.

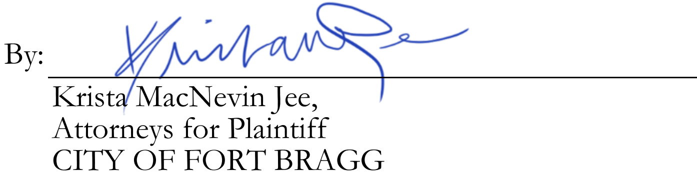
Simply, MR's demurrer is wholly improper as to its claim that injunctive relief is too broad and may not be granted as to *all* City regulations or regulatory authority. Indeed, the ultimate scope of any injunction granted can be tailored to the Court's legal and factual findings; the fact that the Court may issue a more limited injunctive order in the end is no reason to dismiss the Complaint in its entirety. In fact, as to affirmative defenses such as preemption, they "must appear clearly and affirmatively"; if not, "there is no ground for general demurrer. The proper remedy is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment." *Roman v. County of Los Angeles*, 85 Cal. App. 4th 316, 324-25 (2000) (internal quotations, omissions and citations omitted). Where there are "ambiguities and conflicting allegations," then it is "error to sustain" a demurrer. *Id.* at 325. And, even assuming *arguendo* the Court found some valid basis for demurrer, the City would at least be entitled to leave to amend; "[i]t is an abuse of discretion to deny leave to amend if there is a *reasonable possibility* that the pleading can be cured by amendment." *Id.* at 322 (italics added) (citing *Goodman v. Kennedy*, 18 Cal. 3d 335, 349 (1976)). The Supreme Court has recognized that "leave to amend is properly granted where resolution of the legal issues does not foreclose the possibility that the plaintiff may supply necessary factual allegations." *City of Stockton v. Superior Court*, 42 Cal. 4th 730, 747 (2007) (internal citation omitted). If there has not yet been "an opportunity to amend . . . leave to amend is [to be] liberally allowed."

VIII. <u>CONCLUSION.</u>

For all of the foregoing reasons, the demurrer must be denied in its entirety, or in the alternative, the City must be permitted leave to amend.

Dated: February 8, 2022

JONES MAYER

By: 

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Fort Bragg v. Mendocino Railway
Case No. 21CV00850

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE) **ss.**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca 92835. On February 9, 2022, I served the foregoing document(s) described as **CITY'S OPPOSITION TO DEMURRER TO VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF,** on each interested party **listed below**/on the attached service list.

Paul J. Beard, II
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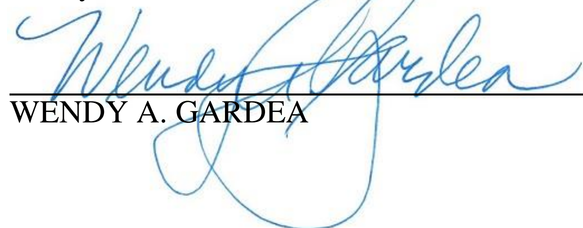
___ (VIA MAIL) I placed the envelope for collection and mailing, following the ordinary business practices.

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

XX (VIA ELECTRONIC SERVICE) By electronically transmitting the document(s) listed above to the e-mail address(es) of the person(s) set forth above. The transmission was reported as complete and without error. See Rules of Court, Rule 2.251.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 9, 2022 at Fullerton, California.



WENDY A. GARDEA