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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MENDOCINO

MENDOCINO RAILWAY, Plaintiff, v. JOHN MEYER; REDWOOD EMPIRE TITLE COMPANY OF MENDOCINO COUNTY; SHEPPARD INVESTMENTS; MARYELLEN SHEPPARD; MENDOCINO COUNTY TREASURER-TAX COLLECTOR; All other persons unknown claiming an interest in the property; and DOES 1 through 100, inclusive, Defendants.	Case No. SCUK-CVED-2020-74939 [APN 038-180-53] **(Assigned to Hon. Jeanine B. Nadel)** **PLAINTIFF MENDOCINO RAILWAY'S OPPOSITION TO DEFENDANT JOHN MEYER'S MOTION FOR AWARD OF ATTORNEY FEES AND COSTS; DECLARATION OF GLENN L. BLOCK IN SUPPORT THEREOF** **Hearing** Date: August 18, 2023 Time: 9:30 a.m. Dept.: E

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INTRODUCTION

While plaintiff Mendocino Railway disagrees with the Court's ruling denying plaintiff the right to exercise eminent domain in this case, plaintiff concedes that given the Court's ruling, Cal. Code Civ. Proc. §1268.610 authorizes the Court to award defendant's litigation expenses including attorneys' fees. Here, however, defendant seeks recovery of unreasonably excessive and improper attorneys' fee amounts, including fees that were unnecessarily incurred because of defendant's own actions. And, as a procedural matter, defendant failed to seek recovery of attorneys' fees in the manner specified by statute. Thus, if the Court finds that defendant is entitled to recover attorneys' fees despite the procedural defect, defendant is entitled to a maximum attorneys' fee award of $167,077.74.

Defendant's claimed attorneys' fees of $399,296.25, applying a 1.5x positive lodestar "enhancement," are unreasonably excessive and include improper amounts. First, defendant's lodestar attorneys' fee figure of $266,197.50 should be reduced to eliminate improper amounts, including: $8,535 for secretarial tasks; $1,750 in undefined "fees for time billed at zero dollars on various dates"—*for which defendant was never actually charged*—and, $8,945 in duplicative charges. (Declaration of Glenn Block (hereinafter, "Block Decl."), ¶¶2–5).

Defendant's lodestar figure should also be reduced further to eliminate unreasonably excessive amounts for unnecessary and inefficient litigation. Cal. Code Civ. Proc. §1260.110 allowed defendant to limit this case to its right to take challenge, bifurcating and obtaining an expeditious determination on that issue before proceeding to address any valuation issues. Availing himself of this straightforward and typical statutory eminent domain procedure would have dramatically reduced the costs and time required. Instead, defendant chose *during the first 1½ years of this case* to bypass this option entirely and to instead focus solely on litigating valuation.[1] (Block Decl., ¶¶7

[1] Defendant did not serve any discovery requests prior to the statutory pre-trial exchange of appraisals or otherwise pursue its right to take objections. Defendant only sought the

–8). Because of this choice, defendant's lodestar amount includes $68,040 in unreasonable and excessive (and unnecessary) attorneys' fees.

Additionally, defendant's lodestar figure includes more than $28,000—*more than 80 hours*—for drafting this unnecessary motion for attorney's fees. (Block Decl, ¶6). Not only was that effort completely unnecessary, insofar as the proper method of seeking attorneys' fees is by simply filing a cost bill, not a motion (Cal. Code Civ. Proc. §1268.610(d)), but the amount of time claimed is excessive on its face by a factor of about three times.

Defendant also seeks an unwarranted positive lodestar multiplier of 1.5x. A positive lodestar multiplier is unwarranted in this case because the lodestar amount already compensates defendant for any skill or complexity factors, to the extent such factors are present here. Ketchum v. Moses (2001) 24 Cal.4th 1122, 1138. Defendant failed to meet his burden to establish the presence of any of the factors that might justify a positive lodestar multiplier. However, there are factors present here that could justify a *negative* lodestar multiplier because: (i) defendant's counsel acknowledges he lacked familiarity with eminent domain law; (ii) defendant's key successful argument at trial—that Mendocino was not a public utility common carrier railroad—followed a roadmap set by other attorneys in another case; and, (iii) defendant failed to avail himself of the typical eminent domain procedure for expeditious resolution of a right to take challenge. Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal.App.4th 140, 160 – 161. (Block Decl, ¶¶9–11)

Taking these factors together, as discussed further below, defendant's claimed "lodestar" of $266,197.50 is $111,000 higher than reasonable or appropriate. Plaintiff submits the appropriate "lodestar" amount in this case is instead no more than **$155,197.50**. And, if a lodestar multiplier were to be applied here, it should be negative.

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deposition of plaintiff's person most knowledgeable when the parties were scheduling expert depositions. And it was not until several weeks after the PMK deposition that defendant first served any written discovery requests in this case.

As a procedural matter, litigation expenses are only awardable if they are claimed *in the manner authorized by the statute upon which defendant relies*. Cal. Code Civ. Proc. §1033.5(a)(10). Here, the statutory authority upon which defendant relies provides that litigation expenses, "*shall be claimed in and by a cost bill to be prepared, served, filed, and taxed as in a civil action*." Cal. Code Civ. Proc. §1268.610(d); emphasis added. While defendant filed a cost bill here (the amount of which—$11,880.24—plaintiff does not challenge), defendant's cost bill fails to include any attorneys' fees. Thus, because defendant failed to follow the statutorily mandated procedure for seeking recovery of its attorney's fees, the Court would be justified only awarding such amounts properly included in its cost bill, i.e., $11,880.24.[2]

ARGUMENT

I. DEFENDANT'S ATTORNEYS' FEES CLAIM IS EXCESSIVE. SOME OF THE CLAIMED FEES ARE NON-RECOVERABLE, SOME WERE UNNECESSARY OR EXCESSIVE, AND DEFENDANT'S REQUEST FOR A 1.5X MULTIPLIER IS UNWARRANTED.

Defendant correctly notes that the first step in determining an award of attorneys' fees is to determine the reasonable amount of time spent by the attorneys on the case, after a "careful compilation" of the time spent, multiplied by the attorneys' reasonable hourly rate. Ketchum v. Moses (2001) 24 Cal.4th 1122, 1131 – 32. The resulting figure is referred to as the "lodestar." Id. In determining the "reasonable" time spent by the attorneys, "inefficient or duplicative efforts [are] not subject to compensation," i.e., are not to be included in the "lodestar" amount. Id. at 1132. Once the "lodestar" amount is determined, the court may then consider whether an adjustment, up or down, to the lodestar amount is appropriate. Id. at 1134 ("the lodestar figure may be increased or decreased depending on a variety of factors . . ."). Per the California Supreme Court in Ketchum, supra, the fee may be adjusted, as relevant, based on "(1) the novelty and

[2] This is not only a procedural issue but goes as well to the *amount* of fees sought by defendant. As discussed further below, defendant claims *more than 80 hours* of attorney time for filing the instant motion. That time was unnecessary as the proper method of claiming fees under Code of Civil Procedure section 1268.610(d) is by way of cost bill, not motion.

difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." Id. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action." Id. Typically, fee enhancements are only awarded as to contingency fee agreements or private attorney general actions which would otherwise be economically infeasible to competent private attorneys. See, e.g., Id. at 1132 – 33.

"[T]he party seeking a fee enhancement bears the burden of proof." Id at 1138. The court should also be careful to "not consider [enhancement] factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar." Id. Likewise, it is improper to award an enhancement for the contingent nature of a fee where the fee is not contingent. Id. at 1141 – 42.

Finally, a fee enhancement should not "be imposed for the purpose of punishing the losing party." Id. at 1139.

Here, while plaintiff does not challenge defendant's attorneys' hourly rate as facially unreasonable, defendant's billings reveal a number of items that are either non-recoverable as a matter of law, are excessive, or were unnecessary. Defendant's "lodestar" is thus overstated. And as discussed further below, defendant's request for a 1.5x positive multiplier is unwarranted. To the extent a multiplier may be warranted here, the factors present in this case support application of a negative multiplier.

A. Defendant's "Lodestar" Amount is Overstated by $115,332.50.

1. Secretarial Tasks Are Not Recoverable as Part of Attorneys' Fees and, As Such, Must Be Deducted from the Lodestar Amount.

Defendant's bills submitted in support of his motion show 56 separate entries from apparent non-attorneys billing for clearly secretarial and clerical activities such as making copies, collating documents in binders, calendaring, and submitting documents

for filing through the court's e-portal. (Block Decl., ¶3). While these entries are for as little as $15, they add up to $8,535 billed for secretarial and clerical activities.

Secretarial and clerical activities have been held to be non-recoverable as part of attorneys' fees. See, e.g., Mohamed v. Barr (2022) 562 F.Supp.3d 1128, 1136 – 37 (U.S. Dist. Ct., E.D. Calif.) [specifically identifying creating indexes; filing; updating the case calendar; copying, scanning, and faxing; and, filing or serving documents as non-recoverable tasks]. The activities described in Mohamed, supra, are precisely the activities described in 56 of defendant's billing records, adding up to $8,535. Thus, the sum of **$8,535** should be removed from the "lodestar" calculation.

2. Improper and Duplicative Amounts Should be Deducted from the Lodestar Amount.

As noted previously, calculation of the lodestar requires a "careful compilation of the time spent." Id. at 1131. The very last entry in defendant's bills shows an apparent catch-all item titled "Fees for time billed at zero dollars on various dates" in the amount of $1,750, with no explanation as to what these items are, who billed them, how many hours were spent, or why they are now included when defendant's counsel obviously previously decided they should not be billed to his client. (Block Decl., ¶4). This hardly amounts to a "careful compilation" of time spent. Ketchum, supra, 1131 – 32. These charges are patently inappropriate and, by their own description, were not fees charged to defendant. Thus, **$1,750** should be removed from the "lodestar" calculation.

Similarly, on the second to the last page of defendant's bills, there are several entries for "opening balance" for several individuals. These entries do not have any hour amounts or any other description. (Block Decl., ¶5). Thus, it appears that these amounts are duplicative of other entries and improperly included in defendant's attorneys' fees figure. Thus, **$8,945** should also be removed from the "lodestar" calculation.

3. A Significant Portion of Defendant's Counsel's Time Was Unnecessary as Defendant's Counsel Focused on Compensation Throughout the Litigation and Only Raised the Right to Take Challenge on Which He Prevailed at the Eleventh Hour; The Lodestar Should be Reduced for This Reason as Well.

As noted previously, only time "reasonabl[y]" spent may be considered in determining the lodestar amount; "inefficient" time is to be excluded. Ketchum, supra, 24 Cal.4th at 1132.

Here, a significant portion of defendant's fees could have been avoided had defendant focused on his right to take challenges at the outset and availed himself of the statutory procedure provided in Code of Civil Procedure section 1260.110 for an early resolution of his right to take objections. See, Cal. Civ. Proc. Code § 1260.110.

Instead, defendant's counsel focused solely on the valuation issue for the first 1 ½ years of this case, rather than the right to take. In ¶16 of his Declaration, Defendant's counsel incorrectly contends, "In this action Meyer's legal claims all were directed at the same conduct and sought the same relief—opposing MR's illegal attempt to take Meyer's Property by eminent domain." This is not true. For the entire first 1 ½ years of this case, Defendant failed entirely to pursue these right to take objections—Defendant propounded no discovery and took no other action in furtherance of its objections. Instead, as reflected in Defendant's counsel's time records, all of Defendant's efforts related to litigating valuation. (Block Decl., ¶¶7 & 12).

Indeed, in defendant's May 2021 discovery responses regarding defendant's boilerplate affirmative defenses, defendant offered no specific facts, documents, or witnesses whatsoever in support of any of defendant's right to take challenges—responding simply, "This is a procedural defense and facts have yet to be determined at this point." Further, defendant's counsel did not disclose to either plaintiff or the court at the Case Management Conference that it intended to pursue right to take objections. (Block Decl., ¶8).

It was not until the end of March 2022—the eve of the parties' statutory pretrial exchange of appraisals—that defendant made *any* effort in furtherance of his right to take challenge. In the course of the parties coordinating the pretrial exchange of appraisals, scheduling expert depositions and scheduling mediation, defendant's counsel first informed plaintiff's counsel on March 24, 2022 that he *might* pursue a right to take

challenge and, accordingly, wished to take plaintiff's PMK deposition. It was at that point that *plaintiff* requested that the trial be bifurcated—*over defendant's counsel's initial objection*—so as to avoid even more unnecessary fees in litigating valuation pending a ruling on the right to take. (Block Decl., ¶¶13 – 14 and Exhibit 1). Defendant then still waited another 2 months, until May 2022—*after having litigated nothing but valuation for 1½ years*—to amend his Answer to assert the right to take defense he ultimately pursued and prevailed upon. (Block Decl., ¶16).

Had defendant and his counsel acted reasonably to avoid excessive fees, wasted time, and unnecessary litigation in this matter, he had a statutory remedy—commonly utilized in eminent domain cases—readily available. Specifically, Code of Civil Procedure section 1260.110 provides for an early resolution of right to take objections prior to the determination of compensation. Cal. Civ. Proc. Code §1260.110.

Yet, instead of availing himself of this commonly used remedy and seeking early resolution of the right to take, defendant's counsel chose to generate unreasonably extensive and utterly unnecessary fees litigating valuation. Indeed, even when plaintiff suggested bifurcating the case so the right to take issue could be heard first, so as to avoid further unnecessary litigation, defendant's counsel initially refused. (Block Decl., ¶14, Exhibit 1). Again, only hours "reasonabl[y]" spent are to be included as part of the lodestar; "inefficient" time is to be excluded. Ketchum, supra, 24 Cal.4th at 1132.

Here, until the end of May 2022—after the parties had completed all expert discovery on valuation and participated in both a Mandatory Settlement Conference and private mediation (which the parties agreed would be focused on valuation)—*virtually all* of the time incurred by defendant's counsel litigating compensation issues and ignoring any right to take objections was unnecessary and therefore inefficient. Review of defendant's time entries reveals that defendant's counsel billed 180.5 hours through the end of May 2022—out of a total of 717.8 hours billed through July 1, 2023. (Block Decl., ¶17).Plaintiff accordingly respectfully submits that the court should reduce the "lodestar" amount by **$63,175** (180.5 hours x $350 per hour).

4. Defendant's Counsel's Time Claimed on This Fee Motion Was Both Unnecessary and Excessive; The Lodestar Should be Reduced for This Reason as Well.

Finally, with respect to calculation of the lodestar amount, defendant's bills show that defendant's counsel claims 81.7 hours for drafting his motion for attorneys' fees. At $350 per hour, that adds up to $28,595 for drafting a motion that was completely unnecessary and, even if necessary, realistically should have taken no more than about a third of the time claimed. (Block Decl., ¶6).

As discussed earlier, *none* of the time incurred for drafting the fees motion was necessary insofar as the correct method for seeking fees under Code of Civil Procedure section 1268.610 is by way of cost bill, not motion. Cal. Code Civ. Proc. §1268.610(d). *Indeed, had defendant (1) sought his fees by way of cost bill as provided in the statute, (2) not claimed over $28,595 for drafting an unnecessary fees motion, and (3) not sought a 1.5 multiple of fees, a motion to tax may not even have been necessary.* (Block Decl., ¶18).

Even ignoring that however—and assuming some time would be necessary to challenge plaintiff's motion to tax costs *if* one were filed—the time claimed by defendant's counsel is more than three times what one would expect to see for drafting a fees motion. Thus, Defendant's request for 81.7 hours for this motion is patently excessive. See Rolex Watch USA Inc. v. Zeotec Diamonds Inc. (C.D. Cal., Aug. 24, 2021) 2021 WL 4786889, at 5 [23 hours reasonable to prepare motion for attorneys' fees and reply]; and, Smith v. Jaguar Land Rover North America, LLC (C.D. Cal., Oct. 18, 2019) 2019 WL 9047074, at 3 [11.2 hours reasonable for preparation of motion for attorneys' fees].

As the fees for filing defendant's motion were entirely unnecessary, plaintiff respectfully submits that the "lodestar" should be additionally reduced by the amount claimed for the fees motion, i.e., **$28,595**.

5. Thus, the "lodestar" should be reduced by $111,000.

Considering all four factors above warranting reduction of the "lodestar" amount, plaintiff respectfully submits that the "lodestar" should be reduced by $115,865 ($8,535 + $1,750 + $8,945 + $63,175 + $28,595 = $111,000), and that the "lodestar" amount

should therefore be reduced from the $266,197.50 sought by defendant down to **$155,197.50** ($266,197.50 - $111,000= $155,197.50).

B. Defendant's Request for a 1.5x Positive Lodestar Multiplier is Unwarranted; However, A Negative Multiplier is Supported.

As noted, once the "lodestar" amount is determined, the court may then consider whether an adjustment, up or down, to the lodestar amount is appropriate. Ketchum, supra, 24 Cal.4th at 1134. ("the lodestar figure may be increased or decreased depending on a variety of factors . . ."). The fee may be adjusted, as relevant, based on factors such as novelty and difficulty of the issues, skill, if the litigation precluded other employment, and a contingency fee agreement. Id. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action." Id. Typically, fee enhancements are awarded only in the case of contingency fee agreements and in private attorney general actions. See, e.g., Id. at 1132 – 33.

"[T]he party seeking a fee enhancement bears the burden of proof." Id at 1138; emphasis added. And a trial court "should not consider [enhancement] factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar." Id. Likewise, it is improper to award an enhancement for the contingent nature of a fee where the fee is not contingent. Id. at 1141 – 42. Finally, a fee enhancement should not "be imposed for the purpose of punishing the losing party." Id. at 1139.

As discussed below, defendant failed to satisfy his burden of proof justifying a positive fee multiplier. See, Id. at 1138.

1. This is Not a Contingency Case.

Defendant's counsel first suggests that he is entitled to a fee multiplier here because there was no assurance of payment and the case was thus like a contingency case. (Motion, p. 10:22 – p. 12:6). This claim is simply incorrect. A typical contingency

fee calculates attorneys' fees as a percentage of the recovery in the case. See, e.g., People ex rel. Dept. of Transportation v. Yuki (1995) 31 Cal.App.4th 1754, 1768.

Defendant's counsel offers no (appropriately redacted) contingency fee agreement, no evidence that his firm's fee was contingent in any way, nor any evidence that his firm would have waived its right to fees had it not prevailed in this action. Defendant's counsel, in fact, took no real risk of non-payment in taking this case.

To the contrary, defendant's evidence shows that this was an *hourly* fee case. Moreover, there were always sufficient funds in this case to pay defendant's counsel's attorney fees. Plaintiff offered and deposited into court the sum of $350,000 at the outset of this case. (Block, Decl., ¶19). That sum was available at any time for defendant to withdraw as a matter of law, even if he lost his right to take challenge. Cal. Code Civ. Proc. §1255.210. Defendant thus clearly had funds available to pay his attorneys' fees in this matter.

Moreover, and perhaps more significantly, once defendant decided to pursue the right to take challenge, only one of two things could happen. Either (1) defendant would prevail, in which case defendant would be entitled to recover his attorney fees per Cal. Code Civ. Proc. §1268.610; or, (2) defendant would not prevail, in which case defendant would be entitled to compensation of at least $350,000 (or as much as $1,055,000 as claimed by defendant). In either case, more than sufficient funds to cover defendant's attorneys' fees. There simply was no risk, as both a practical and legal matter, of defendant's counsel not getting paid.

Defendant's counsel's attempt to characterize this as equivalent to a contingency case warranting a fee multiplier is thus misplaced. Defendant has not met his burden of proof to justify a multiplier on the grounds of the case being contingent. This simply was not a contingency case.

2. The "Novelty, Difficulty and Complexity" of the Action Do Not Warrant a Positive Lodestar Multiplier Here; Even If Those Factors Were Present, They are Already Included in the "Lodestar" Calculation. If Anything, these Factors Support Application of a Negative Multiplier.

Defendant's counsel next suggests that he is entitled to a multiplier of his actual fees because of the novelty, difficulty and complexity of this action and because of his own skill in pursuing this action. This claim too is misplaced. This is a typical eminent domain case and has not been deemed complex.

As the California Supreme Court warned in the Ketchum case, supra, these factors are generally already factored into the "lodestar" calculation and are thus very susceptible to double counting. Id. at 1138. As stated by the Court there: "for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar." Id. In other words, to the extent that the case had novel, difficult, or complex issues, that time would already be accounted for in the "lodestar" figure since more complex issues typically take more time to litigate.

It is worthy of note here that defendant's counsel was essentially handed a road map by counsel for the City of Fort Bragg and the already favorable legal ruling the City had received there. (Block Decl., ¶¶10–11). This is thus not a case in which defendant's counsel devised a novel legal theory to achieve success. Instead, defendant's counsel simply coopted the arguments of the City of Fort Bragg, and favorable ruling, before even pursuing his right to take challenge on essentially the same grounds.[3] Moreover, Defendant's counsel acknowledges in his Declaration he lacked familiarity with eminent domain law. (Johnson Declaration, ¶14). And, Defendant's counsel's lack of familiarity with the eminent domain law is evidenced by his failure to employ the statutory procedure (Cal. Code Civ. Proc. §1260.110) for an early and expeditious, and more efficient, resolution of defendant's right to take objections. This is a typical procedure knowledgeable eminent domain counsel would have utilized. As noted above, this would have avoided nearly 200 hours of unnecessary time litigating valuation.

[3] Defendant's counsel's time records reveal that he reviewed City of Fort Bragg documents on April 16 and 18, 2022 and thereafter reviewed and did legal research regarding "eminent domain taking" and "railroad law." These are the first time entries that note any efforts related to Defendant's right to take objections. (Block Decl., ¶10).

Thus, these factors—defendant's counsel following the roadmap set out by the City of Fort Bragg's counsel, his lack of familiarity with the eminent domain law, and failure to avail himself of the more efficient statutory remedy for resolution of the right to take objections—establish that a negative lodestar multiplier is justified.

There simply is no basis for a positive multiplier here. Defendant again has not met his burden of proof on this issue. However, application of a negative multiplier is supported.

3. Defendant Offers No Evidence of Lost Opportunities Due to this Litigation.

Defendant's counsel next suggests that he is entitled to a fee multiplier because his firm allegedly could have taken "several new cases." (Motion, p. 13, lns. 6 – 7). Defendant's counsel offers no evidence as to what these cases were or that they would have been more lucrative to defendant's counsel's firm than the instant case had they been taken. Defendant's counsel simply refers to his own conclusory statement in his own declaration that "this litigation prevented Johnson from taking several new cases." (Johnson Decl., para.22, p. 6, lns. 15 – 17).

Defendant's counsel's time records indicate this case did not prevent defendant's counsel from taking other work. Over the course of more than 2½ years of litigation, defendant's counsel only devoted more than 50 hours per month to this case five times. Except for August 2022, during trial when this case may have consumed much of defendant's counsel's work, even in the other 4 months noted above, defendant's counsel had sufficient available time to work on other matters. (Block Decl., ¶¶20–21). Moreover, Plaintiff's counsel was not deprived of other work while working on this one and was able to handle other cases and take on new cases. (Block Decl., ¶22).

Defendant's counsel's conclusory statement—with no evidence of what these alleged cases were, or any evidence that they might have been more lucrative than the instant case—hardly amounts to satisfying defendant's burden of proof justifying a fee multiple. Moreover, defendant's counsel's own time records reveal that this case could not have materially precluded any other opportunities.

4. This is Not a Private Attorney General Case.

Defendant's counsel finally attempts to justify receiving multiple of his actual fees by inexplicably relying on private attorney general cases. Coalition for L.A. County Planning v. Board of Supervisors (1977) 76 Cal.App.3d 241, upon which defendant relies, was literally an action brought by public interest groups regarding a county's land use plan for the benefit of the public. Id. at 244. The court there held that to award fees in that instance required that the action "be commenced and maintained as a *representative* action." Id. at 248; emphasis in original. That case simply bears no resemblance to this case. This action was not commenced or maintained by defendant as a representative action on behalf of others. Instead, this was an eminent domain action against defendant, which defendant litigated for his own benefit.

Defendant's reliance on Amaral v. Cintas Corp. (2008) 163 Cal.App.4th 1157 is likewise misplaced. That case involved attorneys' fees awarded in a *class action* with broad benefits to a large number of individuals. Again, the instant case was not brought by defendant to pursue the rights of others—to the contrary, *defendant* litigated this matter to defend his own interests. That other entities may be interested in the outcome of this litigation is irrelevant. This action was not pursued on their behalf.

5. A Fee Multiplier May Not "be imposed for the purpose of punishing the losing party."

Finally, prominently displayed within defendant's counsel's final argument as to why the court should award it a multiple of its actual fee is the following statement:

> "[Plaintiff's] attempt to take [defendant's] private property is wrong on a moral, a constitutional and a statutory level, and luckily the court was able to prevent an injustice from occurring."

(Motion, p. 13, lns. 19 – 21).

Not only is this statement factually false and belied by both the facts and the case law, but this statement has no legal bearing on the amount of fees nor on whether a multiplier is justified. Instead, it appears to be nothing more than a transparent attempt to raise the ire of the Court and to attempt to persuade the Court to award a fee multiplier in order to punish plaintiff for its good faith belief that it was entitled to

acquire defendant's property. That, however, is legally and patently impermissible. As held by the California Supreme Court in Ketchum, supra, a fee enhancement should not "be imposed for the purpose of punishing the losing party." Ketchum, supra, 24 Cal.4th at 1139.

II. CODE OF CIVIL PROCEDURE SECTION 1268.610 IS CLEAR ON ITS FACE. LITIGATION EXPENSES "SHALL" BE SOUGHT BY WAY OF *A COST BILL*. DEFENDANT DID NOT DO SO HERE.

Attorneys' fees are only recoverable in California to the extent provided by contract or statute. Cal. Code Civ. Proc. §1033.5(a)(10). Here, there is no contract authorizing an award of attorneys' fees. There is, however, a statute authorizing such an award where, as here, the Court enters judgment denying a condemning entity the right to take. Cal. Code Civ. Proc. §1268.610.

Insofar as section 1268.610 serves as the sole statutory basis for defendant's request for attorneys' fees as "litigation expenses," the language of the statute is controlling. Subsection (d) of section 1268.610 is unambiguous as to the process for seeking litigation expenses under the statute, "*Litigation expenses under this section* ***shall*** *be claimed in and by a cost bill* to be prepared, served, filed, and taxed as in a civil action." Cal. Code Civ. Proc. §1268.610(d); emphasis added.

The statute must be read as meaning what it says; the Court may not speculate that the legislature meant something other than what the legislature specifically said. Los Angeles County v. Reid (1961) 193 Cal.App.2d 748, 752. The term "shall," as a matter of statutory construction, means "*mandatory*." People v. Standish (2006) 38 Cal.4th 858, 869. As a procedural matter, it is thus "*mandatory*" that claims for litigation expenses be included in a cost bill in order for them to be recoverable under section 1268.610. See, Miller and Starr, California Real Estate 4th – Eminent Domain, §24:78 fn. 16 ("Litigation expenses [under C.C.P. §1268.610] are claimed by a cost bill prepared, served, filed and taxed as in a civil action."). By way of example, consistent with this requirement, in the City of Oakland v. Oakland Raiders case upon which defendant erroneously relies as support for a fee multiplier, the Raiders sought their attorneys' fees by way of cost

memorandum—*not a motion*—as mandated by the statute. City of Oakland v. Oakland Raiders (1988) 203 Cal.App.3d 78, 81.

Here, defendant filed a cost bill, but that cost bill did not include attorneys' fees. Instead, defendant's cost bill seeks $11,880.24 in other costs and litigation expenses. Plaintiff does not dispute defendant's entitlement to these other amounts included in its cost bill. Plaintiff disputes entitlement only to amounts *not* included in defendant's cost bill. As a procedural matter, then, as defendant's cost bill fails to include attorneys' fees as part of its claim for litigation expenses, such fees should be denied.

CONCLUSION

As a procedural matter, insofar as defendant did not include his attorney fee claim in his cost memorandum as required by Code of Civil Procedure section 1268.610(d), defendant's litigation costs should be limited to the $11,880.24 claimed in his statutorily required cost memorandum. His claim to fees is therefore barred.

If the court chooses to overlook this procedural failing, the court should award fees of no more than $167,077.74 (attorneys' fees of $155,197.50+ costs of $11,880.24). This amount represents the utter maximum fair value of defendant's actually, reasonably, and necessarily incurred attorney's fees, after deducting those amounts which defendant improperly includes or which were unreasonably excessive or unnecessary on their face.

Defendant has not established, much less met his burden of proof, for any positive multiplier of the actual fees incurred. Thus, the award it is respectfully submitted, should be a maximum of $167,077.74. Or, the Court should further reduce this amount by a negative lodestar multiplier to account for defendant's counsel's lack of familiarity with the eminent domain law, failure to utilize the statutory procedure for early resolution of right to take objections, and defendant's counsel following the roadmap set out by the City of Fort Bragg's counsel.

Dated: August 3, 2023

CALIFORNIA EMINENT DOMAIN LAW GROUP,
a Professional Corporation

By:_____
Glenn L. Block
Attorneys for Plaintiff MENDOCINO RAILWAY

DECLARATION OF GLENN L. BLOCK

I, Glenn L. Block, declare and state that:

1. I am an attorney licensed to practice law in the state of California and am a partner of California Eminent Domain Law Group, counsel of record to Plaintiff MENDOCINO RAILWAY in the above-entitled action now pending in Mendocino Superior Court. As such, I have personal knowledge of the matters set forth herein, or has knowledge on information and belief, and could and would competently testify thereto if called as a witness.

2. Defendant's lodestar attorneys' fee figure of $266,197.50 should be reduced to eliminate improper amounts, including: $8,535 for secretarial tasks; $1,750 in undefined "fees for time billed at zero dollars on various dates"—*for which defendant was never actually charged*—and, $8,945 in duplicative charges.

3. I have reviewed Exhibit A to Mr. Johnson's Declaration in Support of Meyer's Motion for Attorney's Fees, which includes the time records for Mr. Johnson's law firm. These time records include 56 entries for clerical or secretarial tasks, for individuals with the initials RM, KR or NN. Examples of some of these entries are, "Mailing copies of discovery documents" (5/20/21); "efiling case management conference with the court. Mailing case management conference to counsel Glenn Block" (6/10/21); and, "Printed numerous documents for deposition" (April 25, 2022). All entries describe similar secretarial or clerical tasks. These entries total $8,535.

4. On the last page of Exhibit A to Mr. Johnson's Declaration, there is an entry on June 20, 2023 for "Fees for time billed at zero dollars on various dates for $1,750. There is no explanation as to what these items are, who billed them, how many hours were spent, or why they are now included when defendant's counsel obviously previously decided they should not be billed to his client.

5. On the second to the last page of Exhibit A of Mr. Johnson's Declaration, there are 4 entries on June 6, 2023 with the description "Opening balance for …" for Mr. Johnson and 3 other individuals. These entries total $8,945. It appears that these

entries are duplicative of other entries and improperly included in defendant's attorneys' fee figure.

6. In Exhibit A to Mr. Johnson's Declaration, I identified seventeen (17) entries related to this motion for attorneys' fees. The first entry is on April 20, 2023 and continue thereafter in April, May and June 2023. These entries total 81.7 hours and $28,595.

7. For the first 1 ½ years of this case (from September 2020 when Mendocino Railway first contacted Mr. Meyer and indicated its interest in purchasing the property, through March 2022), defendant's efforts in this litigation were focused solely on valuation. Although defendant raised boilerplate right to take objections in his Answer, defendant conducted no discovery at all during this period – no written discovery requests were propounded by defendant, and defendant did not notice any depositions. However, through this period the parties exchanged several offers/counter-offers for plaintiff's purchase of defendant's property.

8. In March 2021, plaintiff propounded written discovery to defendant, including Special Interrogatories, Requests for Production of Documents and Form Interrogatories. In addition to seeking information and documents related to defendant's claims for compensation, plaintiff sought information and documents related to defendant's right to take objections/affirmative defenses. In his May 20, 2021 verified responses to Form Interrogatory No. 15.1, seeking information, documents and witnesses supporting defendant's thirteen affirmative defenses, defendant merely offered boilerplate responses asserting that plaintiff failed to state sufficient facts in the complaint, and, "This is a procedural defense and facts have yet to be determined to this point."

9. In ¶14 of his Declaration, Mr. Johnson acknowledges his lack of familiarity with the eminent domain law stating, "Meyer's counsel had to review, analyze, and *become familiar with*, the relevant eminent domain and railroad related case law and statutory authorities."

10. In reviewing Mr. Johnson's time records in Exhibit A to his Declaration, there is an entry on April 16, 2022 for "Reviewed City of Fort Bragg court documents," and similarly on April 18, 2022 for "Reviewed City of Fort Bragg litigation and related court documents." Thereafter, on April 19, Mr. Johnson has an entry for, "Reviewed legal issues regarding railroad law and eminent domain taking." This is the first entry in Mr. Johnson's records that describes any tasks related to Meyer's right to take challenge or objections.

11. Mr. Johnson's first entry describing his review of the right to take issues and law did not occur until April 19, 2022, and took place immediately *after* his review of the documents in the Fort Bragg litigation against Mendocino Railway. Clearly, defendant's counsel was following Fort Bragg's lead and roadmap in pursuing his right to take objections. Shortly thereafter, on April 28, 2022, the Court overruled Mendocino Railway's demurrer to Fort Bragg's declaratory relief complaint, a favorable ruling referencing authorities related to Mendocino Railway's public utility common carrier status. Defendant proceeded to coopt these arguments and Fort Bragg's favorable ruling, in pursuing his right to take challenge.

12. In ¶16 of Mr. Johnson's Declaration, he incorrectly states, "In this action Meyer's legal claims all were directed at the same conduct and sought the same relief—opposing MR's illegal attempt to take Meyer's Property by eminent domain." As set forth in ¶7 above, this is not true. For the entire first 1 ½ years of this case, defendant failed entirely to pursue these right to take objections—defendant propounded no discovery and took no other action in furtherance of its objections. Instead, as reflected in defendant's counsel's time records, all of defendant's efforts related to litigating valuation.

13. In late March 2022, I reached out to Mr. Johnson to coordinate pre-scheduling expert depositions for a date shortly after the parties' April 12, 2022 statutory pre-trial exchange of appraisal, and to discuss scheduling of mediation vis a vis the scheduled Mandatory Settlement Conference. I followed up our telephone

conversation with an email. In response to my email, Mr. Johnson advised that he wanted to schedule a deposition of plaintiff's PMK as well as the expert depositions. This was the first time that defendant had indicated it intended to pursue right to take objections (although boilerplate objections had been asserted in his answer). Attached hereto as Exhibit 1 is a true and correct copy of the chain of email correspondence I had with Mr. Johnson between March 22, 2022 and March 30, 2022.

14. In our correspondence reflected in Exhibit 1, immediately upon learning that defendant might pursue his right to take objections, I advised Mr. Johnson that plaintiff would seek to bifurcate and specially set the right to take issue for trial as soon as possible in advance of the compensation trial. Mr. Johnson responded that his client would object to bifurcation and setting of a right to take trial.

15. Up until this point, in late March 2022, defendant had not served any discovery at all—let alone on these issues—nor had defendant otherwise raised or discussed the right to take. All prior communications and discussions between the parties related solely to valuation and defendant's compensation claims – including several offers/counter-offers by the parties in informal efforts to resolve the case.

16. On May 12, 2022, I received an email from Mr. Johnson advising defendant wanted to amend its answer to add an allegation, ¶3, alleging that Mendocino Railway was not a public utility common carrier authorized to exercise eminent domain. On May 27, 2022, by the parties' Stipulation, defendant filed its Amended Answer.

17. In reviewing Exhibit A to Mr. Johnson's Declaration, I calculated that defendant's counsel billed 180.5 hours through the end of May 2022.

18. If defendant had sought attorneys' fees by filing and serving a cost bill as required by Cal. Code Civ. Proc. §1268.610(d), not claimed excessive attorneys' fees for the filing of an unnecessary motion for fees, and not sought a 1.5x positive lodestar multiplier, it may not have been necessary for plaintiff to even file a motion to tax costs because a significant portion of the disputed amounts would not have been at issue.

Moreover, to the extent that defendant may have sought excessive and unreasonable fees related to the valuation/compensation issues (prior to May 2022), these issues could potentially have been resolved informally. In any event, even if a motion to tax was necessary to address any disputed issue, it would likely have been more limited in scope.

19. At the outset of the litigation, on December 21, 2020 plaintiff made a deposit of probable compensation of $350,000. See plaintiff's December 22, 2020 Notice of Deposit.

20. In reviewing Exhibit A to Mr. Johnson's Declaration, I calculated the total number of hours defendant's counsel billed each month. These calculations are reflected in the following table:

Sep-20	1.6	Jan-22	0
Oct-20	5.7	Feb-22	3.3
Nov-20	2.2	Mar-22	8.1
Dec-20	0.5	Apr-22	77
Jan-21	13.3	May-22	27.4
Feb-21	13.8	Jun-22	10.4
Mar-21	2.5	Jul-22	51.5
Apr-21	1.3	Aug-22	114.5
May-21	12.1	Sep-22	89.8
Jun-21	0.8	Oct-22	42.4
Jul-21	0	Nov-22	27.4
Aug-21	1.5	Dec-22	24.4
Sep-21	0.9	Jan-23	41.5
Oct-21	7.7	Feb-23	7.9
Nov-21	0.7	Mar-23	0
Dec-21	0.1	Apr-23	24.6
		May-23	25
		Jun-23	77.9

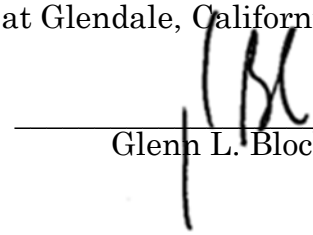
21. Based on the foregoing calculations, over the 2 ½ years of litigation in this case, defendant's counsel only devoted more than 50 hours per month to this case 5 times: in April 2022 (about 77 hours related to the appraisal exchange and expert depositions); in July 2022 (about 51.5 hours relating to trial preparation); in August 2022 (about 114.5 hours related to the trial and trial preparation); in September 2022

(about 90 hours related to the post-trial closing brief and defendant's motion to reopen trial); and, most recently in June 2023 (post-trial motions and defendant's motion for attorney's fees). Thus, except for August 2022, during trial when this case may have consumed much of defendant's counsel's work, defendant's counsel would have had sufficient available time to work on other matters.

22. I have devoted at least as much time as Mr. Johnson to this case, and during the course of this litigation I have been able to work on dozens of other matters. Moreover, during the course of this litigation, I have accepted many new cases as well.

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

Executed this 3rd day of August, 2023 at Glendale, California.



Glenn L. Block

EXHIBIT 1

From: Stephen F. Johnson <steve@mkjlex.com>
Sent: Wednesday, March 30, 2022 10:59 AM
To: Glenn L. Block
Cc: Debi S. Carbon; Stephen F. Johnson
Subject: RE: Mendocino Railway/Meyer - deposition & mediation

Hi Glenn-
As I have mentioned in the past, my client is not necessarily opposed to selling the property, but the issue remains the price. Notwithstanding, he does not, and has never, relinquished his right to defend the lawsuit and oppose the taking of his property. We should have the depositions of the PMK/Pinoli on a different day than the experts. The PMK would generally be the individual that is most knowledgeable of Mendocino Railway's proposed development and subsequent operation of the property in question and knowledgeable regarding the corporate actions taken by Mendocino Railway to commence this eminent domain action. I will also be requesting that documents be produced at the depositions and will forward the deposition notice with the document requests as soon as you provide me with a date.
Thank you,
Steve

Stephen F. Johnson
Mannon, King, Johnson & Wipf, LLP
200 N. School Street, Suite 304
P.O. Box 419
Ukiah, CA 95482
Phone: (707) 468-9151
Facsimile: (707) 468-0284
Email: steve@mkjlex.com

From: Glenn L. Block <glb@caledlaw.com>
Sent: Wednesday, March 30, 2022 10:04 AM
To: Stephen F. Johnson <steve@mkjlex.com>
Cc: Debi S. Carbon <dsc@caledlaw.com>
Subject: RE: Mendocino Railway/Meyer - deposition & mediation

Hi Steve,

I understand that the right to take objections were never waived, but you had previously indicated that Mr. Meyer was focused on compensation. Based on your comments below, we will proceed with

the expectation that he intends to pursue the objections and request that a bench trial be specially set.

Please advise of the PMK categories so that we can determine the appropriate person. Do you want to proceed with the PMK/Pinoli deposition on the same day as Mendocino Railway's experts, or a different day?

Thanks,
Glenn

From: Stephen F. Johnson <steve@mkjlex.com>
Sent: Wednesday, March 30, 2022 9:52 AM
To: Glenn L. Block <glb@caledlaw.com>
Cc: Debi S. Carbon <dsc@caledlaw.com>; Stephen F. Johnson <steve@mkjlex.com>
Subject: RE: Mendocino Railway/Meyer - deposition & mediation

Hi Glenn-
I raised the objections to the right to take in the answer and we have never waived our objections. I will not necessarily know if we are going to actually pursue the objections to the right to take until I complete some discovery on the issue. I would appreciate receiving a date in April to take the deposition of the person most knowledgeable regarding the litigation issues and also the deposition of Robert Pinoli. Please advise on a date as soon as possible. I am going to object to having a hearing on any objections to the right to take prior to the scheduled trial date. I recommend that we complete the depositions and then address the issue.
Thank you,
Steve

Stephen F. Johnson
Mannon, King, Johnson & Wipf, LLP
200 N. School Street, Suite 304
P.O. Box 419
Ukiah, CA 95482
Phone: (707) 468-9151
Facsimile: (707) 468-0284
Email: steve@mkjlex.com

From: Glenn L. Block <glb@caledlaw.com>
Sent: Tuesday, March 29, 2022 6:28 PM

To: Stephen F. Johnson <steve@mkjlex.com>
Cc: Debi S. Carbon <dsc@caledlaw.com>
Subject: RE: Mendocino Railway/Meyer - deposition & mediation

Hi Steve,

Please confirm whether Mr. Meyer will be pursuing right-to-take objections.

Thanks,
Glenn

From: Glenn L. Block
Sent: Thursday, March 24, 2022 12:42 PM
To: Stephen F. Johnson <steve@mkjlex.com>
Cc: Debi S. Carbon <dsc@caledlaw.com>
Subject: RE: Mendocino Railway/Meyer - deposition & mediation

Hi Steve,

Thank you for sending the mediator bios – I'll review with Mendocino Railway and get back to you.

We'll cooperate on scheduling regarding your request for a PMK deposition. Please advise of the PMK categories so that we can ensure the proper representative is available.

Presumably, the purpose of the PMK deposition relates to Meyer's right to take objections asserted in his Answer. Based on our prior discussions, my understanding was that Mr. Meyer was focused on compensation and was not pursuing those objections. However, if he intends to pursue those objections now and litigate the right to take, Mendocino Railway will ask the Court to specially set the right to take trial at the Court's earliest available date prior to any compensation trial (CCP 1260.110). Please confirm Mr. Meyer's intentions so that we can plan accordingly.

Thank you,
Glenn

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Fax: (818) 957-3477

E-mail: glb@caledlaw.com

From: Stephen F. Johnson <steve@mkjlex.com>
Sent: Thursday, March 24, 2022 12:02 PM
To: Glenn L. Block <glb@caledlaw.com>
Cc: Debi S. Carbon <dsc@caledlaw.com>; Stephen F. Johnson <steve@mkjlex.com>
Subject: RE: Mendocino Railway/Meyer - deposition & mediation

Hi Glenn-
We can work with your schedule below. I have attached biographies of a couple of mediators that I propose using for the mediation. Also, I would like to take the deposition of the person most knowledgeable for Mendocino Railway. Perhaps we could complete the deposition on the same day as the experts. Please advise so we can get this scheduled.
Thank you,
Steve

Stephen F. Johnson
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200 N. School Street, Suite 304
P.O. Box 419
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Phone: (707) 468-9151
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From: Glenn L. Block <glb@caledlaw.com>
Sent: Tuesday, March 22, 2022 9:08 AM
To: Stephen F. Johnson <steve@mkjlex.com>
Cc: Debi S. Carbon <dsc@caledlaw.com>
Subject: Mendocino Railway/Meyer - deposition & mediation

Hi Steve,

Following our conversation yesterday, I propose that we pre-schedule expert depositions a couple of weeks after the exchange of valuation data on April 12. If possible, I think we should schedule the depositions of the parties' respective experts on successive days – either April 26/27 (Tuesday/Wednesday) or April 27/28 (Wednesday/Thursday) in Ukiah. We'll plan to take Meyer's expert(s) deposition(s) at Adair's offices one of the days, and you'd take Mendocino Railway's experts depositions on the other day. And, as we discussed, we'd produce our respective experts' files the prior week.

With regard to mediation, I think it may make sense to schedule the mediation the week after the MSC (May 11, 2022 in Department E), in the event the parties are unable to resolve the matter at the MSC. As you are more familiar with the MSC process, let me know if you believe it would be more productive to schedule the mediation prior to the MSC. Also, please let me know which mediators you propose and I'll review them with Mendocino Railway.

Thank you,
Glenn

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PROOF OF SERVICE

Mendocino Railway v. John Meyer, et al.
Mendocino Superior Court Case No.: SCUK-CVED-20-74939

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 3429 Ocean View Boulevard, Suite L, Glendale, CA 91208. On August 3, 2023, I served the within document(s):

PLAINTIFF MENDOCINO RAILWAY'S OPPOSITION TO DEFENDANT JOHN MEYER'S MOTION FOR AWARD OF ATTORNEY FEES AND COSTS; DECLARATION OF GLENN L. BLOCK IN SUPPORT THEREOF

☒ **ELECTRONIC MAIL:** By transmitting via e-mail the document listed above to the e-mail address set forth below.

☐ **BY MAIL:** By placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Glendale, California addressed as set forth in the attached service list

☐ **OVERNIGHT DELIVERY:** By overnight delivery, I placed such document(s) listed above in a sealed envelope, for deposit in the designated box or other facility regularly maintained by United Parcel Service for overnight delivery and caused such envelope to be delivered to the office of the addressee via overnight delivery pursuant to C.C.P. §1013(c), with delivery fees fully prepaid or provided for.

☐ **PERSONAL SERVICE:** By personally delivering the document(s) listed above to the person(s) listed below at the address indicated.

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

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

Executed on August 3, 2023, in Glendale, California.

Debi Carbon

SERVICE LIST

Mendocino Railway v. John Meyer, et al.
Mendocino Superior Court Case No.: SCUK-CVED-20-74939

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