JOHN F. BARG (SBN 60230; jbarg@bargcoffin.com)
JULIA G. MATA (SBN 294117; jmata@bargcoffin.com)
BARG COFFIN LEWIS & TRAPP, LLP
600 Montgomery Street, Suite 525
San Francisco, California 94111
Telephone: (415) 228-5400
Fax: (415) 228-5450

Attorneys for Plaintiff WOLVERINE FUELS SALES, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WOLVERINE FUELS SALES, LLC Plaintiff, v. CITY OF RICHMOND AND CITY OF RICHMOND CITY COUNCIL, Defendants.	Case No. **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

For its complaint against the City of Richmond and the City of Richmond City Council (collectively, the "City"), plaintiff Wolverine Fuels Sales, LLC ("Wolverine"), a wholly-owned subsidiary of Wolverine Fuels, LLC, alleges as follows:

JURISDICTION AND VENUE

1. Wolverine is a Delaware limited liability company with its principal place of business in Utah. It is authorized to do business in several states, including California.

2. The City of Richmond is a municipal corporation located in Contra Costa County, in the Northern District of California. 28 U.S.C. section 84(a).

3. The City of Richmond City Council is the elected governing body of the City of

Richmond.

4. Jurisdiction is based on 28 U.S.C. section 1331 (federal question) because Wolverine is claiming that the City adopted an Ordinance (as defined below) that violates provisions of the United States Constitution, and is thereby actionable under 42 U.S.C. section 1983. Additionally, Wolverine asks this Court to apply and interpret federal laws, namely, the Interstate Commerce Commission Termination Act, 49 U.S.C. section 10501, the Federal Hazardous Materials Transportation Act, 49 U.S.C. section 5103, and the Federal Shipping Act of 1984, 46 U.S.C. section 41106, which preempt the Ordinance.

5. Venue is proper in this district because the City is located in this district and the property giving rise to the Ordinance is located in this district, and because a substantial portion of the activities giving rise to this action occurred and are occurring in this district.

NATURE OF THE ACTION

6. Wolverine brings this action to enjoin enforcement of an Ordinance adopted by the City that violates provisions of the United States Constitution. Specifically, the Ordinance unduly burdens interstate and foreign commerce in violation of the commerce clause (Article 1 section 8), impairs the rights and obligations of Wolverine contracts in violation of Article 1 section 10, and violates Wolverine's due process rights, both substantive and procedural, under the Fifth and Fourteenth Amendments of the Constitution. Wolverine seeks a declaratory judgment that the Ordinance is unconstitutional and is preempted by Federal law.

7. The City adopted the ordinance, entitled "Prohibition on the Storage and Handling of Coal and Petroleum Coke" ("Ordinance"), following action by the City's Planning Commission which recommended unanimously that the City Council "not adopt the proposed ordinance" and defer consideration of the Ordinance until completion of an air monitoring study to assess whether the Levin Richmond Terminal Corporation ("LRT") facility is a source of fugitive coal and petroleum coke ("petcoke") air emissions that present health risks for the public, and until the City staff prepares an analysis of the Ordinance's economic impact on businesses, jobs and the community. Specifically --

> [T]he Richmond Planning Commission does *not* find that the storage and handling of coal and petroleum coke is an undesirable land use; and . . . recommends that the City Council *not* adopt an ordinance . . . prohibiting the storage and handling of coal and petroleum coke, . . . *cannot* find that the proposed ordinance is necessary for public health, safety and welfare, and that *additional study is needed* to better understand the air quality impacts of operations at existing sites . . . [and] the potential economic impacts to the City of Richmond . . . (emphasis added)

8. Rather than follow the Planning Commission's recommendations, the City pressed forward without the benefit of any scientifically reliable environmental air sampling, analysis, or study for air particulates and their potential health effects, and without waiting for any economic analysis of the impact of the Ordinance. The City adopted the Ordinance banning storage and handling of coal and petcoke within the City, based on the unsupported theory that coal and petcoke "dust" is being dispersed into the air by the LRT facility and harming City residents.

9. LRT is the only facility that stores and handles coal and petcoke in Richmond, and only one business entity ships coal to LRT – Wolverine.

10. Although the City claims that the Ordinance is "necessary for public health and safety as it will reduce particulate matter emissions and toxic exposure from coal and petroleum coke storage" and for "protecting the public from the health hazards of coal and petroleum coke storage and handling," the City had no evidence on which to base its "No-Coal" Ordinance and chose to ignore its Planning Department's unanimous recommendation to defer action on the Ordinance.

11. During the City's consideration of the proposed Ordinance, Sonoma Technology, Inc. performed environmental air monitoring at LRT, and the results were presented to the City Council. The testing proved that the LRT facility is not a source of fugitive PM2.5 emissions, which is a respirable particle size that can pose health risks. No contrary air monitoring or other scientifically reliable evidence was presented to or considered by the City showing that LRT is a source of harmful fugitive dust emissions.

12. Such site specific air monitoring was exactly what the Planning Commission recommended before the City adopted the proposed Ordinance. The City ignored Sonoma

Technology's air monitoring data and analysis apparently because it was inconsistent with the City's desire to adopt the Ordinance regardless of the evidence. Therefore, the City had no factual rational basis for exercising police power or other authority in adopting the Ordinance.

13. Richmond Mayor Butt has cited reducing the burning of fossil fuels and climate change as objectives of the Ordinance. Tom Butt E-Forum: *Coalageddon Coming to Richmond* (Nov. 23, 2019). However, coal and petcoke are not burned at the LRT facility. Furthermore, "[i]t is facially ridiculous to suggest that this one operation resulting in consumption of coal in other countries will, in the grand scheme of things, pose a substantial global warming-related danger to people in Oakland." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F.Supp.3d 986, 1008 (N.D. Cal. 2018), *appeal pending*, No. 18-16141 (9th Cir.).

14. Objecting to the Ordinance were not only LRT and Wolverine but also Phillips 66, the California Building Trades Unions and Operating Engineers Union Local 3, members of which include LRT employees who will lose their jobs unnecessarily as a result of the Ordinance. The job losses created by the City's adoption of the Ordinance are unnecessary because the City chose to adopt the Ordinance without factual support, and contrary to air monitoring evidence demonstrating that LRT's facility was not causing air dispersion of coal or petcoke dust. The City thereby acted against the interests of these businesses, their employees, and union members without any local benefit, public health need or rational basis for doing so, and against the unanimous findings of its own Planning Commission. The City's Mayor had no regard for the workers, cavalierly announcing, "They will have to find other jobs."

15. The coal mined and sourced by Wolverine in Utah, shipped by rail to Richmond via the Union Pacific Railroad, a Class 1 Railroad, and stored temporarily at LRT awaiting transshipment by merchant vessel to Japan, is desirable low -sulfur, high-BTU thermal coal used as fuel in Japan's modern coal-fired power plants. Japan uses the coal-fired power plants to fulfill electricity generation needs, replacing nuclear power plants taken out of service following the Fukushima nuclear power plant disaster. Wolverine owns the coal during its interstate transport to Richmond and while it is stored at LRT, with ownership transferring from Wolverine to the buyer when the coal is loaded onto the vessels for overseas shipment to Japan.

16. Wolverine has long-term contracts with the buyer of its coal obligating Wolverine to deliver its coal to LRT. Wolverine also has long-term contracts with LRT for temporary coal storage and transloading of coal, as well as with the Union Pacific Railroad, a Class 1 Railroad, which transports the coal from Utah to Richmond. All of these contracts will be disrupted by the Ordinance, and the rights and obligations of the parties to the contracts directly impaired.

17. The export market for coal is strong and has been promoted by Congress for almost three decades. *See* 42 U.S.C. § 13367. The Ordinance directly conflicts with such federal policy.

18. The Ordinance and its enforcement will cause Wolverine irreparable harm for which it has no adequate remedy at law. Moreover, the balance of hardships caused by the Ordinance and its enforcement tip markedly in favor of Wolverine. Accordingly, Wolverine seeks injunctive and declaratory relief against enforcement of the Ordinance on the grounds that it creates an undue burden on interstate and foreign commerce, interferes with and impairs Wolverine's rights and obligations under existing contracts, and was adopted without any rational basis or evidence, all in violation of the United States Constitution. The Ordinance also is preempted by the Interstate Commerce Commission Termination Act, the Hazardous Materials Transportation Act, and the Shipping Act of 1984.

THE PARTIES

19. Wolverine is a Delaware limited liability company with its principal place of business in Utah. It is authorized to do business in several states, including California.

20. The City of Richmond is a municipal corporation of the County of Contra Costa, State of California, and is chartered by the State of California.

21. The City Council of the City of Richmond is an elected governing body for the City of Richmond.

FACTS

22. Wolverine mines and sources low-sulfur, high-BTU thermal coal in Utah, ships the coal via Union Pacific Railroad, a Class 1 Railroad, from Utah to Richmond, and stores the coal temporarily at LRT, pending overseas shipment via marine vessel to Japan. Wolverine

covers the coal with a surfactant when the coal is loaded in railcars in Utah to minimize the potential for dust during the interstate shipment to LRT.

23. Wolverine owns the coal throughout this interstate commerce with title to the coal transferring from Wolverine to the buyer when the coal is loaded onto vessels at LRT's marine terminal facility for shipment to Japan, which depends on this source of energy in place of nuclear power plants decommissioned after the 2011 Fukushima disaster. Recognizing the difficulty inherit in attempting to regulate interstate and foreign commerce, the City included self-serving language in the Ordinance, claiming that:

> This Article is not intended to, and shall not be interpreted to regulate or applied to prohibit the transportation of coal and/or petroleum coke, for example, by train or marine vessel, including without limitation through the City of Richmond or to or from a coal or petroleum coke storage and handling facility.

24. Yet, that is *precisely* the effect of the Ordinance, which would prohibit storage and handling of coal and petcoke at LRT, which (i) is the only business entity storing and handling coal and petcoke in Richmond, and (ii) is merely a point of transfer of these commodities in interstate and foreign commerce.[1] The unavailability of LRT for transloading would directly affect rail and vessel operations, as demonstrated by letters from Wolverine and Phillips 66 to the City Council, necessitating redirection of shipments and transportation of these commodities to more distant marine terminals to meet customer needs, or discontinuation of such rail, truck and overseas shipments.

25. More specifically, in a letter submitted to the City Council on December 2, 2019, Wolverine noted that (1) if LRT were not available as a result of the Ordinance, coal exports to Japan would need to be shipped from Utah through a more distant marine terminal, potentially in Mexico, with increased emissions resulting from much longer rail transport; or (2) if Wolverine

[1] As Richmond Mayor Butt observed during consideration of the Ordinance, "[b]ecause of Federal preemption, we cannot regulate the transportation of coal by rail." Tom Butt E-Forum: *Coal Dust in Richmond* (Dec. 18, 2018). In an interview conducted by KCPW radio, the Mayor again acknowledged that the City has "no regulatory authority over the railroads," but observed that, by prohibiting LRT coal operations, "then the coal trains go away." https://kcpw.org/blog/in-the-hive/2020-02-13/the-latest-battle-brewing-over-the-future-of-utahs-coal-industry/

could not find a suitable alternative marine terminal, Japan would replace the high BTU, low- sulfur Utah coal with lower quality coal on the international market. Wolverine noted that either scenario would lead to increased greenhouse gas emissions and other environmental impacts, contrary to Mayor Butt's stated objective of the Ordinance.

26. The City's claim that the Ordinance is "necessary for public health and safety as it will reduce particulate matter emissions and toxic exposure from coal … storage" and to "protect[] the public from health hazards of coal … storage and handling" at LRT is not supported by the record.

27. The materials provided to the Planning Commission included a scientific analysis by Sonoma Technology, Inc. ("STI"), demonstrating that existing data "does not support the conclusion that the Terminal is a source of fugitive $PM_{2.5}$ coal or petcoke emissions that pose health risks or other impacts." Sonoma Technology, Inc., *Assessment of the State of Data and Science Underlying the Proposed Ordinance Prohibiting Coal and Petcoke Storage and Handling in Richmond*, at 23 (July 12, 2019) ("Initial STI Assessment").

28. Following the Planning Commission's unanimous recommendation that the City Counsel not adopt the Ordinance and that further consideration be deferred, STI completed an evaluation of preliminary screening data from $PM_{2.5}$ air monitoring at the LRT facility. The evaluation showed "no statistically significant difference in $PM_{2.5}$ concentrations immediately upwind and downwind at the Terminal. Therefore, combined with the ambient data from other nearby monitoring locations discussed in [STI's] initial report, the results of this preliminary screening study support the conclusion that the Terminal is not a source of fugitive $PM_{2.5}$ emissions." STI, *Supplemental Report on the Assessment of the State of Data and Science Underlying the Proposed Ordinance Prohibiting Coal and Petcoke Storage and Handling in Richmond*, at 2 (Nov. 19, 2019) ("Supplemental STI Assessment"). This report was provided to the City Council and other City officials and staff on November 26, 2019.

29. Neither the Initial STI Assessment nor the Supplemental STI Assessment was addressed in the City's Agenda Reports for the City Council meetings December 3, 2019, January 14, 2020 or February 4, 2020.

30. Instead, the City relied on anecdotal information and microscopic examination of dust samples from surfaces in southwestern Richmond in an effort to support the need for the Ordinance and to attempt to justify its assertion of police power to "protect[] the public from the health hazards of coal and petroleum coke storage and handling" at LRT. The microscopic analysis of dust samples was performed for the City by McCrone Associates, *Examination of Samples from Richmond, California for Coal Dust* (Nov. 9, 2018). This McCrone information, provided to the Planning Commission and the City Council, did not identify LRT as the source of the sampled dust. Additionally, McCrone's microscopic analysis was shown by Sonoma Technologies to be scientifically unreliable, not probative of any ongoing source, and not indicative of harmful, respirable particles. Moreover, the City's information is contradicted by the evaluation by Sonoma Technologies of actual air monitoring for fugitive $PM_{2.5}$ emissions upwind and downwind of coal and petcoke operations at the LRT facility.

31. Specifically, the Initial STI Assessment observed that the report commissioned by Mayor Butt from McCrone Associates failed to identify LRT as the source of the dust particles in the samples, failed to distinguish the physical and chemical characteristics of coal dust from other visually similar particles, such as black carbon and diesel particulates, and failed to identify other sources of particulate matter.

32. Additionally, the Initial STI Assessment noted that, although the particle size is not identified in the McCrone report, based on the microscopy methodology used in the analysis, the samples appear to consist of particles that are much larger than $PM_{2.5}$ and therefore not associated with potential health risks. The McCrone report also fails to provide a scientifically acceptable sampling protocol for collection and handling or chain of custody for the samples.

33. The Initial STI Assessment also observed that the McCrone report used a low-powered stereomicroscope that is insufficient for accurately characterizing the size of the particulate matter and is scientifically unsuitable for distinguishing coal and petcoke dust from soot from diesel vehicle exhaust, from nearby Interstate Highway 580 tire and brake wear, re-suspended road dust, and other visually similar particulate matter.

34. In addition to reviewing the McCrone report, the Initial STI Assessment also

reviewed ambient data for $PM_{2.5}$ at existing monitoring locations in Richmond, including data from air monitoring at Atchison Village, which is downwind from LRT under prevailing wind conditions. Although other monitoring locations showed occasional exceedances of National Ambient Air Quality Standards ("NAAQS"), monitoring at Atchison Village showed no NAAQS exceedances. This actual monitoring data demonstrates that, contrary to the anecdotal media reports and complaints referenced in the Ordinance, LRT is not a source of harmful fugitive dust emissions.

35. For these and other reasons, the Initial STI Assessment concluded that the proposed Ordinance was not supported by existing, scientifically valid data:

> The McCrone analysis does not demonstrate the existence of coal dust in the samples submitted by residents, nor does it support the need for an ordinance singling out the Terminal as presenting health risks from fugitive coal and petcoke dust emissions. Similarly, the existing monitoring data for Richmond does not support the conclusion that the Terminal is a source of fugitive $PM_{2.5}$ coal or petcoke emissions that pose health risks or other impacts.

36. The Sierra Club subsequently submitted microscopic analyses of dust samples its personnel reportedly collected. Those dust samples were analyzed by Microvision Northwest Forensic Consulting, and reported to the City Council. In addition to raising other questions about sampling protocols and reliable methodologies, the Microvision analyses similarly did not identify LRT as the source of dust in the samples, and do not provide a scientific basis for concluding that LRT is a source of fugitive coal dust emissions.

37. By letter dated July 5, 2018, Bay Area Air Quality Management District Executive Officer Jack Broadbent noted the large number of current and historical sources of particulate emissions in Richmond and advised Mayor Butt and the City Council what would be required for a *valid* study of potential emissions, including the need to implement methodologies to identify ongoing sources of airborne emissions, differentiate among sources of particulate matter, scientifically speciate coal or petcoke from other types of elemental carbon and other particulate matter, and distinguish between re-entrained coal or petcoke dust that was deposited historically versus any ongoing sources of fugitive emissions.

38. The McCrone and Microvision reports were not prepared in compliance with these methodologies and do not provide a valid scientific basis for concluding that the Ordinance is needed to "protect[] the public from the health hazards of coal and petroleum coke storage and handling" at the LRT facility.

39. The City's adoption of the Ordinance, the purported purpose of which is "protecting the public from health hazards of coal and petroleum coke storage and handling," ignores both the unanimous recommendation of the Planning Commission and the data showing that the LRT is *not* a source of harmful fugitive dust emissions.

40. The City's adoption of the Ordinance also ignores that there is a study now underway, pursuant to AB 617, that will determine and address – with community input – areas of concern and contributing sources of air pollution in Richmond. By letter dated July 5, 2018, the Bay Area Air Quality Management District advised the Mayor and the City Council that the AB 617 study will evaluate concerns raised by the community, including evaluating potential pollutants at and around the LRT facility, with input from the Richmond community Steering Committee established under AB 617.

41. The Ordinance is wholly lacking in the support required for a valid exercise of police powers, would directly violate Constitutional protections and guarantees, is preempted by Federal law, and is arbitrary, capricious and unlawful.

42. An actual controversy has arisen and now exists between Wolverine and the City concerning their respective rights and obligations, warranting declaratory relief.

43. Wolverine will suffer substantial and irreparable harm for which it has no adequate remedy at law as a result of the City's unlawful adoption and enforcement of the Ordinance. Accordingly, Wolverine respectfully requests that the Court grant the relief sought herein.

CLAIMS FOR RELIEF

FIRST CLAIM

(Unconstitutionality Under the Commerce Clause)

44. Wolverine realleges and incorporates by reference the allegations set forth in

paragraphs 1 through 43, above, as though fully set forth herein.

45. LRT is a point of transfer for coal shipments in interstate and foreign commerce. The Ordinance would force LRT to discontinue coal storage and handling. Consequently, Wolverine would need to either discontinue sales to Japan or attempt to find another suitable marine terminal with deep water berths for oceangoing vessels and interstate rail or truck access for the export of coal. Such a facility does not currently exist in the San Francisco Bay Area.[2] The Ordinance thereby unduly burdens shipments in interstate and foreign commerce, facially and as applied, by eliminating this essential transfer point for export of coal and by redirecting and restricting interstate and foreign commerce. U.S. Const. Art. I, § 8.

46. Such overt discrimination against interstate rail shipments and international marine shipments, without scientifically reliable evidence and a rational basis, is impermissible under the Commerce Clause.

47. In addition, the Ordinance overtly discriminates against interstate and foreign commerce, facially and as applied, because it regulates transactions beyond the City's borders. The coal regulated by the City's Ordinance does not originate in the City and is not distributed in the City.

48. There is no valid basis for the City's exercise of police power or legitimate local interest that would justify the excessive burden posed by the Ordinance for interstate and foreign commerce. Moreover, the Commerce Clause bars application of a state or local law to interstate or foreign commerce, especially commerce that takes place outside of the State's or municipality's borders, whether or not the commerce has effects within the State or municipality.

49. Thus, the Ordinance unconstitutionally interferes with and burdens interstate and the foreign commerce transactions, including commerce outside of the City's borders. Wolverine therefore seeks injunctive and declaratory relief finding that the Ordinance is unconstitutional

[2] It is worth noting that the Sierra Club and several of the other environmental groups overtly supporting the Ordinance also supported the City of Oakland's "no coal" ordinance in relation to the proposed construction of a new coal terminal at the former Oakland Army Base, which was invalidated by this Court in *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 321 F.Supp.3d 986 (N.D. Cal 2018), *appeal pending*, No. 18-16141 (9th Cir.).

under the Commerce Clause.

Wherefore, Wolverine prays for judgment as set forth below.

SECOND CLAIM

(Unconstitutionality Under Impairment of Contracts Clause)

50. Wolverine realleges and incorporates by reference the allegations set forth in paragraphs 1 through 49, above, as though fully set forth herein.

51. Wolverine exports its low-sulfur, high BTU thermal coal to Japan by means of long-term contracts with (a) Union Pacific Railroad, a Class 1 Railroad, which transports the coal in interstate commerce from Utah to Richmond, (b) LRT, which exclusively transfers Wolverine coal from railcars to marine vessels, temporarily stores Wolverine's coal after rail delivery pending marine vessel loading at the LRT marine terminal in Richmond, and transloads such coal onto commercial marine transport vessels for export in foreign commerce to Japan, and (c) the buyers of its coal, which take ownership of the coal when it is loaded into the commercial marine transport vessels for export in foreign commerce to Japan.

52. Article 1 section 10 of the United States Constitution prohibits a State, including its sub-divisions like the City, from enacting a law which impairs the duties and obligations of contracts. The Ordinance is such an impermissible law.

53. In addition to impairing obligations of Wolverine's existing contracts, the Ordinance impairs Wolverine's ability to renew such contracts in the ordinary course of its business.

54. It is the ordinary course of Wolverine's business to extend and/or renew its rail contracts with Union Pacific Railroad, its port contracts, and its export contracts with the coal buyer as current contracts approach maturity. The Ordinance impairs Wolverine's current and future contractual arrangements and obligations.

55. The City's impairment of Wolverine's contracts and contract rights and obligations by adopting the Ordinance is unconstitutional and must be enjoined.

Wherefore, Wolverine prays for judgment as set forth below.

THIRD CLAIM

(Preemption Under the Interstate Commerce Commission Termination Act)

56. Wolverine realleges and incorporates by reference the allegations set forth in paragraphs 1 through 55, above, as though fully set forth herein.

57. The Interstate Commerce Commission Termination Act ("ICCTA"), 49 U. S. C sections 10501 et seq., preempts the Ordinance, facially and as applied to Wolverine. The ICCTA established the Surface Transportation Board ("STB"), which has exclusive jurisdiction over transportation by rail carrier that is "only by railroad" or "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)(1)(A) and (B).

58. When the transportation is between "a State and a place in the same or another State as part of the interstate rail network" or "the United States and a place in a foreign country," STB has *exclusive* jurisdiction. *Id.* at 10501(a)(2)(A) and (F); 49 U.S.C. § 10501(b).

59. The ICCTA expressly preempts any state or local regulation of matters that fall under the STB's exclusive jurisdiction, including operation of interstate rail lines. *Id.* at § 10501(b), ICCTA also preempts a city's application of state and local law to a private rail carrier, including operation of spur, industrial, team, switching, or side tracks, or facilities..

60. The interstate transport of coal from Utah occurs on Union Pacific Railroad's rail lines pursuant to a contract with Wolverine, and is further transported within the LRT facility by Richmond Pacific Railroad Corporation ("RPRC"), from Union Pacific rail lines to LRT. The transport of Wolverine's coal from Utah to Richmond, within LRT's facility, and from LRT to Japan by marine vessel, is subject to the exclusive jurisdiction of the STB.

61. The Ordinance's prohibition of storage and handling of coal at LRT affects Union Pacific Railroad's rail operations by requiring Wolverine to transport its coal to a more distant marine terminal for shipment to Japan. The Ordinance's prohibition of storage and handling of coal at LRT also affects RPRC's rail operations, approximately 50 percent of which involve transport of coal. States and their municipalities cannot take action that would have the effect of restricting railroad operations or otherwise unreasonably burdening interstate commerce.

62. As noted above, Richmond Mayor Butt has acknowledged that, "[b]ecause of Federal preemption, we cannot regulate the transportation of coal by rail," and that the City has "no regulatory authority over the railroads." He has also admitted the effect of the Ordinance, observing that by prohibiting LRT coal operations, "then the coal trains go away."

63. Thus, the ICCTA preempts the Ordinance, which affects rail operations that are the subject of exclusive federal jurisdiction.

Wherefore, Wolverine prays for judgment as set forth below.

FOURTH CLAIM

(Violation of Due Process Rights under the United States Constitution)

64. Wolverine realleges and incorporates by reference the allegations set forth in paragraphs 1 through 63, above, as though fully set forth herein.

65. The United States Constitution protects property rights, both substantive and procedural. Substantive due process protects citizens from arbitrary and irrational acts of government. The City's adoption of the Ordinance was arbitrary and irrational.

66. Numerous sources of air particulate emissions in Richmond are not affected or regulated by the Ordinance; only Wolverine's coal, and only the LRT facility, are regulated by the Ordinance. The only scientifically reliable evidence addressing whether the LRT facility – and thereby Wolverine's coal-- is one of the many sources of air particulate emissions is the actual air monitoring performed by STI, showing that the LRT facility is not a source of harmful fugitive particulate emissions.

67. Without a valid basis for exercise of police power, and without regard for other sources of airborne particulate matter, the Ordinance violates the Constitution's due process protections.

Wherefore, Wolverine prays for judgment as set forth below.

FIFTH CLAIM

(Preemption Under the Hazardous Materials Transportation Act)

68. Wolverine realleges and incorporates by reference the allegations set forth in paragraphs 1 through 67, above, as though fully set forth herein.

69. The Hazardous Materials Transportation Act ("HMTA"), 49 U. S. C. section 5101 et seq., establishes a national regulatory scheme for the transportation of hazardous materials, and preempting State and local regulations like the Ordinance. Congress has delegated to the Secretary of Transportation the authority to designate "hazardous materials" as those that "may pose an unreasonable risk to health and safety or property." 49 U.S.C. § 5103(a).

70. The Secretary of Transportation has not designated coal as a "hazardous material" under the HMTA. Yet the Ordinance is treating it and has characterized it as a hazardous material by prohibiting coal shipments in commerce on the basis of alleged health risks. Such characterization is inconsistent with the HMTA.

71. Furthermore, even if such materials were hazardous, handling and storage of coal at LRT is merely incidental to transportation and interstate and foreign shipment of coal and is therefore excluded from regulation under state or local law. *See* 49 C.F.R. § 171.8.

72. Accordingly, the HMTA preempts the City's attempt to designate coal as a "hazardous material," where the handling and storage at LRT is incidental to the transportation and movement of coal in interstate and foreign commerce..

Wherefore, Wolverine prays for judgment as set forth below.

SIXTH CLAIM

(Preemption Under the Shipping Act of 1984)

73. Wolverine realleges and incorporates by reference the allegations set forth in paragraphs 1 through 72, above, as though fully set forth herein.

74. The Shipping Act of 1984. Section 40101, et seq., preempts the Ordinance. The Shipping Act of 1984 provides that a marine terminal operator like LRT may not—

(1) agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;

(2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or

(3) unreasonably refuse to deal or negotiate.

46 U.S.C. § 41106.

75. The Ordinance will force LRT to refuse terminal services to Wolverine, making compliance with federal law in conflict with the Ordinance. Such discrimination against shippers of a particular commodity is prohibited under the Shipping Act of 1984.

Wherefore, Wolverine prays for judgment as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Wolverine respectfully prays for judgment in its favors as follows:

A. For a declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and/or Rule 57 of the Federal Rules of Civil Procedure, that:

1. The Commerce Clause of the United States Constitution prohibits the City from adopting the Ordinance and applying the Ordinance to Wolverine's coal;

2. The Ordinance is preempted by ICCTA and cannot be enforced or applied to handling, storage and transportation of Wolverine's coal;

3. The Ordinance violates the Due Process clauses of the United States Constitution both facially and as applied to Wolverine;

4. The Ordinance violates the "impairment of contracts" provision of the United States Constitution;

5. The HMTA preempts and/or otherwise prohibits the City from enforcing the Ordinance and applying the Ordinance to Wolverine's handling, storage and transportation of coal; and

6. The Shipping Act of 1984 preempts and/or otherwise prohibits the City from enforcing the Ordinance and applying the Ordinance to Wolverine's handling, storage and transportation of coal.

B. For a permanent injunction, pursuant to 28 U.S.C. § 1651, 42 U.S.C. § 1983, and/or Rule 65 of the Federal Rules of Civil Procedure, enjoining the City from enforcing the unlawful Ordinance;

C. For Wolverine's reasonable attorneys' fees, costs, expenses, and disbursements;

and

D. For such other and further relief as the Court may deem just and proper.

Dated: March 4, 2020

Respectfully submitted,

BARG COFFIN LEWIS & TRAPP, LLP

By: _____

JOHN F. BARG

Attorneys for Plaintiff
WOLVERINE FUELS SALES, LLC