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6 Attorney for Defendant,
7 NORTH COAST RAILROAD AUTHORITY,
8 a Public Agency

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11 CITY OF NOVATO,

12 Petitioner,

13 v.

14 NORTH COAST RAILROAD AUTHORITY,

15 Respondent.

) Case No. CV 074645

)
) RESPONDENT'S OPPOSITION TO
) APPLICATION FOR LEAVE TO FILE
) AMICUS CURIAE BRIEF IN SUPPORT OF
) REQUEST FOR PRELIMINARY
) INJUNCTION

16 Hearing:

17 Date: December 11, 2007

18 Time: 9:00 a.m.

19 Dept: E

20 Judge: Honorable James Ritchie

21 CALIFORNIA DEPARTMENT OF
22 TRANSPORTATION, CALIFORNIA
23 TRANSPORTATION COMMISSION,
24 CALIFORNIA DEPARTMENT OF FISH
25 AND GAME, KERNEN CONSTRUCTION,
26 MASS ELECTRIC CONSTRUCTION CO.,
27 NORTHWESTERN PACIFIC RAILROAD
28 COMPANY, AND DOES 1 TO 10,

Real Parties in Interest.

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1 The Second Amended Petition raised a brand new theory for relief alleging that Respondent
 2 engaged in a "pattern and practice" of violating the California Environmental Quality Act
 3 ("CEQA"). This theory was not raised in the Application for Preliminary Injunction and was not
 4 addressed in Respondent's Opposition.

5 On December 3, 2007, Respondent was served by Federal Express with an Application for
 6 Leave to File Amicus Brief in support of the Petition and Application for Preliminary Injunction.
 7 The amicus brief, among other issues, briefs the theory first advanced by Petitioner in the Second
 8 Amended Petition as to "pattern and practice" which was not addressed in the Application for
 9 Injunction.

10 Respondent objects to the proposal to permit the filing of an amicus brief at this point
 11 because it: (1) is prejudicial to Respondent; and (2) is untimely.

12
 13 **LEGAL ARGUMENT**

14 Although the filing of an amicus brief in the trial court is unusual, it is addressed solely
 15 to the discretion of the trial court, which discretion is not appealable. (See *In re: Veteran's*
 16 *Industries, Inc.* (1970) 8 Cal.App.3d 902, 924).

17 **1. Respondent is Prejudiced by the Proposed Amicus Brief.**

18 The proposed amicus brief improperly addresses an issue which was not raised in the
 19 Application for Injunction filed herein by Petitioner on October 11, 2007. An amicus brief must
 20 accept the issues made and propositions urged by the parties. It is improper for an amicus to
 21 address additional questions. See *Strong v. State Board of Equalization* (2007) 115 Cal.App.4th
 22 1182, 1191, Fn.6, citing *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143.¹

24
 25 Although the issue of pattern and practice was raised by the Petitioner in the Second Amended
 26 Petition filed on November 20, it had not earlier been raised or briefed by Petitioner. As to
 27 whether the amicus brief should be admitted for consideration at the hearing on the merits is a
 28 separate issue, and is addressed to the sound discretion of the Court. The prejudice to
 Respondent identified here is applicable to the hearing on the application for injunction would not
 be applicable to the hearing on the merits as the briefing schedule for the hearing on the merits
 has not yet commenced.

1 Petitioner's October 11 Application for Injunction did not address the "pattern and
 2 practice" argument or any of the line of cases referring to it. This argument was first advanced
 3 in the Second Amended Petition filed November 20. It would be improper for the Petitioner to
 4 raise this issue in its Reply to Opposition as a new issue. It is equally improper for the Amici to
 5 address a new issue in support of Petitioner.

6 Furthermore, the interjection of the amicus brief in the middle of the established briefing
 7 schedule on the injunction application prejudices Respondent in that it cannot effectively respond,
 8 its opposition brief having already been timely filed. The amicus brief addresses itself as a
 9 "Reply to the Opposition," providing the Petitioner's interest with an additional fifteen pages of
 10 argument to the Court to consider, to which Respondent has no meaningful opportunity for reply.

11 Were the Court inclined to consider the amicus brief at the hearing on the preliminary
 12 injunction, the only fair manner for the Court to do so would be to provide Respondent a
 13 meaningful opportunity to reply by continuing the hearing on the application for injunction. Such
 14 a continuance would in and of itself be prejudicial to Respondent and the real parties in interest,
 15 by increasing the time of uncertainty. For this reason, Respondent urges the Court to reject the
 16 application as it applies to the preliminary injunction.

17
 18 **2. The Amicus Brief is Untimely.**

19 The timing of the application for filing of the amicus brief is not only prejudicial to
 20 Petitioner, it is untimely. The application for the amicus brief does not address why the amicus
 21 brief is being filed now, after this matter has been pending for more than two months. The filing
 22 of this action by Petitioner was accompanied by headlines in newspapers up and down the
 23 Redwood Empire.²

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 25
 26 ² In fact, Respondent first learned of the filing of the action when a newspaper for the *Marin*
 27 *Independent Journal* e-mailed a copy of the Petition to Mitch Stogner. See Stogner Decl. Opp.
 28 Preliminary Inj., ¶18.

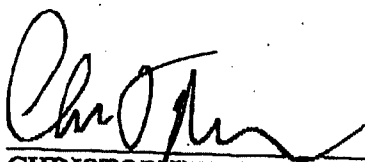
1 Surely, if the issues are of such importance to the Amici, they have been aware of the
 2 pendency of this action, or should have been aware, since late September. Under these
 3 circumstances, the Amici should address why they are filing this petition at this late date, on the
 4 eve of the hearing for the preliminary injunction, and after the Respondent's opportunity for
 5 submitting briefs has expired. If the timing of the application filing was tactical, the Court should
 6 exercise its discretion to deny the application. If there was some other reason why Amici did not
 7 apply for leave to file a brief at the early stages of this litigation, Amici should have identified
 8 such reason in its application.

9 **CONCLUSION**

10 The proposed amicus brief impermissibly introduces new issues for the Court's
 11 consideration at the hearing presently scheduled for December 11, 2007. This is prejudicial to
 12 the Respondent and for this reason alone the Court should deny the application, at least as it
 13 applies to the hearing on the preliminary injunction.

14 If the Court were to grant the Amici application, the Court should be aware that several
 15 organizations are anxious to file an Amici brief in support of Respondent. (See Neary Decl., ¶4
 16 below). Respondent does not identify prejudice to the introduction of Amicus briefs for the
 17 hearing on the merits, but leaves that issue to the discretion of the Court. If the Court were to
 18 grant the application, the Court may anticipate additional applications for amicus brief in support
 19 of Respondent's position.
 20

21
22 DATED: December 3, 2007

23 
 24 **CHRISTOPHER J. NEARY**
 25 Attorney for Defendant NORTH COAST
 26 RAILROAD AUTHORITY
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Declaration of Christopher J. Neary

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1. I have reviewed the points and authorities filed by the Petitioner in support of the application for preliminary injunction and nowhere find any reference to a theory that Respondent adopted an unlawful "pattern and practice" of violating CEQA.

2. I have reviewed the proposed brief to be filed by Amici and it briefs the "pattern and practice" theory in its brief, identifying the Second Amended Petition as the source of the argument.

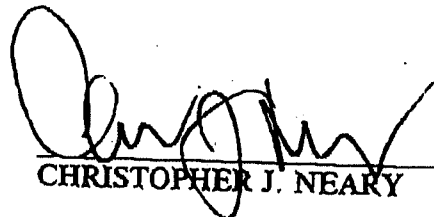
3. The first time the Second Amended Petition was seen by the undersigned was on November 20, 2007.

4. The undersigned has been advised that several entities and organizations contacted attorneys representing the interests of Respondent in early November proposing to file amicus briefs in support of Respondent's position and it is my understanding that they remain willing and anxious to do so at the present time.

5. I am the attorney of record for Respondent NORTH COAST RAILROAD AUTHORITY ("NCRA") and am licensed to practice before all of the Courts of the State of California. I make this declaration of my own personal knowledge, except as to those statements made upon information and belief and as to those statements, I believe them to be true. If called upon to testify to the matters stated herein, I could and would competently do so.

Executed this 3 day of December, 2007 at Willits, California.

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


CHRISTOPHER J. NEARY

PROOF OF SERVICE

I, JENNIFER M. O'BRIEN, declare that:

I am employed in the County of Mendocino, State of California. I am over the age of eighteen and not a party to the within entitled action; my business address is 110 South Main Street, Suite C, Willits, California 95490. On this date I served the attached

RESPONDENT'S OPPOSITION TO APPLICATION FOR LEAVE TO FILE AMICUS CURAIE BRIEF IN SUPPORT OF REQUEST FOR PRELIMINARY INJUNCTION.

City of Novato v. North Coast Railroad Authority, et al.
Marin County Superior Court, Case No. CV 074645

on the parties in said cause by U.S. Mail, first class, postage prepaid, at the Willits, California post office, addressed as follows

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

Executed this 3rd day of December, 2007 at Willits, California.


JENNIFER M. O'BRIEN