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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'S REPLY IN SUPPORT OF EX PARTE APPLICATION FOR ORDER STAYING ENFORCEMENT OF DEFENDANT'S COSTS AWARD, ETC.** Hearing Date: September 28, 2023 Hearing Time: 1:30 p.m.

Plaintiff Mendocino Railway ("Railway") hereby replies to the opposition of Defendant John Meyer ("Johnson").

ARGUMENT

A. Johnson's Award Is Only for Costs Under Section 1033.5 of the Code of Civil Procedure, So the Railway's Appeal Automatically Stayed the Award's Enforcement

It cannot be seriously disputed that Mr. Johnson's award was "solely for costs awarded under Chapter 6 (commencing with Section 1021) of Title 14" of the Code of Civil Procedure—i.e., under sections 1021 to 1038. (Code of Civ. Proc. § 917.1(d).)[1]

First, on June 21, 2023, Johnson filed a costs memorandum, using the Judicial Council's Form MC-010 designed specifically for ***section 1033.5*** costs. As the footnote on page 1 of Form MC-010 makes clear, the memorandum is used to claim costs under "Code of Civil Procedure §§ 1032, 1033.5." (*See also Highland Springs Conference & Training Center v. City of Banning* (2019) 42 Cal.App.5th 416, n.9 ("Judicial Council form MC-010, titled Memorandum of Costs (Summary), is designed for use in claiming costs incurred in obtaining a judgment. (§§ 1032, 1033.5.)").) In his cost memorandum, Johnson claimed the following categories of litigation (non-attorneys' fees) costs: filing and motion fees; deposition costs; court reporter fees as established by statute; models, enlargements, and exhibit photocopies; and arbitration/mediation fees. Section 1033.5 authorizes ***all*** those costs. (Code of Civ. Proc. § 1033.5(a)(1), (3), (11), (13); *Berkeley Cement, Inc. v. Regents* (2019) 30 Cal.App.5th 1133, 1143 (voluntary mediation allowed under section 1033.5(c) at court's discretion).)

Second, Johnson sought his attorney's fees. Again, "attorney's fees" are specifically allowed as an item of cost under section 1033.5(a)(10) when "authorized by . . . statute." Consistent with section 1033.5(a)(1), Johnson relied on 1268.610 of the Code of Civil Procedure as the statute authorizing his fees. But, ultimately, the fees were awarded pursuant to section 1033(a)(10)'s mandate that attorney's fees are an item of costs, when allowed by statute (or contract).

Johnson did not obtain costs that were not otherwise authorized by section 1021, et seq.,

[1] Unless otherwise stated, all "section" references are to the Code of Civil Procedure.

including section 1033.5. And he obtained no money damages. Thus, far from being a bondable "money judgment," his award is "solely for costs awarded under Chapter 6 (commencing with Section 1021) of Title 14" of the Code of Civil Procedure. (Code of Civ. Proc. § 917.1(d).) Consequently, the Railway's appeal automatically stayed Johnson's award—i.e., without the requirement of giving an undertaking. (*Id.*)

B. Nothing in Section 1268.610 Exempts Johnson from the "Automatic Stay" Rule

In Johnson's view, the fact that he obtained "litigation expenses" under section 1268.610 somehow exempts him from the "automatic stay" rule applicable to costs-only awards. (Opp. at 4.) He emphasizes that "litigation expenses" under section 1268.610 comprise "all expenses reasonably and necessarily incurred in the proceeding in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceeding," including fees for attorneys, experts, and appraisers. (*Id.* (quoting Code of Civ. Proc. § 1235.140).) From that premise, he reasons that section 1268.10 "far exceeds the scope of the specific definitions of costs in Code of Civil Procedure section 1033.5(a) that features a list of 16 categories of items as allowable costs." (*Id.*) Thus, he claims, his award does not consist of section 1033.5 costs that would trigger the "automatic stay" rule under section 917.1(d). (Opp. at 4-5.)

Johnson's argument is misleading. Section 1033.5 broadly authorizes ***all the costs*** allowed under section 1268.610. Section 1268.61 allows the award of "litigation expenses," including "reasonable attorney's fees, appraisal fees, and fees for the services of other experts," if and only to the extent to which they are "reasonably and necessarily incurred in the proceeding." (Code of Civ. Proc. §§ 1268.61, 1235.140.) ***But section 1033.5 authorizes those very same expenses***:

- Section 1033.5 expressly allows, as a matter of right, the recovery of 15 categories of litigation expenses, including the expenses Johnson claimed in his cost memorandum. (*Id.* § 1033.5(a)(10).) Indeed, while section 1033.5 contains a short list of generally-disallowed costs, even those costs are allowed when "expressly authorized by law," like sections 1268.61 and 1235.140. (*Id.* § 1033.5(b).)
- Section 1033.5 specifically allows "[a]ttorney's fees . . . when authorized by . . . [s]tatute,"

including sections 1268.61 and 1235.140. (*Id.* § 1033.5(a)(10).)

- Section 1033.5 specifically allows "[f]ees of expert witnesses ordered by the court" as a matter of right, as well as "[f]ees of experts not ordered by the court . . . when expressly authorized by law," including sections 1268.61 and 1235.140. (*Id.* § 1033.5(a)(8), (b).)
- In a capacious catch-all provision, section 1033.5 allows ***any other*** "[i]tems not mentioned," at the "court's discretion," if "reasonably necessary to the conduct of the litigation." (*Id.* § 1033.5(c)(4); *see also Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, 1379 ("An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.'").). That catch-all provision easily encompasses section 1235.140's "appraisal fees"—and, for that matter, any other "litigation expense" that a defendant could possibly claim.

Tellingly, Johnson fails to identify a ***single*** expense authorized under sections 1268.61 and 1235.140 that section 1033.5 does not already authorize. That's because no such expense exists. Section 1033.5 encompasses the very same expenses allowed in sections 1268.61 and 1235.140.[2] Further, the costs that Johnson actually claimed and obtained—***all of them***—are authorized as a preliminary matter under section 1033.5. All the ordinary litigation costs he listed in his cost memorandum—e.g., filing fees, deposition costs, statutory attorney's fees, etc.—are specifically authorized under section 1033.5. Thus, there can be no dispute that Johnson's award is solely for costs awarded under section 1021, *et seq.*, of the Code of Civil Procedure, such that the Railway's appeal automatically stayed enforcement of the award. (Code of Civ. Proc. § 917.1(d).

Given the extraordinarily broad scope of allowable costs under section 1033.5, almost ***any*** costs-only award comes under the umbrella of section 1033.5 and therefore is subject to the

[2] As if that were insufficient, section 1033.5(a)(16) contains yet another catch-all provision that allows recovery of "[a]ny other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal." That catch-all provision easily covers section 1268.610.

"automatic stay" rule. The only exceptions are costs awarded under section 998 and 1141.21, which are not at issue here and to which the "automatic stay" rule expressly does ***not*** apply. (*Id.* § 917.1(a)(2)-(4). However, the "automatic stay" rule's near-total application to costs-only awards is a feature of section 917.1, not a bug, that was incorporated into the statute by way of a 1993 amendment. "The intent of this amendment was to 'require an undertaking or a bond to be filed for a stay of enforcement of an order for extraordinary costs awarded pursuant to ***specified*** [Code of Civil Procedure] sections'" only. (*Quiles v. Parent*, 10 Cal.App.5th 130, 144 (2017) (quoting Sen. Com. on Judiciary, Analysis of Assem. Bill No. 58 (1993–1994 Reg. Sess.) as amended Aug. 16, 1993, p. 2 (emphasis in original)).) And, as the Court of Appeal in *Quiles* explained:

> "[V]ery little appears to be absolutely excluded from classification as a "cost" by the language of section 1033.5. Based solely on reading the applicable statutes, there is a reasonable argument that ***nearly all postjudgment awards of costs in California courts should be subject to the automatic stay of section 917.1, subdivision (d), including attorney fees and unusual costs particular to specific statutes or contracts***. The only obvious exceptions would be those stated in the statute, section 998 and section 1141.21 costs. (§ 917.1, subd. (a).)

(*Id.* at 141 (emphasis added).)

Quiles is especially instructive. In *Quiles*, the plaintiff sued her employer for unlawful termination under federal law. She prevailed and was awarded her fees and costs ("costs award") under a federal statute, 29 U.S.C. § 216(b). The employer appealed the costs award. The question for the Court of Appeal was whether those costs were awarded under section 1021, *et seq.*, such that enforcement was automatically stayed. The Court answered in the affirmative. (*Id.* at 133.)

Like section 1268.610 in this case, the federal statute at issue in *Quiles* broadly allows the court "a reasonable attorney's fee to be paid by the defendant, and costs of the action." (29 U.S.C. § 216(b).) And like section 1268.610, the federal statute is nonreciprocal, in the sense that only a prevailing *plaintiff* can be awarded costs. But unlike section 1268.610, the federal statute "does not specifically discuss the types of costs to be awarded," though "federal case law supports awarding a broad measure of costs, not limited by statutory lists of generally allowable costs." (*Quiles*, 10 Cal.App.5th at 147.) Indeed, as to litigation costs not comprising attorney's fees, the federal statute

does not impose a "reasonable necessity" requirement as section 1033.5 does.

Nevertheless, the Court concluded that the plaintiff's costs, awarded pursuant to 29 U.S.C. § 216(b), were section 1033.5 costs that triggered the "automatic stay" rule:

> A cost is a cost, unless specifically excepted in section 917.1, subdivision (a). Though somewhat ambiguous, the best interpretation of section 1033.5 is that costs awarded under a federal statute and federal case law are still costs for purposes of state law. (§ 1033.5, subds. (a)(16), (b), (c)(4).)

(*Quiles*, 10 Cal.App.5th at 148.)

Clearly, if "costs awarded under a federal statute and federal case law are still costs for purposes of state law," then *a fortiori* costs awarded under a ***state*** statute like section 1268.610 are, as well.

C. The Court Should Follow the *Quiles*, Which Rightly Repudiates *Dowling*

The Railway's *Ex Parte* Application explains at great length why the Court should follow *Quiles*, not *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, to conclude that Johnson's award is a section 1033.5, costs-only award subject to the "automatic stay" rule under section 917.1. (Ex Parte App., pp. 8-11.) *Quiles* is much more recent (2017), better reasoned, and fully consistent with the plain text of the relevant statutes. Importantly, none of the "stay" statutes, including section 917.1 makes a distinction between so-called "routine" and "nonroutine" costs. At most, *Dowling*'s holding should not be stretched beyond the anti-SLAPP context, which implicates a unique legislative concern for defendant's ability to exercise his or her First Amendment rights.

Johnson doesn't even attempt to defend *Dowling*. Nowhere does he say why *Dowling* is better reasoned or more persuasive than *Quiles*. Certainly, he doesn't explain the textual basis—in section 917.1 or elsewhere—for the "routine/nonroutine" distinction. (*Cf. Quiles*, 10 Cal.App.5th at 144 ("The current statute does not state that the ['automatic stay'] rule applies only to 'routine' costs. The current statute does not state that the rule applies only to awards of costs that are mandatory, nondiscretionary, and/or reciprocal.").) Nor does Johnson explain why *Dowling* can or should extend beyond the narrow area of anti-SLAPP litigation.

Effectively conceding by omission that *Quiles* is the more persuasive of the two decisions,

Johnson insists that the "automatic stay" rule does not apply to his award even under *Quiles* because "Code of Civil Procedure § 1033.5(a)(16) is . . . not an applicable 'catchall' for the recovery of costs in an eminent domain action because attorney fee [sic] and costs do not go to the prevailing party," but only to the "successful defendant." (Opp. at 7.) That argument is meritless.

Section 1033.5(a)(16) allows recovery of "[a]ny other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal." That catch-all provision easily covers the costs awarded to Johnson, as the "prevailing party" in this Court. But regardless, ***another*** catch-all provision in section 1033.5 authorizes his costs award: "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion," if "reasonably necessary to the conduct of the litigation." (Code of Civ. Proc. § 1033.5(c)(2), (4).) Johnson does not dispute that said catch-all provision brings all of section's 1268.610 costs within the purview of section 1033.5, triggering the "automatic stay" rule under section 917.1(d).

D. No Undertaking Is Required

Citing section 917.1(b), Johnson demands an order requiring the Railway to give an undertaking. (Opp. at 7.) Section 917.1(b) requires an undertaking that is "double the amount of the judgment or order unless given by an admitted surety insurer." (Code of Civ. Proc. § 917.1(b).) That provision does not support requiring the Railway to give an undertaking.

Section 917.1(b) applies only to the judgments and orders listed in section 917.1(a): (1) a true "money" judgment (that is not a costs-only award, like Johnson's), (2) a judgment for section 998 costs (not applicable here), and (3) a judgment for section 1141.21 costs (not applicable here). Section 917.1(b) does ***not*** apply to a costs-only judgment under section 917.1(d), like Johnson's costs award in this case.

E. A Discretionary Undertaking—Beyond What the Railway Has Already Deposited—Is Both Improper and Unnecessary

Johnson argues that that, because the costs judgment is "large" and the danger of "asset dissipation is acute," the Court should exercise its discretion to require an undertaking, even though

the Railway's appeal automatically stayed enforcement of his costs award. (Opp. at 8 (quoting *Quiles*, 10 Cal.App. at 5th at 145.)

Again, Johnson's argument for an undertaking fails. First, he presents no admissible evidence—other than an inadmissible (and factually incorrect) news article (Opp. at 8)[3]—concerning the Railway's operations, let alone financial condition, that would suggest an inability to pay the award, should it be upheld on appeal. None. Even if the Court were to accept the facts reported in the news article—that the Railway sold a small portion of property to a sister company, Sierra Northern Railway for $4.1 million—those facts do not show dissipation of assets; it shows the exchange of property ***for a substantial sum of money***.

Further, Johnson speculates that existing litigation involving the Railway may expose it to "significant legal liabilities." (Opp. at 8.) He says so with no basis in fact or evidence. As this Court knows, the lawsuits referred to principally concern whether the Railway is subject to land-use regulation by the City of Fort Bragg and the California Coastal Commission, given the Railway's public-utility and federal-railroad status that preempt such state and local regulation. While, in one of the actions, the Commission does seek fines for the Railway's purported failure to apply for land-use permits for certain railroad work, there is absolutely no evidence that these fines—if allowed—would represent "significant legal liabilities" that would risk asset dissipation and inability to pay Johnson's costs award.

Finally, Johnson speculates that the Railway "may continue to transfer its assets to Sierra Northern and then subsequently declare bankruptcy." (Opp. at 8-9.) He points to the "previous owner" of the Railway line who "filed bankruptcy," purportedly making it "quite possible that Mendocino Railway could file bankruptcy as well." Again, this is pure speculation, based on Johnson's say-so. There is no evidence of any dissipation of assets, no evidence of anything coming close to a potential

[3] The Court should ***deny*** judicial notice of the news article, let alone of the purported facts contained therein. News stories are not judicially noticeable. (*North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal. App. 4th 762, 779 n.7 ("The Bisnos also requested that the court take judicial notice of a news article from the Los Angeles Times, and a press release from the Commission on Judicial Performance. The trial court declined to do so, and the Bisnos wisely do not challenge that ruling on appeal.").)

bankruptcy, and of course no evidence of any logical relationship between the former owner of the Railway's line and the Railway itself (there is none). "[S]peculation is not evidence." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437.)

On the other hand, Johnson does not address the *Railway's* concerns about having to pay a costs award that is subsequently reversed. There is no guarantee—and Johnson has identified none—that restitution can or will be made.

Given the utter lack of admissible and competent evidence of any risk of asset dissipation, or any other basis for requiring an undertaking, requiring one anyway would be an abuse of discretion.

D. The Current Deposit Held by the State Is Sufficient Protection

While an undertaking is neither required or necessary, the $350,000 deposit already made by the Railway at the start of this action adequately protects Johnson against any perceived risk of nonpayment, if the Court of Appeal upholds the costs award. That deposit is and will remain with a State government agency—the Treasurer's office—and the monies will be available to Johnson if his costs award is affirmed. If the Court deems it necessary, it can order those monies to remain on deposit with the State at least until such time that Johnson is paid his costs award therefrom (if the award is upheld).

E. Johnson Is Owed No Fees

Johnson claims fees for opposition this Ex Parte Application, if he prevails. However, he has presented no admissible evidence substantiating the claimed fees. On this basis alone, even if he prevails, his fees should be denied.

F. The Railway's Fees

In addition to the fees incurred bringing the Ex Parte Application, the Railway has incurred an additional 4015 to research and draft this Reply Brief in response to Johnson's opposition brief. (*See* Declaration of Paul Beard II, ¶ 2.) Thus, the total amount of fees that the Railway should be awarded is $12,330.50 in fees (including a $60 filing fee incurred upon filing of the application).

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CONCLUSION

Johnson's costs award is subject to the "automatic stay" rule because it was allowed under section 1021, *et seq.* Enforcement was stayed effective August 30 when the Railway appealed the costs order. All liens, writs, and other enforcement actions taken after that date are invalid and should be quashed.

Accordingly, the Court should issue an order: (1) recalling/quashing the recorded abstract of judgment against the Railway's real property; (2) invalidating any and all other liens that may have been recorded against said property; (3) recalling/quashing the writ of execution and notice of levy issued against the Railway's personal property; (4) staying any and all further enforcement of the costs award until such time that the Court of Appeal issues the remittitur in this case; and (5) awarding the Railway its reasonable expenses, including attorney's fees, for having to make this application.

DATED: September 27, 2023

Attorneys for Plaintiff Mendocino Railway

DECLARATION

I, Paul Beard II, declare and state as follows:

1. I am an attorney of record and represent Plaintiff Mendocino Railway in this matter. The following facts are within my personal knowledge. If called upon to testify, I could and would testify competently thereto.

2. I have expended 7.3 hours researching and drafting this reply brief. At my hourly rate of $550 per hour, Plaintiff therefore has incurred $4,015 in fees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge.

DATED: September 27, 2023.

Attorneys for Plaintiff MENDOCINO RAILWAY

PROOF OF SERVICE

My business address is: FisherBroyles LLP, 453 S. Spring Street, Suite 400-1458, Los Angeles, CA 90013. I am over the age of 18 and not a party to this action.

On September 27, 2023, I served **REPLY IN SUPPORT OF EX PARTE APPLICATION** on the following counsel for Defendant:

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BY ELECTRONIC TRANSMISSION. I emailed the above documents at the above email.

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

DATED: September 27, 2023