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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF MENDOCINO**

10 MENDOCINO RAILWAY,)	<u>Unlimited</u>
11 Plaintiff,)	Case No. SCUJ-CVED 20-74939
12 vs.)	DEFENDANT JOHN MEYER'S REPLY
13 JOHN MEYER; REDWOOD EMPIRE)	BRIEF TO OPPOSITION TO REOPEN
14 TITLE COMPANY OF MENDOCINO)	CASE
15 COUNTY; SHEPPARD)	
16 INVESTMENTS; MARYELLEN)	
17 SHEPPARD; MENDOCINO COUNTY)	
18 TREASURER-TAX COLLECTOR; all)	
other persons unknown claiming an)	Date: October 7, 2022
16 interest in the property; and DOES 1)	Time: 9:30 AM
through 100, inclusive)	Dept: E
17 Defendants.)	

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20 **A. There Is Good Reason And It Is In The Furtherance of Justice To Reopen**
21 **The Case.**

22 There is good cause to reopen the case due to the late discovery of "The Employer
23 Status Determination" for Mendocino Railway ("MR") issued by the Railroad Retirement
24 Board ("Retirement Board Decision"), which is highly probative on many of the key
25 issues in this case.

26 The Court should reopen the case to hear testimony regarding the Retirement
27 Board Decision and the issues addressed therein because there is good reason and it is in
28 furtherance of justice under Code of Civil Procedure § 607(6).

1 MR argues in its response to the John Meyer's ("Meyer") motion to reopen the
2 case that "the document that Meyer relies on to reopen the case does not in any way
3 undermine or otherwise affect the evidence establishing that the railroad as a public
4 utility." (Mendocino Railway's Opposition To Reopen Case p. 2, line 17-19.) MR states
5 in opposition to the motion that Robert Pinoli's trial testimony is consistent with the
6 statement in the Retirement Board's Decision which provides that "MR's ability to
7 perform common carrier services is thus limited to the movement of goods between
8 points on its own line, a service it does not perform." (Johnson Declaration, Exhibit A,
9 p. 1, paragraph 4.)

10 MR's argument that Retirement Board Decision does not undermine the testimony
11 of Robert Pinoli or MR's evidence is untrue. Mr. Pinoli testified to exact opposite
12 throughout the trial, which is well known to the Court and the parties. Near the end of the
13 trial Mr. Pinoli testified as follows:

14 MR. BLOCK: Q "And then findings of fact, number 1. Can you read findings of
15 fact number 1?"

16 A. Applicant is a common carrier railroad engaged in interstate commerce.
17 Applicant operates railroad passenger and freight services between Fort Bragg and
18 Willits, California.

19 Q. And is it your understanding that this is a finding of fact by the California
20 Public Utilities Commission in August of 1998, finding that CWRR, the operator of the
21 California Western Railroad at that time, was a common carrier railroad?

22 A. Yes.

23 Q. Engaged in interstate commerce?

24 A. That is correct.

25 Q. Operating in railroad, passenger, and freight services between Fort Bragg and
26 Willits?

27 A. That is correct.

28 Q. Similar services to the services that Mendocino Railway offers now, correct?

1 A. That is correct.

2 Q. And similar to services that Mendocino Railway has operated along the
3 California Western Railroad since it purchase the CWR in 2004?

4 A. That is correct.” (Johnson Supplemental Declaration, Exhibit 1, page 46 line
5 10 - p. 47, line 5.)

6 This testimony by Mr. Pinoli is the exact opposite of the argument now being
7 made in MR’s opposition brief. The Court should take the time to sort through this
8 diverging testimony and new evidence on these key issues.

9 **B. Reopening The Case Should Assist The Court With Its Evaluation Of The
10 Evidence.**

11 The Court informed the parties at the end of the trial that it was grappling with the
12 issue of whether the percentage breakdown of the freight, commuter, and excursion
13 services of MR was sufficient to grant it public utility status. Specifically the Court stated
14 the following:

15 “THE COURT: Okay. So maybe this will help focus things. If the PUC said
16 ninety percent of the railways business is excursion services, and Mr. Pinoli agrees with
17 that, and he agrees that the excursion services are not subject to - - don’t create a public
18 entity status, then is ten percent enough to grant status as a public entity or a public
19 utility?

20 That’s the issue here as I see it, and this letter’s really important because you’re
21 asking the PUC to give that very ruling, and I am curious as to whether or not we should
22 wait until we hear from the PUC on that issue before I’d make a decision, because the
23 PUC is the governing body here.

24 So that is my struggle, because in this case, to me, the court issue is whether or not
25 they are a public utility, public entity, and –

26 MR BLOCK: Not a public entity, a public utility.

27 THE COURT: - - public utility.

28 MR. BLOCK : Yeah.

1 THE COURT: And if they have that status, then they have the ability to take
2 property, but if they don't have that status, then they don't and what we are looking at is
3 ninety percent of the business is excursion services, and everybody agrees with that, at
4 least that is what I heard this morning, so we are looking at ten percent, and whether that
5 ten percent gives them status or not, I - -" (Johnson Supplemental Declaration, Exhibit 2,
6 page 40, line 9 - page 41, line 5.)

7 The Retirement Board Decision goes a long way in answering the question that the
8 Court posed at trial regarding the percentage of MR's excursion, passenger and freight
9 operations.

10 The Retirement Board Decision states that "Mendocino's ability to perform
11 common carrier services is thus limited to the movement of goods between points on its
12 own line, a service it does not perform." (Johnson Declaration, Exhibit A, p. 1, paragraph
13 4.) The Retirement Board Decision states that MR is not a common carrier and it is not
14 connected to the interstate railroad network, which is the exact opposite of what Mr.
15 Pinoli testified to at trial and MR has argued throughout this litigation.

16 The Retirement Board Decision and the testimony referenced in the opposition
17 brief establishes that MR was not conducting "common carrier services" such as freight
18 and commuter services. This reference in the Retirement Board Decision and the
19 testimony referenced in the opposition brief reflects that MR is likely an 100% excursion
20 service at the time of filing the action, the importance being, that if MR is solely an
21 excursion service it does not have the power of eminent domain to take property.

22 **C. Meyer's Late Discovery Is Not The Result Of A Lack of Due Diligence.**

23 A party who seeks to introduce further evidence must make a motion to reopen the
24 case for further evidence. The motion must be supported by a showing of good cause and
25 due diligence. (*Ensher, Alexander & Barsroom v. Ensher* (1964) 225 cal. App. 318, 326;
26 7 Witkin California Procedure (6th Ed.) Trial § 163.)

27 As part of the discovery process Meyer served on Mendocino Railway, Form
28 Interrogatories, Special Interrogatories, Requests For Admission, and it served Deposition

1 Notices on Robert Pinoli and the Person Most Knowledgeable For Mendocino Railway,
2 with accompanying requests for documents.

3 Throughout the discovery process Meyer diligently sought to obtain information
4 relating to Mendocino Railway's claim that it has the power of eminent domain, it is a
5 "railroad," it is "common carrier" and it is "public utility."

6 The Retirement Board Decision was apparently not produced or referenced by MR
7 because the decision tends to prove the opposite, specifically that Mendocino Railway
8 does not have the power of eminent domain, it is not a railroad, it is not a common carrier,
9 and it is not a public utility.

10 Meyer's due diligence is evident from the discovery requests attached as Exhibit 4
11 to the Declaration of Glenn Block filed with MR's opposition to this motion to reopen the
12 case.

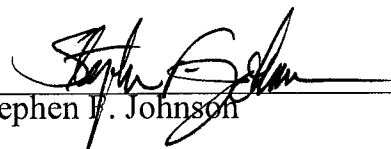
13 The failure of Meyer to obtain the Retirement Board Decision in discovery, or to
14 obtain a copy prior to the close of the case was not due to the lack of due diligence or the
15 lack of effort. The Court should recognize the numerous attempts to obtain such pertinent
16 information and documentation and allow for the case to be reopened.

17 **D. Conclusion.**

18 Meyer respectfully request that the Court reopen the case to address the issues
19 raised in the Retirement Board Decision and allow for questioning of Mr. Pinoli
20 regarding such issues. The testimony will not take much time and the probative value of
21 the evidence and testimony is likely to be very significant.

22 DATED: September 27, 2022.

MANNON, KING, JOHNSON & WIPF, LLP

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26 Stephen L. Johnson
27 Attorney for Defendant John Meyer
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