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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC

Plaintiff,

vs.

CITY OF OAKLAND,

Defendant.

Case No. 3:16-cv-07014-VC

PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC'S NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Date: January 10, 2018
Time: 10 a.m.
Ctrm.: No. 2, 17th Floor

Honorable Vince Chhabria

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

NOTICE OF MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 10, 2018, at 10:00 a.m., or at a different time and date set by the Court, Plaintiff Oakland Bulk & Oversized Terminal, LLC ("Plaintiff" or "OBOT") will, and hereby does, move pursuant to Federal Rule of Civil Procedure 56, Civil Local Rule 7, and Civil Local Rule 56, for summary judgment of all claims filed by OBOT against Defendant City of Oakland (the "City") on the following grounds:

- The Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8, cl. 3) prohibits the City from applying Oakland Ordinance No. 13385 (the "Ordinance") and Resolution No. 86234 (the "Resolution") to OBOT;
- The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 *et seq*., preempts the City from applying the Ordinance and Resolution to OBOT;
- The Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq*., preempts the City from applying the Ordinance and Resolution to OBOT;
- The Shipping Act of 1984, 46 U.S.C. § 40101 *et seq*., preempts and/or otherwise prohibits the City from applying the Ordinance and Resolution to OBOT;
- By adopting the Ordinance and Resolution, the City breached the Development Agreement.

This request for relief is based on this Notice of Motion; the accompanying Memorandum of Points and Authorities, the Declarations of Robert Feldman, Phil Tagami, Lyle Chinkin, Andrew Maier, Megan Morodomi, David Myre and their corresponding exhibits, the pleadings and papers on file in this matter, and such other matters as may be presented to the Court at the hearing.

Dated: November 20, 2017 Respectfully submitted,

By: */s/ Robert P. Feldman*
Robert P. Feldman

Attorney for Plaintiff
OAKLAND BULK & OVERSIZED TERMINAL, LLC

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Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT") respectfully submits this memorandum of points and authorities in support of its motion for summary judgment.

INTRODUCTION

In response to political pressure to ban the export of coal and petcoke from the West Coast of the United States, and particularly from Oakland, the Oakland City Council passed Ordinance No. 13385, prohibiting the rail transportation of coal and petcoke for export overseas through the rail-to-ship terminal under development at the West Gateway of the former Oakland Army Base (the "Terminal"). Ex. 1 (hereinafter, the "Ordinance").[1] Because it is the undisputed purpose and effect of the Ordinance to prevent the interstate rail transportation of coal and petcoke for marine export, the Ordinance violates the Dormant Commerce Clause of the United States Constitution and is preempted by three federal statutes: the Interstate Commerce Commission Termination Act ("ICCTA"), Hazardous Materials Transportation Act ("HMTA"), and the Shipping Act of 1984 ("Shipping Act").

By then passing a Resolution applying the Ordinance to the Terminal, the City also breached one of its contracts with Plaintiff OBOT—a Development Agreement granting OBOT the vested right to develop and operate a multi-commodity bulk goods terminal at the West Gateway subject only to the rules and regulations that existed at the time the contract was entered into in 2013. The admissions of the City and its environmental consultants demonstrate that the ban imposed by the Ordinance was undisputedly *not* necessary to prevent a "substantially dangerous" condition to the Terminal's occupants and "adjacent" neighbors, and therefore did not satisfy the terms of the Development Agreement.

OBOT thus respectfully submits a trial is unnecessary because the Ordinance violates the Constitution, is preempted by federal statutes, and the City's application of that Ordinance to the Terminal breaches the Development Agreement between the City and OBOT as a matter of law.

[1] "Ex. [X]" refers to Exhibit [X] to the Declaration of David E. Myre in Support of OBOT's Motion for Summary Judgment, filed contemporaneously herewith.

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STATEMENT OF FACTS

A. The Parties' Contractual Agreements

OBOT is a limited liability company wholly owned by its sole member, California Capital and Investment Group ("CCIG"). Ex. 2 (Tagami Tr.) at 15:11-19. OBOT and the City of Oakland ("City") entered into both a Lease Disposition and Development Agreement dated December 4, 2012, and a Development Agreement Regarding the Property and Project Known As The Gateway Development/Oakland Global, dated July 16, 2013.[2] *See* Ex. 3 (hereinafter, the "LDDA"); Ex. 4 (hereinafter, the "DA"). Under these agreements, OBOT has the right to develop a bulk goods terminal at the portion of the former Oakland Army Base known as the "West Gateway"—the Terminal. *See* Ex 3 (LDDA); Ex. 4 (DA). Specifically, the DA vested in OBOT the right to develop, use and operate for sixty-six years a "Bulk Oversized Terminal," defined as a "ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo." *See, e.g.*, Ex. 4 (DA) at §§ 2.1-2.2; Recital H; Ex. D-2-2; § 1.1 (incorporating Recital H in definition of "Project").

In April 2014, OBOT entered into an exclusive negotiation agreement ("ENA") with Terminal and Logistics Solutions, LLC ("TLS") concerning the sublease and operation of the Terminal. Ex. 5 (4/17/14 ENA).[3] TLS is a wholly owned subsidiary of Bowie Resources Partners, LLC ("Bowie"), a Kentucky company involved in the extraction and production of western bituminous coal. Ex. 6 (Wolff Tr.) at 7:23-25, 16:12-15, 26:14-20; Ex. 7 (Bridges Tr.) at 14:20-15:1. While the Terminal has always been planned as a multi-commodity bulk terminal, such terminals often require an "anchor tenant" to make the terminal financially feasible; Bowie's bituminous coal from Utah is currently the "anchor tenant." Ex. 2 (Tagami Tr.) at 76:19-77:20, 580:15-581:16.

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[2] The agreements were entered into by OBOT's predecessor-in-interest, Prologis/CCIG. *See* Ex. 3 (LDDA); Ex. 4 (DA). OBOT has succeeded the rights and obligations of Prologis/CCIG's under the LDDA and DA with respect to the West Gateway.

[3] Pursuant to the ENA, TLS has an option to lease, design, build, and operate the Terminal. *See, e.g.*, Ex. 2 (Tagami Tr.) at 491:3-7; Ex. 6 (Wolff Tr.) at 25:20-22; Ex. 7 (Bridges Tr.) at 38:22-39:10, 207:7-24, 208:19-23. Since its execution, the ENA has undergone several amendments. *See* Ex. 2 (Tagami Tr.) at 439:24-448:15.

B. Planned Operations at the Rail-to-Ship Terminal

The Terminal's function is to make possible the transportation of bulk goods carried by interstate rail to ships for export overseas. *E.g.*, Ex. 8 (McClure 10/12/17 Tr.) at 31:23-32:2. In the case of coal, Bowie's bituminous coal from Utah would be transported by interstate rail from Utah through the Terminal for export to foreign countries by ship. *See, e.g.*, Ex. 7 (Bridges Tr.) at 59:21-60:6, 72:2-5, 103:22-104:4. Bowie owns the coal from the time it is mined throughout its transportation by rail carrier from Utah through the Terminal, and until the "hatch on the ship [closes] and the ship sails." *Id.* at 105:2-14; *see also* Ex. 6 (Wolff Tr.) at 57:14-59:1.

To get the coal from Utah onto those ships, Bowie contracts with a long-haul Class I rail carrier such as Union Pacific ("UP") or Burlington Northern Santa Fe ("BNSF"). *See* Ex. 6 (Wolff Tr.) at 57:14-59:12. Once UP or BNSF reaches the Port of Oakland's rail yard, the train is broken into two pieces ("cuts"). *E.g.*, Ex. 9 (Sullivan Tr.) at 126:13-21, 134:7-135:9, 136:15-25. Either UP or BNSF, or short line rail carrier Oakland Global Rail Enterprises, Inc. ("OGRE")[4] on behalf of UP and BNSF (pursuant to contractual agreements with those long haul carriers), then performs "last-mile" rail service.[5] Ex. 2 (Tagami Tr.) at 21:21-22:3.[6] Specifically, UP, BNSF or

[4] OGRE is a joint venture between CCIG and West Oakland Pacific Railroad ("WOPR"). Ex. 8 (McClure 10/12/17 Tr.) at 85:22-86:2, 90:17-22; Ex. 10 (McClure 10/16/17 Tr.) at 91:16-18. WOPR is a nonvoting partner in OGRE. Ex. 2 (Tagami Tr.) at 22:3-8. CCIG has an 84% interest in OGRE, and WOPR a 16% interest. Ex. 8 (McClure 10/12/17 Tr.) at 90:6-91:14. "OGRE is primarily CCIG," as CCIG owns "100 percent of the equity and 100 percent of the voting control." *Id.* at 22:15-25. WOPR's 16% interest is related to profits. *Id.* at 22:23-23:1. "[T]he parent company" of OBOT and OGRE "are both CCIG." *Id.* at 84:25-85:3.

[5] OGRE will have an inter-track agreement ("ITA") with UP, Ex. 2 (Tagami Tr.) at 63:25-64:2, pursuant to which UP will reserve the right to perform these last-mile services itself. Ex. 10 (McClure 10/16/17 Tr.) at 89:7-23. TLS has had discussions with both UP and BNSF "regarding their capacity on their lines to service the terminal," but TLS would not itself contract with the railroads. Ex. 7 (Bridges Tr.) at 157:6-23, 158:21-159:3. Nor would TLS pay OGRE—indeed, because OGRE's contracts are with UP and BNSF, "no charges would accrue to TLS based on what OGRE provides to . . . UP." *Id.* at 209:7-11.

[6] *See also* Ex. 11 (7/9/13 OGRE Operating Agreement); Ex. 12 (6/1/12 Switching Services Agreement ("SSA")); Ex. 13 (9/1/12 1st Amendment to the SSA); Ex. 14 (9/1/12 1st Amendment to Agreement between BNSF and IRC); Ex. 15 (11/3/15 OGRE Rail Operating Agreement); Ex. 16 (3/1/16 OGRE Safety Program). "OGRE is designated as the rail operator for all of the tenants on the City side of the gateway development area." Ex. 8 (McClure 10/12/17 Tr.) at 82:14-16. OGRE's operations presently include switching cars for UP and BN's manifest traffic—when UP or BNSF's locomotives arrive at the Port rail yard, each locomotive hauls several individual cars,

OGRE (using either OGRE's own locomotives, or UP's or BNSF's locomotives, at the long haul carrier's election)—takes the cars through the last portion of the train's journey to the "dump pits."[7] *See* Ex. 2 (Tagami Tr.) at 61:18-62:2; Ex. 10 (McClure 10/16/17 Tr.) at 28:6-11, 29:10-20, 103:3-104:3. The dump pits are located on a rail right of way at the Terminal—a portion of the West Gateway property that OBOT has subleased to OGRE. Ex. 2 (Tagami Tr.) at 19:13-20:5, 21:2-9; Ex. 10 (McClure 10/16/17 Tr.) at 44:9-45:18; Ex. 17 (OBOT-OGRE Sublease). The rail line leading to, and running over, the "dump pits" sits on that subleased right of way. Ex. 10 (McClure 10/16/17 Tr.) at 42:8-19, 44:9-45:18.

OGRE then pulls "cuts" of the rail cars over the dump pits so the coal in the rail cars can be unloaded. *See id.* at 103:3-104:3; *see also* Ex. 9 (Sullivan Tr.) at 144:15-25; Ex. 18 (Buccolo Rough Tr.) at 127:25-129:7. While each 26-car cut is being unloaded, the remaining "cuts" of coal-filled cars are stored on track (on the rail right of way) at the Terminal near the dump pits. Ex. 9 (Sullivan Tr.) at 137:7-138:6, 145:17-146:25. From the dumper pits, a conveyor system moves the coal into storage and then onto the ships for export overseas.[8] Ex. 10 (McClure 10/16/17 Tr.) at 43:2-8, 199:20-200:2, 215:5-11, 216:19-217:4. After unloading the coal cars, OGRE reconnects the empty cars, air tests and inspects them, and then takes them back to the storage yard for UP or BNSF to carry back to the mine in Utah. Ex. 2 (Tagami Tr.) at 63:13-65:9.

C. <u>The Result of the City's Process was Pre-Ordained</u>

The City knew before entering the DA that the multi-commodity Terminal might handle coal.[9] Eventually, however, the possibility of coal at the Terminal became politically unacceptable to the City Council. *E.g.*, Ex. 25 (Cappio Tr.) at 81:11-14; *see also* Ex. 20 (Cashman Tr.) at

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and "[e]ach of those cars could be carrying different cargo for a different customer." Ex. 10 (McClure 10/16/17 Tr.) at 32:10-14. Pursuant to its contractual arrangements, OGRE "break[s] those [cars] up and bring[s] th[em] to the individual customer". *Id.* at 32:10-14, 32:21-22.

[7] The "dump pits" consist of "an enclosed building over two large holes in the ground." Ex. 2 (Tagami Tr.) at 61:18-62:2.

[8] The shipper, Bowie, arranges for the vessel to arrive at the Terminal. Ex. 7 (Bridges Tr.) at 155:11-156:13. Once the ship arrives, the coal is loaded onto it for export. *Id.* at 99:25-100:12.

[9] *See, e.g.*, Ex. 19 (4/8/13 Email from D. Kalb); Ex. 20 (Cashman Tr.) at 64:4-70:4; Ex. 21 (10/23/12 Email to City Representatives) at OB238282 ("bulk cargo marine terminal for movement of commodities such as iron, ore, coal . . . brought into the terminal by rail").

228:15-230:4; Ex. 26 (Landreth Tr.) at 43:8-15, 45:8-46:1, 47:16-48:7.[10] So, in June 2014, without any formal hearing, the Oakland City Council adopted a Resolution opposing the transportation of fossil fuel materials, including coal. Ex. 62 (Resolution No. 85054). The City has admitted that at least two City Councilmembers made up their minds in 2015—after the 2014 Resolution was passed but before any hearings on the Ordinance were even held—that coal should be banned from the Terminal. Ex. 27 (Cappio Tr.) at 261:3-11.

The City held a hearing on the possibility of coal being shipped through the Terminal on September 21, 2015, taking in public comments both before and after the hearing. *See* Ex. 28 (6/23/16 Staff Report) at 3. Notably, at the September 21, 2015 hearing, the Bay Area Air Quality Management District ("BAAQMD")—the regional agency charged with protecting air quality—did not advocate a ban on coal through the Terminal. Ex. 29 (9/21/15 Council Hearing Tr.) at OB013677-78; *see also* Ex. 27 (Cappio Tr.) at 182:13-183:5, 356:13-25. Rather than supporting a ban on coal, BAAQMD urged instead that the City require "covers" and other mitigation techniques if the project were to go forward. Ex. 29 (9/21/15 Council Hearing Tr.) at OB013677-78; Ex. 30 (10/5/15 Email from BAAQMD to City); Ex. 27(Cappio Tr.) at 182:13-5, 356:13-25.

Soon after the September 21 hearing, the City Staff recognized that it did not have the expertise required to evaluate the public comments that had been submitted. *See* Ex. 31 (4/21/16 City Agenda Report) at 4; Ex. 27 (Cappio Tr.) at 211:21-212:11. Starting in late October 2015, therefore, the City Staff and a consultant, Environmental Science Associates ("ESA"), negotiated a Scope of Work ("SOW") for a report regarding the proposed terminal.[11] ESA's proposed SOW was submitted to the City on January 8, 2016.[12] The SOW proposed a two-phase project. The first phase would have involved, among other things, the identification of (i) potential "thresholds" against which the City Council could have evaluated the project, (ii) potential mitigations that

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[10] Defendant-Intervenor Sierra Club has admitted that it has "ramped efforts across the nation to block the means by which coal is exported from the United States," "worked with persons and/or entities it considers allies to stop the exportation of coal from the United States," and "supported the [Ordinance] as part of its efforts to block the means by which coal is exported from the United States." Ex. 22 (10/20/17 Sierra Club RFA Responses 1-3).

[11] Ex. 23 (10/21/15 Internal ESA Email); Ex. 24 (Ranelletti Tr.) at 233:3-11.

[12] Ex. 32 (1/8/16 ESA Email with SOW); Ex. 35 (ESA 8/22/17 30(b)(6) Tr.) at 48:2-5; Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 179:10-12; Ex. 24 (Ranelletti Tr.) at 246:16-21.

might be employed, and (iii) the applicable regulatory authority of other jurisdictions and agencies; "Phase 2" would have included "modeling" that would have compared the estimated emissions of the proposed terminal activities to the thresholds that the City would adopt in Phase 1. Ex. 32 (1/8/16 ESA Email with SOW) at ESA_039067-68; Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 179:16-181:15, 187:6-14.

The City Staff was scheduled to present the proposed SOW to the City Council on February 16, 2016. Ex. 34 (2/3/16 City Agenda Report); Ex. 27 (Cappio Tr.) at 220:5-10. The political firestorm opposing the SOW was so fierce that the proposal was entirely scrapped. Ex. 27 (Cappio Tr.) at 220:13-221:17; Ex. 35 (ESA 8/22/17 30(b)(6) Tr.) at 153:2-7. As ESA wrote after the City Council meeting, "all parties oppose [c]oal," and "want an out-and-out ban, and now" rather than any "study, analysis, regulations, mitigation measures, etc." that would "allow for the possibility that project [sic] will proceed with some conditions or mitigations." Ex. 36 (2/18/16 Internal ESA Email). This had been the City's plan from the beginning; as the former Project Manager for the City acknowledged, "there wasn't a political will to solve the problem through mitigation." Ex. 20 (Cashman Tr.) at 185:24-186:7. Accordingly, the core of ESA's proposed SOW was eliminated. *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 188:13-22, 203:1-204:6; Ex. 37 (5/4/16 City-ESA Service Agreement) at ESA_035933-946. Instead, the City directed ESA to provide a bare bones study because if there were no study at all—as the assistant City Administrator in charge of the OBOT project wrote—"it would be like the Emperor's New Clothes." Ex. 38 (2/13/16 Email from Cappio); *see* Ex. 27 (Cappio Tr.) at 431:1-432:8.

The City and ESA eventually entered a contract on May 4, 2016. Ex. 39 (5/4/16 City-ESA Service Agreement). At a May 3, 2016 City Council meeting where the City Council voted to retain ESA—obviously before ESA had begun work on the Emperor's New Clothes—a third City Councilmember (Noel Gallo) joined the two Councilmembers who had already made up their minds against coal: he said he was "ready to vote no on the coal."[13] Almost simultaneously, a fourth City Councilmember—Abel Guillen—posted a picture on Instagram of himself holding a sign that said: "NO COAL IN OAKLAND!". Ex. 40 (City Council Social Media Posts) at

[13] Myre Decl., ¶ 3.

1 OB275148. Thus, at least four of the eight Councilmembers who later voted on the Ordinance had
2 already decided to ban coal before ESA began its work. The City Council's attitude was not lost
3 on ESA: ESA's two 30(b)(6) witnesses admitted they knew the City Council wanted a report
4 from ESA that would sustain a ban on coal. Ex. 35 (ESA 8/22/17 30(b)(6) Tr.) at 199:14-24,
5 200:19-201:3; Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 197:16-19.

6 Contrary to its original proposal, ESA's work was limited to a review of the submissions
7 by the public and the project proponents. *See* Ex. 35 (ESA 8/22/17 30(b)(6) Tr.) at 169:16-170:5;
8 Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 59:23-60:11. As ESA recognized at the time, however,
9 there were few public comments of any technical or scientific value. Ex. 41 (5/24/16 Internal ESA
10 Email); Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 217:18-218:14. The record was so poor that the
11 project manager for ESA's Report told her team that she was "nervous" about using the only
12 emissions estimate in the record, an estimate submitted months earlier by Earthjustice. Ex. 41
13 (5/24/16 Internal ESA Email); Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 219:17-220:4. As ESA's
14 project manager testified in deposition, the ESA Report was nothing more than a "preliminary
15 review based on limited information." Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 62:21-24. She
16 conceded at deposition that "you'd have to do more than [ESA] did to satisfy CEQA analysis or an
17 air quality permit." *Id.* at 62:18-20.

18 The Ordinance proclaimed that ESA's work was an "independent evaluation." Ex. 1
19 (Ordinance) at 2; Ex. 27 (Cappio Tr.) at 250:13-15. On the contrary, however, the City Staff and
20 the City's attorneys actively directed ESA's work. That City Staff and attorneys—including trial
21 counsel in this matter—met with ESA at least once a week to review ESA's work. *E.g.* Ex. 42
22 (5/10/16 "Weekly Check-in" Appointment); Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 211:19-212:6.
23 At least twice the City edited drafts of the "independent" ESA report. *Id.* at 212:20-25. The City
24 Staff directed ESA's work: for example, the Staff instructed ESA regarding the evidence it should
25 use to support certain propositions. *E.g.* Ex. 43 (5/26/16 Internal ESA Email); Ex. 33 (ESA
26 10/31/17 30(b)(6) Tr.) at 245:21-246:5. City Staff also requested that certain positions be taken in
27 the report—for example, because of concerns about federal preemption of air quality issues. Ex.
28 44 (6/18/16 Internal ESA Email); Ex. 35 (ESA 8/22/17 30(b)(6) Tr.) at 221:21-222:12. The full

scope of the City's control over the process has not been revealed because of the City's selective assertions of attorney-client privilege and work-product.[14]

To evaluate OBOT's plans, ESA used a set of documents submitted by OBOT known as the OBOT Basis of Design. *See* Ex. 45 (6/23/16 ESA Report) at 2-1-2-2; Ex. 27 (Cappio Tr.) at 433:18-25. These documents were augmented by reports submitted through OBOT by two consultants, HDR Engineering and Cardno.[15] There is no dispute these materials reflected preliminary plans and designs which would be revised as the OBOT terminal was further refined.[16] From the time the ESA contract was signed until the delivery of the Report, ESA nonetheless only asked two questions of OBOT. *See* Ex. 46 (5/11/16 Email from City to OBOT); Ex. 27 (Cappio Tr.) at 434:1-9.

OBOT has always acknowledged that whatever terminal it builds and operates may not be built or operated without a multitude of permits. Tagami Decl. ¶ 3; Ex. 47 (10/6/15 OBOT/TLS Response to City Questions) at OAK0007471; Ex. 2 (Tagami Tr.) at 114:4-14. These permits include permits from BAAQMD, the Oakland Fire Department, OSHA and Cal/OSHA. *Id.*

The City Council received the 163-page ESA Report,[17] a 25-page City Staff Report,[18] as well as the draft Ordinance and Resolution on Friday, June 24, 2016. *See* Ex. 27 (Cappio Tr.) at 244:16-245:25, 248:6-9, 401:12-17. The City Council met on Monday, June 27, 2016 to enact the coal ban. Ex. 1 (Ordinance) at 3; Ex. 50 (hereinafter, the "Resolution") at 9. ESA does not recall being asked any questions about its Report by any City Councilmember. Ex. 33 (ESA 10/31/17

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[14] Declaration of Robert Feldman in Support of OBOT's Motion for Summary Judgment ("Feldman Decl.") ¶¶ 3-6.

[15] *See* Declaration of Phillip Tagami in Support of OBOT's Motion for Summary Judgment ("Tagami Decl.") ¶ 2; Ex. 48 (9/15/15 HDR Report); Ex. 47 (10/6/15 OBOT/TLS Response to City Questions) at OAK0007523-554.

[16] Ex. 45 (6/23/16 Report, hereinafter the "ESA Report") at 2-1–2-2; Ex. 49 (7/21/15 Basis of Design) at OB004322; Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 60:18-22, 61:4-13; Ex. 47 (10/6/15 OBOT/TLS Response to City Questions) at OAK0007471.

[17] The full title of the ESA Report is "Report on the Health and/or Safety Impacts Associated with the Transport, Storage, and/or Handling of Coal and/or Coke in Oakland, Including at the Proposed Oakland Bulk and Oversized Terminal in the West Gateway Area of the Former Oakland Army Base." Ex. 45 (ESA Report).

[18] This Report is entitled "Public Hearing to Consider a Report and Recommendation for Options to Address Coal and Coke Issues." Ex. 28 (6/23/16 Report, hereinafter the "Staff Report").

1 30(b)(6) Tr.) at 92:5-14. In fact, the only City Councilmember who had any interaction with ESA
2 regarding the ESA Report at any point was Councilmember Kalb—the Councilmember whom the
3 City concedes had decided to ban coal in the summer of 2015. *See id.* at 87:7-88:1; Ex. 27
4 (Cappio Tr.) at 258:25-259:9, 261:3-9. The City has asserted that Mr. Kalb's one "fifteen minute"
5 interaction with ESA is subject to attorney-client privilege. Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at
6 87:7-88:8, 89:3-90:4. The City Council made no changes to the draft Resolution and Ordinance
7 that had been forwarded to the City Council by the City Staff on June 24, 2016, including no
8 changes to the "findings" the City Council supposedly made on June 27, 2017. *See* Ex. 51.
9 The City Council passed the Ordinance, purporting to establish a citywide "ban on the
10 storage, loading, unloading, stockpiling, transloading and handling" of coal and petcoke at "Bulk
11 Material Facilities" in Oakland. Ex. 1 (Ordinance) at § 8.60.010. The Ordinance, however,
12 exempts "non-commercial facilities" and "on-site manufacturing facilities" where coal is handled
13 locally. *Id.* § 8.60.040(B)-(C).
14 **LEGAL STANDARD**
15 Summary judgment is appropriate "if the movant shows that there is no genuine dispute as
16 to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
17 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty*
18 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if the evidence is
19 such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*
20 The moving party bears the initial burden of identifying those portions of the record that
21 demonstrate the absence of a genuine issue of material fact. The burden then shifts to the
22 nonmoving party to "go beyond the pleadings, and by his own affidavits, or by the depositions,
23 answers to interrogatories, or admissions on file, designate specific facts showing that there is a
24 genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (internal quotation
25 marks omitted); *see also Anderson*, 477 U.S. at 257.
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27
28

ARGUMENT

I. THE ORDINANCE VIOLATES THE DORMANT COMMERCE CLAUSE

The Dormant Commerce Clause prohibits states from enacting laws that "materially restrict the free flow of commerce across state lines, or interfere with . . . matters [for] which uniformity of regulation is of predominant national concern." *S. Pac. Co. v. State of Ariz.*, 325 U.S. 761, 770 (1945).[19] As the Supreme Court declared upon the establishment of a national railroad system over a century ago: "[T]he right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it that the commerce clause was intended to secure." *Bowman v. Chi. & Nw. R.R. Co.*, 125 U.S. 465, 494-95 (1888) (internal quotation marks omitted).[20] The Dormant Commerce Clause ensures that participants in commerce "will have free access to every market in the Nation [and] that that no home embargoes will withhold [their] exports" to foreign lands. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)).

The Dormant Commerce Clause extends not just to states, but also to any subdivision of a state—*i.e.*, local governments. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Resources*, 504 U.S. 353, 361 (1992) ("[O]ur prior cases teach that a State (***or one of its political subdivisions***) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.") (emphasis added); *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 466-67 (9th Cir. 2001) (Dormant Commerce Clause applied to San Francisco ordinance).

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[19] *See also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978) ("Long ago it was settled that . . . the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce."); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-08 (1976) ("interfere[nce] with the natural functioning of the interstate market either through prohibition or through burdensome regulation" is "common" form of Dormant Commerce Clause violation).

[20] *See also Houston & T.C.R. Co. v. Mayes*, 201 U.S. 321, 328 (1906) ("That states may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the state of articles of commerce generally recognized as lawful . . . has been so frequently settled that a citation of authorities is unnecessary.").

"In reviewing challenges to local regulations under the Commerce Clause, [the Ninth Circuit] follow[s] a two-tiered approach:

> [1] ***When a state statute directly regulates*** or ***discriminates against interstate commerce***, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally ***struck down the statute without further inquiry***.
>
> [2] ***When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly***, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."

S.D. Myers, Inc., 253 F.3d at 466 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)) (emphasis added).

Accordingly, when conducting a Dormant Commerce Clause analysis, courts "must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests." *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).[21] Where a statute "does any of these things, it violates the Commerce Clause per se, and [a court] must strike it own without further inquiry." *Id.* By contrast, if a statute "has only indirect effects on interstate commerce and regulates evenhandedly," the court conducts a balancing testing to determine if the burden on interstate commerce exceeds the local benefits. *E.g.*, *S.D. Myers, Inc.*, 253 F.3d at 466 (internal quotation marks omitted). Here, the Ordinance violates the Dormant Commerce Clause as a matter of law—whether analyzed under the "per se" or "balancing" tier.

A. <u>The Ordinance Is a Per Se Violation of the Dormant Commerce Clause</u>

1. The Ordinance Directly Regulates Interstate and Foreign Commerce

The Ordinance is a per se violation of the Dormant Commerce Clause because it directly regulates interstate and foreign commerce. The Ordinance is ***not*** a law of general application that "regulates evenhandedly" across all activities in Oakland and thereby has only "indirect effects on interstate commerce." *S.D. Myers*, 253 F.3d at 466; *Brown-Forman Distillers Corp.*, 476 U.S. at

[21] *See also Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) (citing *NCAA*, 10 F.3d at 638, regarding direct regulation of interstate commerce as per se violation of Dormant Commerce Clause).

579. Rather, the Ordinance is undisputedly directed specifically at the interstate transportation of coal and petcoke for foreign export to be conducted through the Terminal at the West Gateway.

In *NCAA v. Miller*, the Ninth Circuit was presented with a Nevada statute that regulated "interstate . . . collegiate athletic associations" and thus was directed to only one organization: the National Collegiate Athletic Association ("NCAA"). 10 F.3d at 638. Because the NCAA was undeniably "engaged in interstate commerce in numerous ways," the Ninth Circuit found that the district court had erred by failing to strike down the statute as a "direct regulation" of interstate commerce. *Id.* at 640. The Ninth Circuit thereby confirmed that where a state or local law, like the Ordinance here, "is directed at interstate [or foreign] commerce and only interstate [or foreign] commerce," it is a per se violation of the Dormant Commerce Clause. *NCAA*, 10 F.3d at 638.

The Court should, therefore, strike down the Ordinance as a direct regulation of interstate and foreign commerce because it, too, is undisputedly "directed at interstate [and foreign] commerce and only interstate [and foreign] commerce"—*i.e.*, the transportation and export of coal and petcoke through the Terminal at the West Gateway. *Id.*

(a) The Ordinance Is Undisputedly Directed Solely at the Rail-to-Ship Activities of the Terminal—*Not* A Law of General Applicability.

Despite its facially broad scope, the City has admitted that the Ordinance is directed only at the activities of the interstate rail and marine export Terminal under development at the West Gateway. Ex. 25 (Cappio Tr.) at 57:15-20 ("Is the City aware of any other person, entity or operation other than the contemplated rail and shipping terminal at the West Gateway that would be subject to the Ordinance's prohibitions? A. No."), 58:15-22 ("At the time the City adopted the Ordinance . . . were there any other persons, entities or operations other than the proposed railroad and shipping terminal at the West Gateway that the City believed the Ordinance's prohibitions would apply to? A. Not to my knowledge."), 65:7-14 ("Q. . . . [T]he Ordinance prohibits all other storing or handling of coke in connection with the operations at a rail terminal in Oakland; is that right? A. At this point, specifically the break-bulk terminal proposed for the West Gateway.").[22]

[22] The City has admitted that if either UP or BNSF were to build its own terminal in Oakland, and that terminal were to handle coal, the Ordinance would apply to the operations at those rail terminals as well. Ex. 25 (Cappio Tr.) at 58:23-60:17.

The text of the Ordinance achieves this targeted regulation by exempting all other Oakland entities who handle coal or petcoke from the Ordinance's prohibitions. Ex. 1 (Ordinance) § 8.60.040(C).[23] In fact, the Ordinance expressly prohibits the activities necessary for the "rail transport"[24] and "export"[25] of coal through the Terminal, while exempting the activities of local entities that handle coal or petcoke but are ***not*** engaged in interstate or foreign commerce of them. *Compare id.* at § 8.60.040(B) (an owner or operator "shall not . . . 2. Operate any Telescoping Loading Chute for the transport of Coal or Coke. 3. Operate any Conveyor Shuttle or Traveler or Tripper for the transport of Coal or Coke or in any manner which creates a Transfer Point on site. 4. Load, unload, transload or transfer any Coal or Coke between any mode of transportation, including without limitation . . . a truck[], ship or train") *with id.* at § 8.60.040(C) (exempting "on-site manufacturing facilities where all of the Coal or Coke is consumed on-site" and "non-commercial facilities [that] Store or Handle small amounts of Coal or Coke").[26]

There can be no dispute, therefore, that the Ordinance is directed at the rail-to-ship export activities at the Terminal under development at the West Gateway.

(b) <u>The Terminal Will Undisputedly Engage in Interstate and Foreign Commerce</u>.

Defendants also do not dispute that the Terminal will engage in interstate transportation of goods for export overseas. *See, e.g.*, Ex. 8 (McClure 10/12/17 Tr.) at 31:6-32:2; Ex. 20 (Cashman Tr.) at 57:11-58:13; Ex. 52 (LDDA Attachment 7) at 7-2. Indeed, it is undisputed that coal that would go through the Terminal would be shipped via interstate rail from Utah for overseas export to countries in Asia. *See, e.g.*, Ex. 8 (McClure 10/12/17 Tr.) at 157:9-17; Ex. 2 (Tagami Tr.) at 147:18-24, 280:15-281:16; Ex. 25 (Cappio Tr.) at 66:7-11.

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[23] *See also* Ex. 25 (Cappio Tr.) at 52:15-18, 53:7-16, 54:10-15.

[24] *See* Ex. 1 (Ordinance) at § 8.60.020(B)(1)(c) ("rail transport of Coal or Coke through the City, including without limitation to and from West Oakland"); *see also id.* § 8.60.020(B)(1)(d) ("when Coal or Coke is delivered to and from, or stored at, rail-switching facilities or terminals").

[25] *See* Ex. 1 (Ordinance) at § 8.60.020(B)(1)(f) ("export of Coal").

[26] *See also* Ex. 25 (Cappio Tr.) at 54:10-15 ("Q. So manufacturing facilities that use coal or coke as an integral component in a production process are exempt from the Ordinance if they comply with permits granted by the Bay Area Air Quality Management District? A. And operated pursuant to, that's correct."), 52:15-18 (residential properties exempt from Ordinance), 53:7-16 (apartment building owners can burn coal if comply with Ordinance exemption requirements).

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(c) The Ordinance Undisputedly Prevents the Terminal from Engaging in Interstate and Foreign Commerce in Coal and PetCoke.

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Nor can there by any dispute that the Ordinance prohibits the Terminal from engaging in

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the interstate transportation of coal and petcoke for export. As the City admitted at deposition:

5
Q. So the Ordinance prohibits transferring coal and petcoke from a railcar to a ship for export to a foreign country?

6
A. Yes.

7 Ex. 25 (Cappio Tr.) at 63:18-22 (objection omitted). Indeed, coal and petcoke undisputedly
8 cannot be exported from Oakland if they cannot be transferred onto a ship, and, on its face, the
9 Ordinance prohibits unloading and transferring coal and petcoke from railcars to ships. Ex. 1
10 (Ordinance) at § 8.60.040(B) ("shall not . . . Load, unload, transload or transfer any Coal or Coke
11 between any mode of transportation, including without limitation between or among a motor
12 vehicle (e.g., a truck), ***ship or train***") (emphasis added); *see also* Ex. 25 (Cappio Tr.) at 62:14-22
13 ("Q. . . . And if I want to transport coal from Point A to Point B, to deliver it to Point B, I have to
14 also be able to take the coal off [the train] at Point B; correct? A. Yes."), 61:12-15 ("If you cannot
15 get coal onto a ship, you can't export coal by ship"), 78:25-79:1 ("One of the consequences [of the
16 Ordinance] are that exports . . . could not happen in Oakland . . . .").[27]

17 In fact, the City admits that the purpose of the Ordinance was to block the transport of coal
18 and petcoke overseas. "Prior to passing the Ordinance," the City was well aware that the Terminal
19 was "planning to accept coal shipments from Utah for export." *Id.* at 66:7-11. And the City
20 concedes that those "plans to ship, transport coal and coke through the [T]erminal at the West
21 Gateway" and the City's 2014 "adoption of a resolution to oppose the transportation of fossil
22 fuels, like coal and petcoke" through Oakland were each "an integral part of the City Council's
23 decision to pass the Ordinance." *Id.* at 66:19-69:13. Similarly, Intervenor-Defendant Sierra Club
24 undisputedly "supported the [Ordinance] as part of its efforts to block the means by which coal is
25 exported from the United States." Ex. 22 (10/20/17 Intervenor RFA Response 3). And it is

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[27] The City has further admitted that "the Ordinance prohibits transferring coal and/or petcoke from one railcar to another railcar," Ex. 25 (Cappio Tr.) at 64:2-6, and that "if a train traveling from Utah to Washington State needs to transfer coal from one train to another, it cannot do it in Oakland under the Ordinance." *Id.* at 64:7-13.

1 further undisputed that the Sierra Club has vast political sway over elected representatives in
2 Oakland. Ex. 20 (Cashman Tr.) at 229:15-230:4 ("They're kind of like the liberal equivalent of
3 the NRA. . . . They can make or break . . . . carry a lot of sway. . . .").
4 (d) Regulations that Block Interstate and Foreign Transportation of
5 Lawful Articles of Commerce Are Typical "Direct Regulations".
6 State and local laws that block interstate rail transportation and/or foreign exports of lawful
7 articles of commerce—like the Ordinance here—have long been considered textbook examples of
8 "direct regulations" of interstate or foreign commerce that are per se invalid under the Dormant
9 Commerce Clause. *See, e.g.*, *Pa. v. W. Va.*, 262 U.S. 553, 596-97 (1923) ("Natural gas is a lawful
10 article of commerce . . . . A state law, whether of the state where the gas is produced or that where
11 it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission
12 is a regulation of interstate commerce—a prohibited interference."); *West v. Kan. Natural Gas*
13 *Co.*, 221 U.S. 229, 249 (1911) (statute effectively prohibiting export of natural gas
14 unconstitutional under Dormant Commerce Clause because "to prohibit interstate commerce is
15 more than to indirectly affect it"); *Bowman*, 125 U.S. at 497 (Iowa statute obstructing rail
16 transportation of liquor is an unconstitutional "regulation directly affecting interstate commerce");
17 *Schollenberger v. Pa.*, 171 U.S. 1, 14-15 (1898) (Pennsylvania statute prohibiting import of
18 oleomargarine invalid under Dormant Commerce Clause because "state cannot absolutely prohibit
19 the introduction within the state of an article of commerce"); *Hannibal & St. Joseph R.R. Co. v.*
20 *Husen*, 95 U.S. 465, 469-70, 472 (1877) (statute prohibiting import of cattle with "object and
21 effect [of] obstruct[ing] inter-state commerce" is "a plain regulation of inter-state commerce"
22 violating Dormant Commerce Clause"); *see also Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 126
23 (1978) (suggesting that law that "prohibit[s] the flow of interstate goods" is per se invalid). As the
24 Supreme Court has made clear, state and local entities "have no power to prohibit interstate trade
25 in [any] legitimate articles of commerce . . . ." *Minn. Rate Cases*, 230 U.S. 352, 401 (1913).
26 In fact, the Supreme Court has specifically recognized that a law affecting the flow of
27 bituminous coal in interstate channels—as the Ordinance does here—directly regulates interstate
28 commerce. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393-94 (1941) (noting that

1 "rules respecting . . . sales of ***bituminous coal*** constitute regulations within the competence of
2 Congress under the commerce clause," and explaining that attaching any "conditions to the flow
3 of" bituminous coal "in interstate channels" is "***to regulate commerce itself***") (emphasis added);
4 *see also United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 408-11 (1922)
5 (Congress's commerce power extends to coal in interstate commerce).

6 In sum, because the Ordinance is undisputedly directed at, and only at, the interstate and
7 foreign commerce conducted through a rail-to-ship export terminal (and undisputedly does, in fact,
8 block the interstate rail transportation of coal and petcoke for marine export through Oakland) the
9 Ordinance is a per se unconstitutional "direct regulation" of interstate and foreign commerce. *See,*
10 *e.g.*, *NCAA*, 10 F.3d at 640; *West*, 221 U.S. at 249; *Bowman*, 125 U.S. at 497.

11 **2. The Ordinance Discriminates Against Interstate and Foreign Commerce**

12

13 The Ordinance is separately a per se violation of the Dormant Commerce Clause because it
14 impermissibly "discriminates against interstate [and foreign] commerce" in favor of local
15 interests.[28] As set forth above, the City has banned interstate transportation of coal for export,
16 while protecting in-state interests from the adverse consequences of the ban—a blatant form of
17 economic protectionism prohibited by the Dormant Commerce Clause.

18 When a state or local law "amounts to simple economic protectionism, a 'virtually per se
19 rule of invalidity has been applied.'" *Wyo. v. Okla.*, 502 U.S. 437, 454-55 (1992) (quoting *Phila.*
20 *v. N. J.*, 437 U.S. 617, 624 (1978)). As the Supreme Court explained in *Philadelphia*, "the clearest
21 example" of such economic protectionism "is a law that overtly blocks the flow of interstate
22 commerce"—like the Ordinance does here. 437 U.S. at 624. Another such example of
23 discrimination against interstate and foreign commerce that constituted impermissible economic
24 protectionism was struck down in *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp.

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26 [28] Although courts sometimes conflate discrimination against interstate commerce and
discrimination against competing out-of-state interests, these two forms of "discrimination" are
27 separate grounds for a per se violation of the Dormant Commerce Clause. *E.g.*, *NCAA*, 10 F.3d at
638 (courts "must first ask whether the Statute: 1) directly regulates interstate commerce; 2)
28 discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-
state interests" and where it "does any of these things, it violates the Commerce Clause per se").

653, 660 (W.D.N.Y. 1981). There, the court considered a series of municipal ordinances that prohibited the Port of Rochester from being used for, among other things, "commercial cargo and shipping terminals." *Id.* The court observed that the effect of the ordinances was to block "commercial shipping at the Port of Rochester," which amounted to "outright economic isolationism and patent economic protectionism" and discrimination against interstate and foreign commerce. *Id.* at 660, 662. The court accordingly held the Rochester ordinances constitutionally invalid per se. *Id.*

The Oakland Ordinance is no different. As noted, *supra* SOF.C, the Ordinance on its face bans the loading, unloading and transferring of coal and petcoke at the Terminal, which the City has conceded was intended to prevent interstate transportation of coal and petcoke for export overseas from Oakland. The Ordinance thus "overtly blocks the flow of interstate commerce [in coal and petcoke] at [Oakland's] borders," *Pittston*, 528 F. Supp. at 660, while permitting local facilities that do not transport coal or petcoke in interstate and foreign commerce to store, handle, load and unload coal. Indeed, local interests that are not engaged in the interstate rail transport for export of coal may not only store and handle coal, they may even ***burn*** it or grind it up in the open air for manufacturing purposes. *E.g.*, Ex. 25 (Cappio Tr.) at 53:7-54:15. The net effect of the Ordinance, therefore, is that the City has banned interstate and foreign commerce in coal, while protecting in-state interests from the adverse consequences of the ban—a blatant form of economic protectionism that infringes Congress's latent authority under the Commerce Clause. *See Pac. Merch. Shipping v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir. 2011) ("[T]he whole objective of the [D]ormant Commerce Clause doctrine is to protect Congress's latent authority from state encroachment.").

The Ordinance thus discriminates against interstate and foreign commerce in violation of the Dormant Commerce Clause per se. *E.g.*, *Wyoming*, 502 U.S. 437 at 454-55; *Philadelphia*, 437 U.S. at 624; *Pittston*, 528 F. Supp. at 660.

B. The Ordinance Violates the Dormant Commerce Clause Because It Unduly Burdens Interstate Commerce by Undermining National Uniformity in the Regulation of Rail Transportation

Even if the Ordinance were a law of general application (it is not) that did not "directly

1 regulate" or discriminate against interstate and foreign commerce (it does), the Ordinance would
2 still violate the Dormant Commerce Clause at the second tier of the analysis because it unduly
3 burdens interstate commerce by undermining the necessary substantial uniformity in regulation of
4 rail transportation. *See, e.g.*, *Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 870-
5 72 (9th Cir. 2003); *see also Raymond Motor*, 434 U.S. at 440.

6 **1. Local Legislation That Undermines Uniformity in the Regulation of a**
7 **National System of Transportation Unduly Burdens Interstate Commerce**

8 The Supreme Court has recognized that "ever since *Gibbons v. Ogden*, 9 Wheat.1 [(1824)]
9 . . . the states have not been deemed [permitted]. . . to regulate those phases of the national
10 commerce which, because of the need of national uniformity, demand that their regulation, if any,
11 be prescribed by a single authority." *S. Pac.*, 325 U.S. at 775. Where a state or local law
12 undermines uniformity of regulation in a system of interstate commerce that requires it—such as
13 the national freight railroad system—it places an unconstitutional burden on interstate commerce
14 that clearly outweighs any purported justification. *See, e.g.*, *id.* ("The serious impediment to the
15 free flow of commerce by the local regulation of train lengths and the practical necessity that such
16 regulation, if any, must be prescribed by a single body having a nation-wide authority are
17 apparent."); *Union Pac.*, 346 F.3d at 872; *Raymond Motor*, 434 U.S. at 445-48.

18 The need for uniform federal regulation of rail transportation is well established and
19 undisputed. *See, e.g.*, *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1190 (8th
20 Cir. 2015) (recognizing "need for uniform federal regulation of railroads"); H.R. REP. 104-311 at
21 96 (1995) (noting "federal policy of occupying the entire field of economic regulation of the
22 interstate rail transportation system"); *id.* ("the Federal scheme of economic regulation . . . is
23 intended . . . to be completely exclusive," and lack of uniformity "risks the balkanization and
24 subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of
25 transportation"); *see also Mich. S. R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1154 (2001)
26 ("The [Federal Railroad Safety Act] was enacted under Congress's constitutional authority to
27 regulate interstate commerce with the intent of providing uniform national regulation of railroad
28 operations."); *id.* at 1155 ("Congress' occupation of the field of railroad regulation is to ensure

uniform national standards"). Indeed, the City's retained expert witness in this litigation for "rail operations," Stephen M. Sullivan, testified to the importance of having a federal body to "occupy the field" of regulation in railroad commerce. Ex. 9 (Sullivan Tr.) at 7:11-13, 28:9-29:16. Mr. Sullivan testified that the "railroad networks are very vast and integrated," *id.* at 232:2-4, and underscored the need for "railroad operations" across railroads with different "geographic footprints" to be "closely coordinated." *Id.* at 24:17-25:4.

As the Ninth Circuit has explained in holding unconstitutional regulations affecting train configuration implemented by the California Public Utilities Commission ("CPUC"):

> Both parties concede that trains are not reconfigured during transit, so, for example, a train leaving Nebraska and traveling to Los Angeles would be initially configured so as to meet the most stringent [configuration] standards on its trip. Thus, any rule regarding the make-up of a train will have extra-territorial effects in a number of different states. While the extra-territorial effects of only one state regulatory regime are relatively minor, if California can require the Railroads to develop and to implement performance-based standards, so can every other state, and there is no guarantee that the standards will be similar. The effect of such a patch-work regulatory scheme would be immense.

Union Pac., 346 F.3d at 871; *see also S. Pac.*, 325 U.S. at 775 (similar). Because a patch-work system of rules regarding train configuration "would undermine the need for substantial uniformity in this area and interfere with interstate commerce," the Ninth Circuit held that the CPUC regulations violated the Dormant Commerce Clause. *Union Pac.*, 346 F.3d at 871-72.

2. The Ordinance Undermines the Uniformity of National Railroad Regulation

Here, by preventing the handling, unloading and storage of coal or petcoke in Oakland at a rail-served terminal, *supra* SOF.C, the Ordinance has the same impermissible extraterritorial effect, undermining the uniformity of regulation required by the national rail system, as the CPUC regulations that were struck down in *Union Pacific*. Specifically, the Ordinance requires a patch-work system of rail transportation by forcing rail carriers to divert any train carrying coal and petcoke—fossil fuels used across the country [29]—to terminals outside of Oakland.

Put simply, the Ordinance's ban on coal and petcoke creates a "patchwork regulatory scheme" for rail cargo. As long as the Ordinance is in place, any interstate train carrying cargo for

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[29] *E.g.*, Ex. 20 (Cashman Tr.) at 193:10-195:5; Ex. 9 (Sullivan Tr.) at 36:1-37:15, 230:6-232:5.

export through Oakland will be required to conform its cargo to the Ordinance at its out-of-state point of origin—or divert its course to avoid Oakland altogether—because coal and petcoke cannot be unloaded, transferred from one rail car to another, or even stored in a rail car for a matter of minutes in Oakland—as the City has conceded.[30] *See supra* § I.A.1.(a); Ex. 25 (Cappio Tr.) at 64:15-65:14 ("Q. If one were to store coal or coke for 30 minutes, is that temporarily? . . . . A. That could include the definition of 'temporarily.' Q. And so in addition to the specific things mentioned—loading, unloading, transloading or transferring . . . —the Ordinance prohibits all other storing or handling of petcoke in connection with the operations at a rail terminal in Oakland; is that right? A. At this point, specifically the break-bulk terminal proposed for the West Gateway."), 58:23-59:12 ("Q. If the Union Pacific Railroad decided to build a railroad terminal in Oakland and that terminal was to handle coal, would Union Pacific be subject to the prohibitions regarding coal and petcoke in the Ordinance? A. Yes.") (objections omitted).

Accordingly, like the regulations held invalid in *Union Pacific*, the Ordinance undermines the necessary uniformity in regulation of rail transportation. Indeed, if each city across the country connected to the national railroad system could dictate which lawful articles of commerce can and cannot be transferred or otherwise handled at rail-served terminals within its borders, the "vast and integrated" national rail system would become wholly unworkable. *Cf. Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 342-43 (D.C. Cir. 2013) (even permitting railroads to decide what goods they will carry "would produce gaps in the existing rail system with regard to specific traffic, thereby undermining Congress's clear intent to establish an integrated national network") (internal quotation marks omitted). The Ordinance thus violates the Dormant Commerce Clause as a matter of law on this additional ground. *Union Pac.*, 346 F.3d at 872.[31]

II. THE ORDINANCE IS PREEMPTED BY ICCTA

OBOT is separately entitled to summary judgment because the Ordinance is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101 *et seq.*,

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[30] Any interstate train that needs to stop at a terminal in Oakland to, for example, load or unload additional cars or goods, transfer goods to another train, or even switch crews, would similarly be required to conform its cargo to the Ordinance. *See, e.g.*, Ex. 25 (Cappio Tr.) at 64:2-13.

[31] The burdens the Ordinance imposes on interstate and foreign commerce outweigh the local benefits in many other ways, which OBOT will present to the Court if this case proceeds to trial.

which grants exclusive jurisdiction to the United States Surface Transportation Board ("STB") to regulate "transportation by rail carrier"—including the rail switching services, temporary rail car storage, and unloading and other handling of coal that must be performed at the Terminal to transport coal by rail from Utah to foreign countries overseas.

One of Congress's principal purposes in enacting the ICCTA was to expand federal jurisdiction and broaden the scope of federal preemption. *See* H.R. REP. NO. 104-311 at 95 ("[C]hanges are made to reflect the direct and complete preemption of State economic regulation of railroads."); *see also* Ex. 9 (Sullivan Tr.) at 28:9-29:16 (federal government sought to "occupy the field" of railroad regulation). Accordingly, Congress enacted such a broad express preemption provision that the Ninth Circuit has stated that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998) (internal quotation marks omitted).

"In order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the [STB]," under 49 U.S.C. § 10501(a). *See Or. Coast Scenic R.R. v. Or. Dep't of State Lands*, 841 F.3d 1069, 1073 (9th Cir. 2016). Section 10501(a) provides that:

> (1) Subject to this chapter, the Board has jurisdiction over ***transportation by rail carrier*** that is--
>
> (A) only ***by railroad***; or
>
> (B) ***by railroad and water***, when the transportation is under common control, management, or arrangement ***for a continuous carriage or shipment***.

49 U.S.C. § 10501(a) (emphasis added). The Board's jurisdiction under Section 10501(a) extends specifically to transportation between "(A) a State and a place in the same or another State as part of the interstate rail network; … or (F) the United States and a place in a foreign country." 49 U.S.C. § 10501(a)(2).

"If the Board has jurisdiction under 49 U.S.C. § 10501(a), the question whether jurisdiction is *exclusive*—i.e., whether state regulation is preempted—is a separate question governed by 49 U.S.C. § 10501(b) . . . ." *Or. Coast*, 841 F.3d at 1073. Section 10501(b) gives the

1 Board "exclusive" jurisdiction over "(1) transportation by rail carriers … and (2) the … operation . . . of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b).

A. The Ordinance Impermissibly Regulates "Transportation By Rail Carrier"

Whether an activity is subject to the STB's jurisdiction under Section 10501(a) requires "that the disputed activity meet three statutory prongs: it must be (1) 'transportation' (2) 'by rail carrier' (3) 'as part of the interstate rail network.'" *Or. Coast Scenic*, 841 F.3d at 1073. All three of these requirements are met here.

1. The Ordinance Regulates "Transportation"

The first requirement under Section 10501(a) is satisfied because the Ordinance plainly regulates "transportation." ICCTA defines "transportation" as "a locomotive, … ***yard***, property, ***facility***, instrumentality, or equipment ***of any kind related to the movement of*** passengers or ***property***, or both, ***by rail***, regardless of ownership or an agreement concerning use" and "***services related to that movement including receipt, delivery***, elevation, ***transfer in transit***, refrigeration, icing, ventilation, ***storage***, ***handling***, and ***interchange of*** … ***property***." 49 U.S.C. § 10102(9)(A)-(B) (emphasis added). On the undisputed facts, there are several respects in which the ban imposed by the Ordinance necessarily regulates "transportation" under ICCTA.

First, because the rail operations at the Terminal undisputedly involve the ***movement of property by rail***, *see supra* SOF.B, and because they are performed on a "yard, property, [or] facility … relate[d] to the movement" of such property by rail, they constitute "transportation" under ICCTA. 49 U.S.C. § 10102(9)(A), (B); *see also* Ex. 9 (Sullivan Tr.) at 134:8-135:9, 137:1-139:11, 144:7-25 (discussing movement of coal by rail at Terminal).

Second, the Ordinance regulates "transportation" because it prevents ***loading, unloading, or transferring*** any coal or petcoke "between any mode of transportation, including without limitation . . . a truck[], ship or train." Ex. 1 (Ordinance) at § 8.60.040 B.4; *see also* Ex. 9 (Sullivan Tr.) at 144:15-25 (unloading of coal involves OGRE "pulling the train over the dump pits" by locomotive), 147:17-148:1 ("Q. . . . [T]he railcar unloading process necessarily includes switching unloaded cars to other tracks to facilitate the unloading of more cars; is that right?

1 A. That's correct. Q. And then the railcar unloading process also necessarily includes securing
2 unloaded cars to be left unattended, and coupling into the next cut of cars to be unloaded; is that
3 right? A. That's correct."), 124:14-21 ("rail operations" include the "activities between arriving at
4 the OAB Rail through the handling and unloading process of these trains . . . .").

5 *Third*, the Ordinance bans the temporary "storage" of coal and petcoke that is necessary to
6 transport it by rail at a terminal like that under development at the West Gateway. The Ordinance
7 expressly defines "Store or Handle" to include temporary storage. *Id.* at § 8.60.030(12). The City
8 concedes that, consistent with this definition, the Ordinance prohibits storage of coal and petcoke
9 for even thirty minutes. Ex. 25 (Cappio Tr.) at 48:8-24, 64:15-65:5. And the City's rail
10 operations expert witness testified in this litigation that the temporary storage of coal for more
11 than thirty minutes at the Terminal is an inherent part of the rail operations involved in
12 transporting coal by rail for transfer to ships for marine export. *E.g.*, Ex. 9 (Sullivan Tr.) at
13 146:12-25 ("Q. [T]he second cut of coal railcars will be sitting stationary on track at the terminal
14 near the dump pit for, in your projection, at least 104 minutes? A. Maybe longer, but, yes . . . .").

15 *Fourth*, the Ordinance expressly bans transloading at the Terminal. Ex. 1 (Ordinance) at §
16 8.60.040 B.4.[32] Because "intermodal transloading operations and activities involving loading and
17 unloading materials from rail cars and temporary storage of materials are a part of transportation,"
18 it is "well-established that preemption of state and local regulation under the ICCTA generally
19 extends to transloading facilities." *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 118 (1st Cir.
20 2015). Indeed, courts have routinely recognized that state and local regulations of transloading
21 facilities are within the Board's jurisdiction. *See, e.g.*, *N.Y. Susquehanna & W. Ry. Corp. v.*
22 *Jackson*, 500 F.3d 238, 247-49 (3d Cir. 2007); *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*,
23 669 F.3d 525, 530 (5th Cir. 2012); *Norfolk So. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 158
24 (4th Cir. 2010); *Green Mountain R.R. Co. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005).

25 Even the City's 30(b)(6) witness admitted that, as long as a train "stopped and unloaded
26 and stored and managed and handled coal, yes, it would be subject to the Ordinance." Ex. 25

27 [32] While in industry practice "transload" may often refer to transfer of containerized goods, *see*
28 Ex. 8 (McClure 10/12/17 Tr.) at 198:6-10, "transload" as used here means "transferring bulk shipments from one type of vehicle to another at an interchange point." *Grosso*, 804 F.3d at 118.

1 (Cappio Tr.) at 60:2-17. There is no dispute that the Ordinance regulates "transportation."

2 **2. The Ordinance Regulates Transportation by "Rail Carrier"**

3 The Ordinance also regulates "transportation ***by rail carrier***" under Section 10501(a).
4 ICCTA defines "rail carrier" as "a person providing common carrier railroad transportation for
5 compensation." 49 U.S.C. § 10102(5). While ICCTA does not define "common carrier," that
6 term has been defined in other contexts as "one who operates a railroad as a means of carrying for
7 the public." *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187 (1920); *see also Smith v. Rail Link,*
8 *Inc.*, 697 F.3d 1304, 1308 (10th Cir. 2012) (common carrier is "railroad that carries for the
9 public"); *Kieronski v. Wyandotte Terminal R.R. Co.*, 806 F.2d 107, 108 (6th Cir. 1986) (defining
10 "common carrier" as "one who holds himself out to the public as engaged in the business of
11 transportation of persons or property from place to place for compensation, offering his services to
12 the public generally") (internal quotation marks omitted). Where, a short line carrier, like OGRE,
13 "contracts with . . . a large interstate railroad . . . to undertake the last leg of transportation," it
14 "meet[s] the conventional definition of common carrier." *See Fayard v. Ne. Vehicle Servs., LLC*,
15 533 F.3d 42, 46-47 (1st Cir. 2008).

16 Moreover, "work done by a non-carrier can be considered activity 'by a rail carrier' if there
17 is a sufficient degree of integration between the work done by the non-carrier and the authorized
18 rail carrier's own operations." *Or. Coast*, 841 F.3d at 1074. The overarching consideration is
19 "whether the non-carrier's activities are 'an ***integral part of the rail carrier's provision of***
20 ***transportation by rail carrier***." *Id.* (citation omitted). In *Oregon Coast*, the Ninth Circuit held
21 that track-repair work done by an independent (non-carrier) contractor on behalf of the Port of
22 Tillamook Bay ("a federally regulated railroad authorized by the Board") constituted
23 "transportation by rail carrier." 841 F.3d at 1070-71. In holding that the independent contractor
24 conducting the repair work was engaged in "transportation by rail carrier," the Ninth Circuit
25 reasoned that "track maintenance and repair are essential to providing transportation over a
26 railway." *Id.* at 1074. It would be "absurd," the Ninth Circuit observed, if railroads could divest
27 the STB of jurisdiction by hiring contractors to perform essential rail services. *Id.*

28 At the Terminal at the West Gateway, either UP and BNSF, or OGRE acting on behalf of

1 UP or BNSF,[33] will perform "transportation" of coal and petcoke regulated by the Ordinance.[34]
2 UP and BNSF are undisputedly long haul Class I "common carriers" or "rail carriers," *see, e.g.*,
3 Ex. 10 (McClure 10/16/17 Tr.) at 22:12-14, 101:13-16, and thus undisputedly perform
4 "transportation by rail carrier." "Transportation" by OGRE at the Terminal is also properly
5 considered "transportation by rail carrier" under Section 10501(a) because OGRE undisputedly
6 has contractual agreements with UP and BNSF to switch rail cars on behalf of those railroads,[35]
7 and OGRE will perform the essential "last-mile" rail services for trains of coal—including the
8 movement of property by rail, switching, loading and rail storage described above—at the
9 Terminal on behalf of UP and BNSF, for the benefit of UP and BNSF's customers. *See supra*
10 SOF.B; *see also* Ex. 2 (Tagami Tr.) at 64:15-65:19; Ex. 10 (McClure 10/16/17 Tr.) at 82:12-19,
11 104:16-25, 171:18-174:15, 179:24-181:2; Ex. 9 (Sullivan Tr.) at 144:15-25.
12 Even more so than the track maintenance and repair in *Oregon Coast*, these "last-mile"
13 services are "essential" to rail transportation—without them, rail cargo would never be delivered
14 to the customer. As the City's "rail operations" litigation expert witness testified, it is "common
15 for a long-haul carrier, like Union Pacific or BNSF, to engage a short line carrier to perform the
16 last leg of its rail journey for final delivery of the goods." Ex. 9 (Sullivan Tr.) at 46:22-47:4; *see*
17 *also id.* at 45:2-7 (short lines most often provide last mile service for a longer journey).
18 Because the Ordinance undisputedly regulates these "last-mile" services essential to
19 delivering goods by rail, *see supra* SOF.B-C, whether performed by Class I carriers, or OGRE on
20
21 [33] Under OGRE's forthcoming inter-track agreement with UP, UP will reserve the right to
22 perform "last-mile" services to deliver the coal itself. Ex. 2 (Tagami Tr.) at 63:25-64:18 ("We will have an ITA agreement, inter-track agreement, with Union Pacific Railroad … So any of the
23 class I railroads has the right under an ITA to call our facility. So they can bypass OGRE if they were so to elect and direct deliver to a prospective customer their commodity."); Ex. 10 (McClure
24 10/16/17 Tr.) at 89:7-23 ("The industry track agreement that we would have with both UP and BN would define their rights to go onto the OGRE track to deliver to their customer"), 92:5-96:7.
25 [34] As noted, the City has admitted that if either UP or BNSF were to build its own terminal in
26 Oakland, and that terminal were to handle coal, the Ordinance would apply to the operations at those rail terminals as well. Ex. 25 (Cappio Tr.) at 58:23-60:17.
27 [35] *See* Ex. 11 (7/9/13 OGRE Operating Agreement); Ex. 12 (6/1/12 SSA); Ex. 13 (9/1/12 1st Amendment to the SSA); Ex. 14 (9/1/12 1st Amendment to Agreement between BNSF and IRC);
28 Ex. 15 (11/3/15 OGRE Rail Operating Agreement); Ex. 16 (3/1/16 OGRE Safety Program); Ex. 10 (McClure 10/16/17 Tr.) at 32:1-18, 91:1-94:12.

behalf of those Class I rail carriers—the Ordinance regulates "transportation by rail carrier."

3. The Ordinance Regulates Transportation by Rail Carrier "As Part of The Interstate Rail Network"

The third requirement for STB jurisdiction is also satisfied here: the rail operations in question are conducted as part of the "interstate rail network." Under Section 10501(a)(2), the STB's jurisdiction extends to "transportation" that is "part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A). The Ninth Circuit has applied the STB's definition of "interstate rail network," which "broadly . . . include[s] (but [is] not . . . limited to) facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce." *Or. Coast*, 841 F.3d at 1075 (alteration omitted) (quoting *DesertXpress Enters., LLC*, No. 34919, 2010 WL 1822102, at *9 (S.T.B. May 7, 2010)).[36]

It is undisputed that the rail line over which OGRE (and/or UP or BNSF) will operate to deliver coal and petcoke to ships at the Terminal is part of the general system of rail transportation related to the movement of freight in interstate commerce. That rail line connects the UP or BNSF main line to the dump pits at the Terminal, such that bulk goods carried by UP and BNSF from out-of-state (specifically Utah in the case of coal) can be transferred onto ships for export overseas. *See, e.g.,* Ex. 10 (McClure 10/16/17 Tr.) at 82:12-19 ("this was a very critical part of connecting into the Union Pacific main line from the south, the BNSF main line from the north, connecting as an extension of UP and BNSF. OGRE provides rail service as a rail carrier to the West Gateway . . . ."); Ex. 9 (Sullivan Tr.) at 43:15-44:21 ("'Short line railroads are a critical part of the U.S. freight network.'"). Accordingly, "transportation by rail carrier" that is regulated by the Ordinance is undisputedly performed on part of the "interstate rail network."

All three requirements are thus satisfied, and the Ordinance regulates "transportation by rail carrier" that is subject to the STB's jurisdiction under Section 10501(a).

B. <u>The Ordinance Is Expressly Preempted by ICCTA</u>

Not only does the STB have jurisdiction under Section 10501(a), but its jurisdiction is

[36] Even "'transportation between places in the same state'" are part of the "interstate rail network" "as long as that transportation is related to interstate commerce." *Or. Coast*, 841 F.3d at 1075 (internal quotation marks omitted).

exclusive under Section 10501(b), and thus the Ordinance is preempted.

First, Section 10501(b) gives the Board "exclusive" jurisdiction over "transportation by rail carriers," 49 U.S.C. § 10501(b)(1)—and, indeed, "***all state laws*** that may reasonably be said to have the ***effect*** of ***managing or governing rail transportation***." *Or. Coast*, 841 F.3d at 1077 (quoting *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt.*, 622 F.3d 1094, 1096 (9th Cir. 2010) (emphasis added); *see also N.Y. Susquehanna*, 500 F.3d at 252 (3d Cir. 2007) (same). While ICCTA may not "preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce," *see Or. Coast*, 841 F.3d at 1077—as set forth in detail above, *supra* § II.A.2, the Ordinance is ***not*** a law of general applicability, but is instead specifically directed at the interstate rail transportation of coal and petcoke that is intended for export overseas.[37] By banning the storage, handling, loading, and unloading of coal and petcoke that is transported by interstate rail for export from Oakland, the Ordinance undisputedly has the "effect of . . . governing rail transportation" of coal and coke through the Terminal. *See Or. Coast*, 841 F.3d at 1076. Indeed, that is exactly why the City Council of Oakland passed the Ordinance. *See supra*, SOF.A. The Ordinance is thus preempted by the ICCTA.

Second, Section 10501(b) expressly gives the STB exclusive jurisdiction over "operation . . . of spur, . . . switching, or side tracks, or facilities," 49 U.S.C. § 10501(b)(2), and the Ordinance indisputably affects operations of spur or switching tracks and facilities at the Terminal, *see supra* § II. Since the Ordinance prevents coal and petcoke from being stored, handled, or unloaded on spur or switching tracks and related facilities, the Ordinance is "squarely within this preemption provision," *Or. Coast*, 841 F.3d at 1076, and thus preempted on this additional ground.

III. THE ORDINANCE IS PREEMPTED BY THE HMTA

In addition to being preempted by ICCTA, the Ordinance is preempted by the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101 et seq. A "major purpose of the HMTA was the development of a uniform, national scheme of regulation regarding the

[37] Even if the Ordinance were a law of general applicability (which it is not), "[i]n determining whether a law of general applicability is permissible . . . what matters is the degree to which the challenged regulation burdens rail transportation." *Or. Coast*, 841 F.3d at 1077 (internal quotation marks omitted). As explained, *supra* § I.B, the Ordinance severely burdens rail transportation by banning cargo that railroads can handle in Oakland.

1 transportation of hazardous materials." *Chlorine Inst., Inc. v. Cal. Highway Patrol,* 29 F.3d 495,
2 496–97 (9th Cir. 1994) (internal quotation marks omitted). Accordingly, the HMTA contains an
3 express limitation on state regulation concerning transportation of hazardous materials. In
4 particular, any state or local law "that is not substantively the same" as any provision of the
5 HMTA, or regulations prescribed under the HMTA, is preempted if it involves "the designation,
6 description, [or] classification of hazardous material." 49 U.S.C. § 5125(b)(1)(A); *see* 49 C.F.R.
7 171.1(f)(iii) (a state or local law is preempted if it "is not substantively the same as a federal
8 provision concerning "[t]he designation, description, and classification of hazardous material").
9 Congress vested authority to designate hazardous materials—including "flammable …
10 solid[s]"—to the Secretary of Transportation, upon a determination "that transporting the material
11 in commerce . . . may pose an unreasonable risk to health and safety or property." 49 U.S.C. §
12 5103(a). The Department of Transportation has, accordingly, prescribed comprehensive
13 regulations for rail transportation of hazardous materials. *See* 49 C.F.R. §§ 174.1-174.750.
14 Indeed, rail carriers have a statutory common carrier obligation to "provide transportation or
15 service on reasonable request," 49 U.S.C. § 1101(a), and this obligation requires them "to
16 transport hazardous materials where [as here] the appropriate agencies have promulgated
17 comprehensive regulatory programs addressing the safety . . . risks of transporting hazardous
18 materials by rail." *Riffin*, 733 F.3d at 346 (internal quotation marks omitted). The Secretary of
19 Transportation has determined that coal and petcoke are *not* hazardous materials that present a
20 danger too great to transport by rail. *See* 49 C.F.R. § 172.101 (table of hazardous materials); *see*
21 *also* Ex. 9 (Sullivan Tr.) at 30:21-31:3 ("Q. Did the course that you took with respect to rail
22 transportation of hazardous materials involve petcoke at all? A. It did not. Q. Did the course that
23 you took with respect to rail transportation of hazardous materials involve coal? A. It did not.").
24 In enacting the Ordinance, however, the City declared that transporting coal and petcoke
25 by rail "create[s] conditions substantially dangerous to the health and/or safety" of persons in
26 Oakland such that it needs to be banned. Ex. 1 (Ordinance) at § 8.60.020(B)(1)(d). Indeed, the
27 City has conceded that the Ordinance attempts to designate coal as a material too hazardous to be
28 transported by rail through a terminal—in conflict with the Department of Transportation's

regulations. *See* Ex. 25 (Cappio Tr.) at 79:4-13 ("Q. By passing the Ordinance, did the City seek to designate coal and petcoke as substances that are too hazardous to be transported by rail into a terminal in Oakland? A. Yes . . . ."). The City's regulation banning the rail transportation of coal through any terminal in Oakland is undisputedly "not substantively the same" as the determination of the Secretary of Transportation that coal and petcoke can be safely transported by rail. The Ordinance, therefore, is preempted by the HMTA. 49 U.S.C. § 5125(b)(1)(A).[38]

IV. THE ORDINANCE IS PREEMPTED BY THE SHIPPING ACT

The Ordinance is also preempted by the Shipping Act (46 U.S.C. §§ 40101-41309). While the Shipping Act does not have an express preemption provision, "conflict preemption is implicit preemption of state law that . . . arises when compliance with both federal and state regulations is a physical impossibility." *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (internal quotation marks omitted). The Ordinance is preempted here because it conflicts with the Shipping Act's requirement that "[a] marine terminal operator may not . . . unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp." 46 U.S.C. § 41106(1). "[A] discriminatory practice is prohibited by the Shipping Act's unreasonable discrimination prohibition unless the practice can be justified by 'transportation conditions.'" *See Reed v. City & Cnty. of S.F.*, 10 Cal. App. 4th 572, 574 (Cal. Ct. App. 1992) (citing *N.Y. Shipping Assoc. v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1343-44, 1375 (D.C. Cir. 1988)).

Because the Ordinance requires any operator of the Terminal to refuse to provide terminal services on a basis other than "transportation conditions" (*i.e.*, on the basis of the goods sought to be transported—coal and petcoke), it forces discrimination in violation of 46 U.S.C. § 41106(1), as the City has conceded. *See* Ex. 25 (Cappio Tr.) at 82:3-12 ("Q. Did the Ordinance and Resolution prohibit entities who are affiliated with the terminal at the West Gateway, like OBOT, from doing business with a marine shipping company who wants to ship coal or petcoke? . . . . A. And I will—I will answer that yes . . . ."). It is undisputed that compliance with both the Shipping Act and the Ordinance is impossible, and the Ordinance is accordingly preempted.

[38] Not only does the Ordinance conflict with the uniform federal scheme of regulating hazardous materials, but it requires rail carriers to violate their statutory common carrier obligation.

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V. THE CITY BREACHED THE DEVELOPMENT AGREEMENT

OBOT is likewise entitled to summary judgment that the City breached the DA. The DA permits new regulations to be applied to the Terminal only if there is "substantial evidence" of a condition "substantially dangerous" to the health or safety of "occupants or users of the Project," or its "adjacent neighbors." Ex. 4 (DA) at § 3.4.2; *see also* D.E. 71, at 2.[39] Any such new law or regulation may impair a vested right only if the law or regulation is "necessary" to protect health and safety. *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 421 (2016); *Davidson v. Cty. of San Diego*, 49 Cal. App. 4th 639, 648-49 (1996). This standard is far more demanding than the deferential standard by which general welfare or zoning ordinances may be judged. *See Stewart Enterprises*, 248 Cal. App. 4th at 422–23. On the undisputed facts, no substantial danger to health or safety can be established.

A. Pre-Existing Regulations Will Undisputedly Prevent a Substantial Danger

1. The BAAQMD Permit Process Will Prevent a Substantial Danger to Air Quality

The Ordinance recited without supporting evidence that "pre-existing local, state and/or federal laws are inapplicable and/or insufficient to protect and promote the health, safety and/or general welfare" of Oakland "Constituents." Ex. 1 (Ordinance) at 2. The Resolution contained the same finding. Ex. 50 (Resolution) at 2. This finding is insufficient to satisfy Section 3.4.2 for at least two reasons. *First*, the finding is unsupported by any, much less substantial evidence, all of which is to the contrary. *Second*, while this finding might support the application of the Ordinance to "facilities" without OBOT's vested rights (if there were any such facilities), it fails to address, much less satisfy, the "substantial danger" test in Section 3.4.2. This was no drafting error: comprehensive federal and state laws ensure that operations at the Terminal will not result

[39] There were no negotiations or discussions about the meaning of 3.4.2 between the parties. *See* Ex. 24 (Ranelletti Tr.) at 207:17-212:24. DA Section 3.4.2 provides: "City shall have the right to apply City Regulations adopted by the City after the Adoption Date, if such application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety." Ex. 4.

1 in a condition substantially dangerous to health and safety.[40]

2 It is well established that "[t]wo statutory schemes regulate air quality in California: the
3 federal Clean Air Act (42 U.S.C. §§ 7401 et seq.) and the California Clean Air Act (Cal. Health &
4 Safety Code § 39000 et seq.)." *Friends of Oceano Dunes, Inc. v. San Luis Obispo Cty. Air*
5 *Pollution Control Dist.*, 235 Cal. App. 4th 957, 961 (2015). Under the Federal Clean Air Act
6 ("FCAA"), the Environmental Protection Agency ("EPA") sets national ambient air quality
7 standards ("NAAQS") for the maximum allowable concentration of a given pollutant. *Id.*; *see*
8 *also* Chinkin Decl., ¶ 6. As the City's retained health expert witness in this litigation testified, the
9 NAAQS were designed by the EPA to "protect public health, including the health of at-risk
10 (sensitive) populations." Ex. 53 (Moore Tr.) at 42:1-14, 63:11-21; *see also* Chinkin Decl., ¶ 6.

11 The FCAA delegates to each state the primary responsibility for protection of air quality
12 within its geographic boundaries. *Friends of Oceano Dunes*, 235 Cal. App. 4th at 961. Pursuant
13 to this delegation and the California Clean Air Act, Cal. Health & Safety Code § 39000, *et seq.*
14 ("CCAA"), the California Air Resources Board is charged with developing and enforcing a State
15 Implementation Plan to ensure compliance with federal air quality standards. *See* Cal. Health &
16 Safety Code § 39602. As relevant here, the CCAA further assigns regulatory authority over air
17 quality to regional "air districts," such as BAAQMD for the Bay Area, and the South Coast Air
18 Quality Management District ("SCAQMD") for certain southern California counties. *Nat. Res.*
19 *Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 651 F.3d 1066, 1069 (9th Cir. 2011). The
20 mission of a California Air District is to "achieve and maintain compliance, in its regional
21 jurisdiction, with state and federal ambient air quality standards"—air quality standards that
22 protect the public. *Cal. Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist.*, 62 Cal. 4th 369,
23 378 (2015); *see also* Ex. 53 (Moore Tr.) at 42:1-13, 63:11-21. To accomplish this objective,
24 BAAQMD "monitors air quality, issues permits to certain emitters of air pollution, and
25 promulgates rules to control emissions." *Cal. Bldg. Indus. Assoc.*, 62 Cal. 4th at 378.

26 [40] As part of its original Scope of Work, ESA had proposed to "[d]evelop a matrix indicating
27 jurisdictional authority for regulation of operational activity covered in the Project or for relevant health and safety aspects." *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 187:6-15; Ex. 32 (1/8/16
28 ESA Email with SOW) at ESA_039073. At the City's instruction, however, it did not do so. *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 187:6-15.

There is no dispute that OBOT must obtain an Authority to Construct and Permit to Operate ("BAAQMD Permit") before it may construct, operate and continue to operate the Terminal. *See* Tagami Decl. ¶ 3; Ex. 24 (Ranelletti Tr.) at 284:1-9, 290:16-19; Ex. 27 (Cappio Tr.) at 175:2-10, 177:4-178:3. For several reasons it is likewise undisputed that a BAAQMD Permit—if it is issued—will protect against a substantially dangerous air quality condition.

First, the City has admitted this central proposition. Claudia Cappio, the Deputy City Administrator with overall responsibility for the OBOT project and the principal author and signatory to the June 24 Staff Report,[41] appeared as the City's Rule 30(b)(6) witness. Ms. Cappio testified she "ha[s] [no] reason to think that BAAQMD would enforce EPA standards in a way that permitted a substantial danger to people in the City of Oakland," Ex. 27 (Cappio Tr.) at 273:1-12; likewise, she never "reach[ed] a determination that BAAQMD's rules and regulations were inadequate to ensure adequate air quality with respect to the OBOT terminal." *Id.* at 180:18-23.

Second, three coal or petcoke terminals are currently operating in the BAAQMD region with BAAQMD permits. *See* Ex. 45 (ESA Report) at 2-18-2-20; Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 76:21-25, 77:25-78:9, 82:17-24. Neither the Ordinance, the Resolution, nor the ESA Report addresses the fact that these terminals operate pursuant to BAAQMD permits and none of these documents cites any evidence that these nearby terminals pose a substantial danger to anyone. The SCAQMD likewise has issued permits to two such terminals at the Port of Long Beach.[42] The City Council made no finding that any of these terminals had Air District permits or that they posed any substantial danger.

Third, the Ordinance itself demonstrates that a BAAQMD permit protects against a substantial danger. The Ordinance expressly exempts from its scope "on-site manufacturing facilities" *in Oakland* that "consume" (*e.g.*, burn) coal or coke so long as they are operated pursuant to "permits granted by the [BAAQMD]." Ex. 1 at § 8.60.040(C). The City's Rule 30(b)(6) witness admitted that reliance on a BAAQMD permit would ensure safe air quality for

[41] *See* Ex. 27 (Cappio Tr.) at 207:12-208:2, 419:1-12.

[42] *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 84:16-85:13; Declaration of Lyle Chinkin in Support of OBOT's Motion for Summary Judgment ("Chinkin Decl.") ¶¶ 42-43; Ex. 45 (ESA Report) at 2-18-21 (listing terminals but not reporting that they operate with Air District permits or even claiming they posed a substantial danger).

manufacturing facilities that consume coal. *See* Ex. 25 (Cappio Tr.) at 55:7-17, 87:3-88:1; *see also* Tagami Decl. ¶ 5 (OBOT will not burn coal). The City Council did not explain why the BAAQMD permit process is sufficient to ensure safe air quality for manufacturing facilities that "consume" coal—and, by necessity, handle and store it—but not for a modern terminal.

Finally, to ensure that the concentration of pollutants is below the NAAQS,[43] BAAQMD monitors air quality at stations around the Bay Area, including a station in West Oakland. *See* Chinkin Decl. ¶ 8-9. If even a single BAAQMD monitor in the Bay Area becomes "out of attainment" (that is, if the concentration of a certain pollutant at that location is higher than the NAAQS threshold), the entire Bay Area region becomes "out of attainment" for that pollutant, and BAAQMD must act to bring it back into attainment. *See Id.* ¶ 10; Ex. 27 (Cappio Tr.) at 178:5-16. BAAQMD's permitting requirements for any new emissions source provide that "[a] permit application cannot be approved unless [a] modeling analysis demonstrates that the proposed source emissions will not interfere with the attainment or maintenance of a National Ambient Air Quality Standard (NAAQS)." Chinkin Decl. ¶ 11; Chinkin Decl. Ex. E (BAAQMD Permit Handbook). Thus, if a modeling analysis showed that "[t]he Storage or Handling of Coal or Coke" at OBOT would cause "exceedances of ambient air quality standards," BAAQMD would not issue the relevant permits without appropriate controls and mitigation. The City Council's record contained no such modeling analysis: the City refused to allow ESA to do any modeling. *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 203:1-10.[44]

2. The City's Evidence Establishes that the BAAQMD Permit Process Should Have Been Allowed to Proceed

The Ordinance states that it seeks to "eliminat[e] ***any*** risk of release into the environment

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[43] As set forth above, the NAAQS are the maximum allowable concentrations of specific pollutants in the ambient air. *See* Chinkin Decl. ¶ 6.

[44] The ESA Report contains "emissions estimates." *See* Ex. 45 (ESA Report) at 5-17. Such estimates purport to estimate the amount of emissions of "fugitive coal dust" that would be released during the transportation of coal by rail and from the unloading, storage, transfer and transloading of coal at the Terminal. *See id.* Emission estimates are only part of the process of predicting the impact of those emissions on air quality. Chinkin Decl. ¶ 12. "Modeling" is used to predict whether, and to what extent, those emissions would increase the concentration of pollutants at a given location. *Id.* Modeling is only as good as the emissions estimates on which the models are based; if the estimates are flawed, the model will be similarly flawed to the same extent. *See* Ex. 54 (Gray Tr.) at 194:13-19.

1 (including without limitation airborne particulate . . . .)". Ex. 1 at § 8.60.010 (emphasis added).
2 There is absolutely no evidence that the release of "any" quantum of particulate matter poses a
3 danger, much less a substantial danger: as the City's retained health expert in this litigation
4 testified, the U.S. EPA (which the City's expert concedes is both competent and capable) has
5 identified "permissible" concentrations of pollutants, including particulate matter, below which the
6 "health of any sensitive group of the population" will be protected. Ex. 53 (Moore Tr.) at 63:5-21,
7 92:21-93:1; *see also* Declaration of Dr. Andrew Maier in Support of OBOT's Motion for
8 Summary Judgment ("Maier Decl."), ¶¶ 3-5; Ex. 20 (Cashman Tr.) at 171:10-15 (even operation
9 of office park "would increase the amount of PM 2.5 and PM 10 emissions in the air").
10 The Ordinance also recites a "Finding," incorporated into the Resolution, that the
11 "transport and Storing and Handling of Coal or Coke" would pose a substantial danger because
12 Coal and Coke "release fugitive dust, as particulate matter (PM10) and fine particulate matter (PM
13 2.5) . . . ." Ex. 1 (Ordinance) at § 8.60.020(B)(1)(a). The Ordinance contains no numerical
14 estimates of these emissions. The only numerical emissions estimates that are arguably presented
15 by the Ordinance were incorporated by reference from the June 23, 2016 Staff Report, which in
16 turn relied on the ESA Report. *See* Ex. 1 (Ordinance) at 3; Ex. 27 (Cappio Tr.) at 247:16-248:5;
17 Ex. 28 (6/23/16 Staff Report) at Attachment C. The Staff Report reproduced the following table
18 from the ESA Report that purported to be a "Summary of Emissions Estimates . . . at OBOT":
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SUMMARY OF EMISSIONS ESTIMATES FROM RAIL TRANSPORT, STAGING/SPUR TRAVEL, UNLOADING, STORAGE, TRANSFER AND SHIP LOADING OF COAL AT OBOT

Fugitive Coal Dust Emissions Source*	tons/yr			lbs/day		
	TSP	PM_{10}	$PM_{2.5}$	TSP	PM_{10}	$PM_{2.5}$
Rail Transport*						
BAAQMD	2,102	988	148	12,012	5,646	847
Oakland	82	38	6	468	220	33
So Emeryville	35	17	3	203	95	14
San Leandro	98	46	7	562	264	40
Staging at Port Railyard, Rail Spur Trip to OBOT	156	78	18	889	445	67
SUBTOTAL - Oakland	238	**116**	**18**	1,357	665	100
OBOT Operations						
Unloading	11.9	5.7	0.9	66.0	31.2	4.7
Storage	3.2	1.5	0.2	17.7	8.4	1.3
Transfer	10.4	4.9	0.7	57.6	27.2	4.1
Transloading	11.9	5.7	0.9	66.0	31.2	4.7
SUBTOTAL	37.5	17.7	2.7	207.3	98.1	14.8
PROJECT TOTAL– Oakland**	276	**134**	**21**	1,564	**763**	**115**

1 *See* Ex. 28 (Staff Report) at 12. Based on this table (hereafter referred to as "Table 5-7"[45]), the
2 City Staff wrote in the Staff Report that "overall emissions from the OBOT project are expected to
3 exceed the City of Oakland CEQA Thresholds of Significance" which would be "presumptively a
4 substantially dangerous condition to health."[46] *Id.* Notably, ESA made no such statement. *See*
5 Ex. 45 (ESA Report) at 5-17-5-18. Neither the Ordinance nor the Resolution contain any
6 reference to "thresholds" other than the "City of Oakland CEQA Thresholds of Significance," and
7 the City concedes that these thresholds were the only air quality thresholds potentially considered
8 by the City Council.[47] Ex. 27 (Cappio Tr.) at 314:18–315:2.

9 Table 5-7 is divided into two parts: the top portion addresses "Rail Transport"; the bottom
10 portion addresses "OBOT Operations." The estimates for "Rail Transport" are divided into
11 several geographic areas, *i.e.*, "BAAQMD," "Oakland," "So Emeryville," "San Leandro," and also
12 contains estimates for "Staging at Port Railyard, Rail Spur Trip to OBOT" (hereafter "Staging").[48]
13 *See* Chinkin Decl. ¶ 17. The estimates for "OBOT Operations" are divided into various
14 "operations" or activities, *i.e.*, "Unloading," "Storage," "Transfer," and "Transloading." *Id.* Table
15 5-7 reports emissions of particulate matter in columns labeled "TSP," "PM10" and "PM2.5,"
16 which contain numbers for different sizes of particulate matter emissions. *Id.* ¶¶ 15-16.

17 The values reported in Table 5-7 are incorrect for many reasons. For example, the
18 emissions estimates for "Staging at Port Railyard, Rail Spur Trip to OBOT" are 17 times higher
19 than they should be. *Id.* ¶ 28. ESA arrived at this grossly inflated result because it disregarded its
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21 [45] For ease of reference, OBOT refers herein to the table that depicts the emissions estimates as
22 "Table 5-7" as it is labelled in the ESA Report. The Staff Report table on page 12 is identical to
Table 5-7 in numerical values. *Compare* Ex. 28 (Staff Report) at 12 *with* Ex. 45 (ESA Report) at
23 5-17. The differences in the tables are the omission of the phrase "uncontrolled air emissions . . .
." and the addition of the double asterisk (**) at the bottom of the Staff Report table.
24 [46] Although Table 5-7 estimates PM10 and PM2.5 emissions, the Staff Report statement
regarding "substantial danger" based on CEQA thresholds specifically referred to PM2.5
25 emissions. *See* Ex. 27 (Cappio Tr.) at 292:8-17.
26 [47] CEQA Thresholds of Significance are generally used during the environmental review of
projects to screen for potentially significant sources of pollutants. Chinkin Decl., ¶ 35. If
27 estimated emissions from a facility exceed those thresholds, then ordinarily modelling is done to
determine whether the emissions would cause violations of the NAAQS. *See id.*, ¶ 12
28 [48] As used by ESA, "Staging" refers to the movement of the trains once they exit the mainline
until they unload the coal. *See* Ex. 45 (ESA Report) at 5-10-5-11.

1 own documentation and used as a key input in its emissions formula a "threshold friction velocity"
2 value that it now concedes was "obvious[ly]" incorrect. Ex. 33 (ESA 10/31/17 Tr.) at 262:11-
3 263:20; Chinkin Decl. ¶¶ 20-24. As another example, ESA's estimates for "OBOT Operations"
4 are reported as based on "Controlled Operations" (*i.e.*, the emissions that would result after dust
5 mitigation technology is applied) but the numbers in the ESA Report are actually the estimates for
6 "uncontrolled" operations. *See id.* ¶¶ 29-33. By correcting those two flaws in ESA's estimates,
7 the resulting emissions would be well below the City's own significance thresholds. *Id.* ¶¶ 35-36.
8 The City's response to these flaws in the ESA Report has been two fold. First, the City's
9 retained expert for this litigation (Ranajit Sahu) essentially repeated the same mistakes, coming to
10 almost identical numerical values as ESA. Chinkin Decl. ¶ 25-26; Ex. 55 (Sahu Tr.) at 220:11-21.
11 Tellingly, Sahu testified that he did not know whether the ESA estimates were for Controlled or
12 Uncontrolled operations, *id*. at 15:13-16:17, despite having adopted ESA's estimates for three out
13 of four OBOT Operations entirely unchanged. *See* Chinkin Decl. ¶ 25; *compare* Ex. 56 (Sahu
14 Spreadsheets) *with* Ex. 57 and Ex. 58 (ESA Spreadsheets). Likewise, Sahu did not address in his
15 reports the use of the wrong threshold friction velocity; in fact, his calculations used the same
16 value. *See* Chinkin Decl. ¶ 26; Ex. 56 (Sahu Spreadsheets); Ex. 55 (Sahu Tr.) at 220:11-21.
17 Far more important for purposes of this motion, however, is Sahu's excuse for ESA's
18 errors: his opinion is that no emissions estimates for the Terminal should have been offered by
19 ESA (or by him, now) because the documentation of the proposed Terminal on which ESA relied
20 (which was provided by OBOT during the public hearing process leading to the Ordinance) was
21 preliminary.[49] Of course the documentation was preliminary: the OBOT Basis of Design itself
22 states that it is a "first step in the project's design process," representing about 10% of that
23 process. Ex. 49 (Basis of Design) at OB004322. The ESA Report specifically noted that OBOT's
24 plans were merely "conceptual." Ex. 45 (ESA Report) at 2-1. The material point for this Motion,
25 however, is that Sahu's testimony effectively establishes that the ESA Report could not have been
26 substantial evidence of a substantial danger. He admitted that "to assess whether the emissions"
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28 [49] *See* Ex. 55 (Sahu Tr.) at 119:22-120:12, 123:20-24, 124:18-125:3, 126:20-127:10, 127:15-17, 140:21-141:1, 142:8-14, 177:18-178:3, 192:16-24, 201:7-10, 258:21-259:4; 260:23-261:13.

from the Terminal "are going to present a significant harm to adjacent folks and impacted residents" would require "precis[ion] in the engineering estimates," *see* Ex. 55 (Sahu Tr.) at 128:7-13—the precision he conceded would be required by an air district such as BAAQMD before it would issue a permit. *See id.* at 261:14-262:11.[50] The City, however, was in such a "crazy" rush to adopt an unnecessary ban[51] that it passed the Ordinance without the required data subs rather than permitting BAAQMD to address air quality in the appropriate course.

3. OSHA and Cal/OSHA Worker Safety Regulations Will Prevent a Substantial Danger to Workers

The Ordinance included a finding, incorporated into the Resolution, that "[w]orkers would be closest to the fugitive coal dust and respirable fine particulates during transport and staging of loaded cars for unloading and within the enclosed facilities." Ex. 1 (Ordinance) at § 8.60.020(B)(1)(d). The City failed to make any findings, however, that existing regulations of applicable agencies, including the federal Occupational Safety and Health Administration ("OSHA") and Cal/OSHA,[52] would be insufficient to protect workers from a "substantially dangerous" condition at the Terminal.

The City acknowledged at deposition that OSHA applies regulations for health and safety of workers at the Terminal. *See* Ex. 27 (Cappio Tr.) at 174:16-18, 175:12-15. Critically for present purposes, the City has further admitted that it did not "reach a determination that OSHA's rules and regulations would be inadequate to ensure [worker] safety at the terminal." *Id.* at 181:1-9. Nor did the City determine that workers at other coal terminals had suffered any ill effects whatsoever from working at those terminals. *Id.* at 338:4-12. Unlike the City, ESA actually evaluated OSHA's "airborne coal dust restrictions," Ex. 33 (10/31/17 ESA 30(b)(6) Tr.) at 187:19-24, and did not conclude that the OSHA restrictions were insufficient to protect workers at the Terminal. *Id.* at 188:9-11.

Both OSHA and Cal/OSHA set "Permissible Exposure Limits" ("PELs") for exposure to

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[50] ESA has similarly conceded that it would have needed "to do more than [ESA] did to satisfy CEQA analysis or an air quality permit." Ex. 33 (10/31/17 ESA 30(b)(6) Tr.) at 62:18-20.

[51] *See* Ex. 37 (5/4/16 Internal ESA Email) at ESA_038570.

[52] Cal/OSHA is common name for the California Division of Occupational Safety and Health. *See* Tagami Decl. ¶ 3.

1 coal dust. Maier Decl. ¶ 6. OBOT has always agreed that the Terminal will be subject to, and will
2 comply with, all OSHA and Cal/OSHA regulations, *see* Ex. 47 (10/6/15 OBOT/TLS Response to
3 City Questions) at OAK0007469, Tagami Decl. ¶ 3, which would include PELs. The City has
4 made no findings that such PELs, or any other requirements of OSHA or Cal/OSHA will not
5 protect against a "substantially dangerous" condition. *See* Ex. 27 (Cappio Tr.) at 181:1-9.

6 In sum, the record did not—and could not—support a finding that it was "necessary" to
7 ban coal to protect workers' health.

8 **4. Pre-Existing Fire Safety Measures Will Prevent a Substantial Fire Danger**

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10 The Ordinance made a number of "findings," incorporated into the Resolution, regarding
11 the potential dangers of coal fires. Setting aside the inaccuracy of these findings, it is undisputed
12 that the City did not, and could not, make a finding that the City's current regulations and
13 requirements would be inadequate to protect against any "substantial danger."

14 A September 10, 2015 Staff Report ("Sep. 10 Staff Report"), Ex. 59 at 5, produced by City
15 Staff acknowledged that the National Fire Protection Association ("NFPA") "rates the health risks
16 and fire risks for commodities on a scale from 0 - 4" in its "704 Material Hazards for Emergency
17 Response index." *Id.* Bituminous coal, the Staff Report stated, has an "NFPA rating of one (1)
18 for health risks and a rating of one (1) for fire risks as there are no reactivity or low fire risks
19 associated with that commodity." *Id.* The Oakland Fire Department ("OFD") Marshal reported
20 the same ranking to Ms. Cappio, who—as the City's 30(b)(6) witness—acknowledged this meant
21 the danger ranking of coal to be "low . . . as the rankings for commodities go." Ex. 27 (Cappio
22 Tr.) at 163:11-164:10. As Ms. Cappio testified, she understood that the OFD:

23 > use[s] [NFPA ratings] as a basis for evaluating materials that may be stored, managed or . . . handled on particular sites throughout the City of Oakland or
24 > actually when they're responding to an emergency, let's say there's a car accident involving a tanker and that tanker has a particular set of ratings, they know
25 > immediately what some of the dangers or risks may be.

26 *Id.* at 166:3-23. In other words, the OFD would consider bituminous coal a low risk commodity.
27 And the Ordinance—which refers to coal generally and not to bituminous coal in particular—
28 ignored that the terminal operator had already agreed in writing to handle only bituminous coal in

1 response to a specific question from the City. Ex. 48 (9/15/15 HDR Report) at OAK0007470.
2 Ms. Cappio attended meetings with the OFD, including Miguel Trujillo, the City's current
3 Fire Marshal, to discuss "permitting and processing of the plans for a bulk terminal." Ex. 27
4 (Cappio Tr.) at 169:15-170:3. Among these meetings was "a joint meeting" in the spring of 2016
5 attended by OBOT representatives. *See id.* at 171:12-17. Ms. Cappio specifically recalled that the
6 OFD did not say it would disapprove of a terminal because it would handle coal. *Id.* at 173:11-13;
7 *see also* Tagami Decl. ¶ 4.
8 Indeed, the OFD's assessment is supported by ESA's sub-consultant on fire safety (Steve
9 Radis), *see* Ex. 33 (10/31/17 ESA Tr.) at 15:7-14), who wrote: "Major fires at coal terminals are
10 not common or widespread, ..." Ex. 60 (6/15/16 Internal ESA Email) at ESA_036704.
11 Mr. Radis's opinion was written in response to the City's request to ESA for more information on
12 "spontaneous combustion and related issues" to "bolster" the safety section of the ESA Report.
13 *See id.* at ESA_03706. Mr. Radis's response to the request to "bolster" the fire safety section
14 appears to have been copied, verbatim, into Chapter 6 of the ESA Report—except for his
15 statement that "[m]ajor fires at coal terminals are not common or widespread, but have happened
16 in the past." *See* Ex. 45 (ESA Report at 6-1-6-4); Ex. 35 (Brown Tr.) at 218:3-14, 219:9-19.
17 Even in the unlikely event of a fire at the Terminal, the ESA Report does not conclude that
18 OFD could not adequately respond to fires; on the contrary, it plainly states the opposite by noting
19 only that "a significant investment in both equipment and training is necessary for local fire
20 departments to respond to a coal fire." *See* Ex. 45 (ESA Report) at 6-3. The parties to the DA
21 fully agreed that OBOT must submit a "fire safety phasing plan" to the City's Fire Services
22 Division which would include "all of the fire safety features incorporated into the project and the
23 schedule for implementation of the features." Ex. 59 (Standard Conditions of Approval /
24 Mitigation Measures) at 48. If the OBOT fire safety plan did not adequately "address fire hazards
25 associated with the project," the Fire Services Division could "require changes to the plan or may
26 reject the plan . . . ." *Id.*
27 In sum, there was no evidence that applying a blanket ban on coal through the Terminal
28 was "necessary" to prevent a substantially dangerous fire condition.

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

B. Any Incremental Impact on Greenhouse Gases and Global Pollution Undisputedly Cannot Impact the Health and Safety of Terminal Occupants and Adjacent Neighbors "in Any Meaningful Way"

The City's findings in the Ordinance, incorporated into the Resolution, include the statement that "[t]he export of Coal from facilities at the City of Oakland, including in West Oakland, would lead to the burning of Coal overseas." *See* Ex. 1 (Ordinance) at 7. This may well be the actual reason for the passage of the Ordinance, but it does not satisfy the DA's requirement of "substantial evidence" of a "substantial danger" to "adjacent neighbors" for several reasons. *See* Ex. 4 (DA) § 3.4.2.

First, with respect to global greenhouse gas ("GHG") emissions, assuming, as ESA did, that OBOT would export 5 million tons per year of coal, the burning of that coal would contribute approximately 0.04% to global emissions. Chinkin Decl. ¶ 40. The insignificance of GHG emissions on Oakland is noted in ESA's comment on an internal draft of its original SOW:

> So what type of analysis is this? Are we supposed to come up with a proportional analysis of the contribution of this project to global GHG emissions, and then attribute back to it some infinitesimal portion of sea level rise? I don't see how this comes back to human health and safety in any meaningful way.

Ex. 61 (1/6/2016 Internal ESA Draft SOW) at ESA_035975.

Second, with respect to the City's finding regarding the "incremental effect" of pollution from the combustion of the exported coal affecting the Bay Area, the result is the same: the local impact of any such pollution would be immeasurably small. *See* Chinkin Decl. ¶¶ 39, 41.

Finally, and quite tellingly, the ESA Report characterizes the impact on global GHG emissions and local sea levels as "incremental," but does not quantify the size of the "increment[]." *See* Ex. 45 (ESA Report) at 7-4; Chinkin Decl. ¶ 38. The ESA Report similarly does not state that the "incremental" effect would constitute a "substantially dangerous" condition.

In sum, the City cannot seriously contend that an almost immeasurable increase in GHG and air pollution—no matter how small that increment is—would constitute a substantial health and safety danger to "adjacent neighbors" of the Terminal. *See* Ex. 4 (DA) § 3.4.2.

CONCLUSION

OBOT's motion for summary judgment should be granted.

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Respectfully submitted,

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