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OAKLAND BULK & OVERSIZED TERMINAL, LLC

13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAN FRANCISCO DIVISION

16  
17 OAKLAND BULK & OVERSIZED  
18 TERMINAL, LLC

19 Plaintiff,

20 vs.

21 CITY OF OAKLAND,

22 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.

23 Ctrm.: No. 2, 17<sup>th</sup> Floor

24 Honorable Vince Chhabria

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

#### 4 INTRODUCTION

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

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

23 OBOT thus respectfully submits a trial is unnecessary because the Ordinance violates the  
 24 Constitution, is preempted by federal statutes, and the City’s application of that Ordinance to the  
 25 Terminal breaches the Development Agreement between the City and OBOT as a matter of law.  
 26  
 27

28 <sup>1</sup> “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.

1 **STATEMENT OF FACTS**

2 **A. The Parties' Contractual Agreements**

3 OBOT is a limited liability company wholly owned by its sole member, California Capital  
4 and Investment Group ("CCIG"). Ex. 2 (Tagami Tr.) at 15:11-19. OBOT and the City of Oakland  
5 ("City") entered into both a Lease Disposition and Development Agreement dated December 4,  
6 2012, and a Development Agreement Regarding the Property and Project Known As The Gateway  
7 Development/Oakland Global, dated July 16, 2013.<sup>2</sup> See Ex. 3 (hereinafter, the "LDDA"); Ex. 4  
8 (hereinafter, the "DA"). Under these agreements, OBOT has the right to develop a bulk goods  
9 terminal at the portion of the former Oakland Army Base known as the "West Gateway"—the  
10 Terminal. See Ex 3 (LDDA); Ex. 4 (DA). Specifically, the DA vested in OBOT the right to  
11 develop, use and operate for sixty-six years a "Bulk Oversized Terminal," defined as a "ship-to-  
12 rail terminal designed for the export of non-containerized bulk goods and import of oversized or  
13 overweight cargo." See, e.g., Ex. 4 (DA) at §§ 2.1-2.2; Recital H; Ex. D-2-2; § 1.1 (incorporating  
14 Recital H in definition of "Project").

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

24 \_\_\_\_\_  
25 <sup>2</sup> The agreements were entered into by OBOT's predecessor-in-interest, Prologis/CCIG. See Ex.  
26 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.

27 <sup>3</sup> Pursuant to the ENA, TLS has an option to lease, design, build, and operate the Terminal. See,  
28 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.

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

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

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

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

24 <sup>5</sup> OGRE will have an inter-track agreement (“ITA”) with UP, Ex. 2 (Tagami Tr.) at 63:25-64:2,  
25 pursuant to which UP will reserve the right to perform these last-mile services itself. Ex. 10  
26 (McClure 10/16/17 Tr.) at 89:7-23. TLS has had discussions with both UP and BNSF “regarding  
27 their capacity on their lines to service the terminal,” but TLS would not itself contract with the  
28 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.

<sup>6</sup> *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,

1 OGRE (using either OGRE’s own locomotives, or UP’s or BNSF’s locomotives, at the long haul  
 2 carrier’s election)—takes the cars through the last portion of the train’s journey to the “dump  
 3 pits.”<sup>7</sup> See Ex. 2 (Tagami Tr.) at 61:18-62:2; Ex. 10 (McClure 10/16/17 Tr.) at 28:6-11, 29:10-20,  
 4 103:3-104:3. The dump pits are located on a rail right of way at the Terminal—a portion of the  
 5 West Gateway property that OBOT has subleased to OGRE. Ex. 2 (Tagami Tr.) at 19:13-20:5,  
 6 21:2-9; Ex. 10 (McClure 10/16/17 Tr.) at 44:9-45:18; Ex. 17 (OBOT-OGRE Sublease). The rail  
 7 line leading to, and running over, the “dump pits” sits on that subleased right of way. Ex. 10  
 8 (McClure 10/16/17 Tr.) at 42:8-19, 44:9-45:18.

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

### 18 C. The Result of the City’s Process was Pre-Ordained

19 The City knew before entering the DA that the multi-commodity Terminal might handle  
 20 coal.<sup>9</sup> Eventually, however, the possibility of coal at the Terminal became politically unacceptable  
 21 to the City Council. *E.g.*, Ex. 25 (Cappio Tr.) at 81:11-14; see also Ex. 20 (Cashman Tr.) at  
 22

---

23 and “[e]ach of those cars could be carrying different cargo for a different customer.” Ex. 10  
 24 (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.

25 <sup>7</sup> The “dump pits” consist of “an enclosed building over two large holes in the ground.” Ex. 2  
 (Tagami Tr.) at 61:18-62:2.

26 <sup>8</sup> 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.

27 <sup>9</sup> See, *e.g.*, Ex. 19 (4/8/13 Email from D. Kalb); Ex. 20 (Cashman Tr.) at 64:4-70:4; Ex. 21  
 28 (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”).

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

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

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

24 \_\_\_\_\_  
25 <sup>10</sup> Defendant-Intervenor Sierra Club has admitted that it has “ramped efforts across the nation to  
26 block the means by which coal is exported from the United States,” “worked with persons and/or  
27 entities it considers allies to stop the exportation of coal from the United States,” and “supported  
28 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).

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

<sup>12</sup> 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.

1 might be employed, and (iii) the applicable regulatory authority of other jurisdictions and  
 2 agencies; “Phase 2” would have included “modeling” that would have compared the estimated  
 3 emissions of the proposed terminal activities to the thresholds that the City would adopt in Phase  
 4 1. Ex. 32 (1/8/16 ESA Email with SOW) at ESA\_039067-68; Ex. 33 (ESA 10/31/17 30(b)(6) Tr.)  
 5 at 179:16-181:15, 187:6-14.

6 The City Staff was scheduled to present the proposed SOW to the City Council on  
 7 February 16, 2016. Ex. 34 (2/3/16 City Agenda Report); Ex. 27 (Cappio Tr.) at 220:5-10. The  
 8 political firestorm opposing the SOW was so fierce that the proposal was entirely scrapped. Ex.  
 9 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  
 10 after the City Council meeting, “all parties oppose [c]oal,” and “want an out-and-out ban, and  
 11 now” rather than any “study, analysis, regulations, mitigation measures, etc.” that would “allow  
 12 for the possibility that project [sic] will proceed with some conditions or mitigations.” Ex. 36  
 13 (2/18/16 Internal ESA Email). This had been the City’s plan from the beginning; as the former  
 14 Project Manager for the City acknowledged, “there wasn’t a political will to solve the problem  
 15 through mitigation.” Ex. 20 (Cashman Tr.) at 185:24-186:7. Accordingly, the core of ESA’s  
 16 proposed SOW was eliminated. *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 188:13-22, 203:1-  
 17 204:6; Ex. 37 (5/4/16 City-ESA Service Agreement) at ESA\_035933-946. Instead, the City  
 18 directed ESA to provide a bare bones study because if there were no study at all—as the assistant  
 19 City Administrator in charge of the OBOT project wrote—“it would be like the Emperor’s New  
 20 Clothes.” Ex. 38 (2/13/16 Email from Cappio); *see* Ex. 27 (Cappio Tr.) at 431:1-432:8.

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

28 <sup>13</sup> 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

1 scope of the City's control over the process has not been revealed because of the City's selective  
2 assertions of attorney-client privilege and work-product.<sup>14</sup>

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

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

15 The City Council received the 163-page ESA Report,<sup>17</sup> a 25-page City Staff Report,<sup>18</sup> as  
16 well as the draft Ordinance and Resolution on Friday, June 24, 2016. *See* Ex. 27 (Cappio Tr.) at  
17 244:16-245:25, 248:6-9, 401:12-17. The City Council met on Monday, June 27, 2016 to enact the  
18 coal ban. Ex. 1 (Ordinance) at 3; Ex. 50 (hereinafter, the "Resolution") at 9. ESA does not recall  
19 being asked any questions about its Report by any City Councilmember. Ex. 33 (ESA 10/31/17  
20

21 <sup>14</sup> Declaration of Robert Feldman in Support of OBOT's Motion for Summary Judgment  
("Feldman Decl.") ¶¶ 3-6.

22 <sup>15</sup> *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  
23 City Questions) at OAK0007523-554.

24 <sup>16</sup> 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  
25 OBOT/TLS Response to City Questions) at OAK0007471.

26 <sup>17</sup> 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  
27 Proposed Oakland Bulk and Oversized Terminal in the West Gateway Area of the Former  
Oakland Army Base." Ex. 45 (ESA Report).

28 <sup>18</sup> 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.

26  
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).<sup>19</sup> 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).<sup>20</sup> 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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<sup>19</sup> 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).

<sup>20</sup> 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.”).

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

3 [1] *When a state statute directly regulates or discriminates against interstate*  
4 *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*.

5 [2] *When, however, a statute has only indirect effects on interstate commerce and*  
6 *regulates evenhandedly*, we have examined whether the State’s interest is  
legitimate and whether the burden on interstate commerce clearly exceeds the local  
benefits.”

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

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

19 **A. The Ordinance Is a Per Se Violation of the Dormant Commerce Clause**

20 **1. The Ordinance Directly Regulates Interstate and Foreign Commerce**

21 The Ordinance is a per se violation of the Dormant Commerce Clause because it directly  
22 regulates interstate and foreign commerce. The Ordinance is *not* a law of general application that  
23 “regulates evenhandedly” across all activities in Oakland and thereby has only “indirect effects on  
24 interstate commerce.” *S.D. Myers*, 253 F.3d at 466; *Brown-Forman Distillers Corp.*, 476 U.S. at  
25

26  
27 <sup>21</sup> See also *Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1041 (9th Cir.  
28 2014) (citing *NCAA*, 10 F.3d at 638, regarding direct regulation of interstate commerce as per se  
violation of Dormant Commerce Clause).

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

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

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

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

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

27 <sup>22</sup> The City has admitted that if either UP or BNSF were to build its own terminal in Oakland,  
 28 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.

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

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

15 (b) The Terminal Will Undisputedly Engage in Interstate and Foreign  
 16 Commerce.

17 Defendants also do not dispute that the Terminal will engage in interstate transportation of  
 18 goods for export overseas. *See, e.g.*, Ex. 8 (McClure 10/12/17 Tr.) at 31:6-32:2; Ex. 20 (Cashman  
 19 Tr.) at 57:11-58:13; Ex. 52 (LDDA Attachment 7) at 7-2. Indeed, it is undisputed that coal that  
 20 would go through the Terminal would be shipped via interstate rail from Utah for overseas export  
 21 to countries in Asia. *See, e.g.*, Ex. 8 (McClure 10/12/17 Tr.) at 157:9-17; Ex. 2 (Tagami Tr.) at  
 22 147:18-24, 280:15-281:16; Ex. 25 (Cappio Tr.) at 66:7-11.

23 <sup>23</sup> *See also* Ex. 25 (Cappio Tr.) at 52:15-18, 53:7-16, 54:10-15.

24 <sup>24</sup> *See* Ex. 1 (Ordinance) at § 8.60.020(B)(1)(c) (“rail transport of Coal or Coke through the City,  
 25 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”).

26 <sup>25</sup> *See* Ex. 1 (Ordinance) at § 8.60.020(B)(1)(f) (“export of Coal”).

27 <sup>26</sup> *See also* Ex. 25 (Cappio Tr.) at 54:10-15 (“Q. So manufacturing facilities that use coal or coke  
 28 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).

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

3 Nor can there be any dispute that the Ordinance prohibits the Terminal from engaging in  
 4 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  
 6 ship for export to a foreign country?

7 A. Yes.

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

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

27 <sup>27</sup> The City has further admitted that “the Ordinance prohibits transferring coal and/or petcoke  
 28 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** 12 **Commerce**

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.<sup>28</sup> 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.

25 \_\_\_\_\_  
 26 <sup>28</sup> Although courts sometimes conflate discrimination against interstate commerce and  
 27 discrimination against competing out-of-state interests, these two forms of “discrimination” are  
 28 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)  
 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”).



1 653, 660 (W.D.N.Y. 1981). There, the court considered a series of municipal ordinances that  
 2 prohibited the Port of Rochester from being used for, among other things, “commercial cargo and  
 3 shipping terminals.” *Id.* The court observed that the effect of the ordinances was to block  
 4 “commercial shipping at the Port of Rochester,” which amounted to “outright economic  
 5 isolationism and patent economic protectionism” and discrimination against interstate and foreign  
 6 commerce. *Id.* at 660, 662. The court accordingly held the Rochester ordinances constitutionally  
 7 invalid per se. *Id.*

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

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

26 **B. The Ordinance Violates the Dormant Commerce Clause Because It Unduly**  
 27 **Burdens Interstate Commerce by Undermining National Uniformity in the**  
 28 **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**  
 8 **Commerce**

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

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

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

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

9 Both parties concede that trains are not reconfigured during transit, so, for example,  
 10 a train leaving Nebraska and traveling to Los Angeles would be initially configured  
 11 so as to meet the most stringent [configuration] standards on its trip. Thus, any rule  
 12 regarding the make-up of a train will have extra-territorial effects in a number of  
 13 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.

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

## 18 **2. The Ordinance Undermines the Uniformity of National Railroad 19 Regulation**

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

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

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

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

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

## 23 **II. THE ORDINANCE IS PREEMPTED BY ICCTA**

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

26 <sup>30</sup> Any interstate train that needs to stop at a terminal in Oakland to, for example, load or unload  
 27 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.

28 <sup>31</sup> 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.

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

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

13 “In order for federal preemption to apply under the ICCTA, the activity in question must  
 14 first fall within the statutory grant of jurisdiction to the [STB],” under 49 U.S.C. § 10501(a). *See*  
 15 *Or. Coast Scenic R.R. v. Or. Dep’t of State Lands*, 841 F.3d 1069, 1073 (9th Cir. 2016). Section  
 16 10501(a) provides that:

17 (1) Subject to this chapter, the Board has jurisdiction over ***transportation by rail***  
 18 ***carrier*** that is--

19 (A) only ***by railroad***; or

20 (B) ***by railroad and water***, when the transportation is under common  
 21 control, management, or arrangement ***for a continuous carriage or***  
 22 ***shipment***.

23 49 U.S.C. § 10501(a) (emphasis added). The Board’s jurisdiction under Section 10501(a) extends  
 24 specifically to transportation between “(A) a State and a place in the same or another State as part  
 25 of the interstate rail network; ... or (F) the United States and a place in a foreign country.” 49  
 26 U.S.C. § 10501(a)(2).

27 “If the Board has jurisdiction under 49 U.S.C. § 10501(a), the question whether  
 28 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 .  
 2 . . . of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or  
 3 intended to be located, entirely in one State.” 49 U.S.C. § 10501(b).

4 **A. The Ordinance Impermissibly Regulates “Transportation By Rail Carrier”**

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

9 **1. The Ordinance Regulates “Transportation”**

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

18 *First*, because the rail operations at the Terminal undisputedly involve the *movement of*  
 19 *property by rail*, *see supra* SOF.B, and because they are performed on a “yard, property, [or]  
 20 facility ... relate[d] to the movement” of such property by rail, they constitute “transportation”  
 21 under ICCTA. 49 U.S.C. § 10102(9)(A), (B); *see also* Ex. 9 (Sullivan Tr.) at 134:8-135:9, 137:1-  
 22 139:11, 144:7-25 (discussing movement of coal by rail at Terminal).

23 *Second*, the Ordinance regulates “transportation” because it prevents *loading, unloading,*  
 24 *or transferring* any coal or petcoke “between any mode of transportation, including without  
 25 limitation . . . a truck[], ship or train.” Ex. 1 (Ordinance) at § 8.60.040 B.4; *see also* Ex. 9  
 26 (Sullivan Tr.) at 144:15-25 (unloading of coal involves OGRE “pulling the train over the dump  
 27 pits” by locomotive), 147:17-148:1 (“Q. . . . [T]he railcar unloading process necessarily includes  
 28 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.<sup>32</sup> 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 <sup>32</sup> 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,<sup>33</sup> will perform “transportation” of coal and petcoke regulated by the Ordinance.<sup>34</sup>  
 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,<sup>35</sup>  
 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

21 <sup>33</sup> 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  
 23 will have an ITA agreement, inter-track agreement, with Union Pacific Railroad ... So any of the  
 24 class I railroads has the right under an ITA to call our facility. So they can bypass OGRE if they  
 25 were so to elect and direct deliver to a prospective customer their commodity.”); Ex. 10 (McClure  
 26 10/16/17 Tr.) at 89:7-23 (“The industry track agreement that we would have with both UP and BN  
 27 would define their rights to go onto the OGRE track to deliver to their customer”), 92:5-96:7.

28 <sup>34</sup> As noted, 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.

<sup>35</sup> *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);  
 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.

1 behalf of those Class I rail carriers—the Ordinance regulates “transportation by rail carrier.”

2 **3. The Ordinance Regulates Transportation by Rail Carrier “As Part of**  
 3 **The Interstate Rail Network”**

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

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

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

25 **B. The Ordinance Is Expressly Preempted by ICCTA**

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

27 <sup>36</sup> Even “transportation between places in the same state” are part of the “interstate rail network”  
 28 “as long as that transportation is related to interstate commerce.” *Or. Coast*, 841 F.3d at 1075  
 (internal quotation marks omitted).

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

2       *First*, Section 10501(b) gives the Board “exclusive” jurisdiction over “transportation by  
3 rail carriers,” 49 U.S.C. § 10501(b)(1)—and, indeed, “*all state laws* that may reasonably be said to  
4 have the *effect of managing or governing rail transportation.*” *Or. Coast*, 841 F.3d at 1077  
5 (quoting *Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt.*, 622 F.3d 1094, 1096 (9th Cir.  
6 2010) (emphasis added); *see also N.Y. Susquehanna*, 500 F.3d at 252 (3d Cir. 2007) (same).  
7 While ICCTA may not “preempt state or local laws if they are laws of general applicability that do  
8 not unreasonably interfere with interstate commerce,” *see Or. Coast*, 841 F.3d at 1077—as set  
9 forth in detail above, *supra* § II.A.2, the Ordinance is *not* a law of general applicability, but is  
10 instead specifically directed at the interstate rail transportation of coal and petcoke that is intended  
11 for export overseas.<sup>37</sup> By banning the storage, handling, loading, and unloading of coal and  
12 petcoke that is transported by interstate rail for export from Oakland, the Ordinance undisputedly  
13 has the “effect of . . . governing rail transportation” of coal and coke through the Terminal. *See*  
14 *Or. Coast*, 841 F.3d at 1076. Indeed, that is exactly why the City Council of Oakland passed the  
15 Ordinance. *See supra*, SOF.A. The Ordinance is thus preempted by the ICCTA.

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

### 22 **III. THE ORDINANCE IS PREEMPTED BY THE HMTA**

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

26 <sup>37</sup> Even if the Ordinance were a law of general applicability (which it is not), “[i]n determining  
27 whether a law of general applicability is permissible . . . what matters is the degree to which the  
28 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

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

#### 7 **IV. THE ORDINANCE IS PREEMPTED BY THE SHIPPING ACT**

8 The Ordinance is also preempted by the Shipping Act (46 U.S.C. §§ 40101-41309). While  
 9 the Shipping Act does not have an express preemption provision, “conflict preemption is implicit  
 10 preemption of state law that . . . arises when compliance with both federal and state regulations is  
 11 a physical impossibility.” *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015)  
 12 (internal quotation marks omitted). The Ordinance is preempted here because it conflicts with the  
 13 Shipping Act’s requirement that “[a] marine terminal operator may not . . . unreasonably  
 14 discriminate in the provision of terminal services to, a common carrier or ocean tramp.” 46 U.S.C.  
 15 § 41106(1). “[A] discriminatory practice is prohibited by the Shipping Act’s unreasonable  
 16 discrimination prohibition unless the practice can be justified by ‘transportation conditions.’” *See*  
 17 *Reed v. City & Cnty. of S.F.*, 10 Cal. App. 4th 572, 574 (Cal. Ct. App. 1992) (citing *N.Y. Shipping*  
 18 *Assoc. v. Fed. Maritime Comm’n*, 854 F.2d 1338, 1343-44, 1375 (D.C. Cir. 1988)).

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

27 \_\_\_\_\_  
 28 <sup>38</sup> 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.

1 **V. THE CITY BREACHED THE DEVELOPMENT AGREEMENT**

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

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

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

15 The Ordinance recited without supporting evidence that “pre-existing local, state and/or  
 16 federal laws are inapplicable and/or insufficient to protect and promote the health, safety and/or  
 17 general welfare” of Oakland “Constituents.” Ex. 1 (Ordinance) at 2. The Resolution contained the  
 18 same finding. Ex. 50 (Resolution) at 2. This finding is insufficient to satisfy Section 3.4.2 for at  
 19 least two reasons. *First*, the finding is unsupported by any, much less substantial evidence, all of  
 20 which is to the contrary. *Second*, while this finding might support the application of the  
 21 Ordinance to “facilities” without OBOT’s vested rights (if there were any such facilities), it fails to  
 22 address, much less satisfy, the “substantial danger” test in Section 3.4.2. This was no drafting  
 23 error: comprehensive federal and state laws ensure that operations at the Terminal will not result  
 24

25 <sup>39</sup> There were no negotiations or discussions about the meaning of 3.4.2 between the parties. *See*  
 26 Ex. 24 (Ranelletti Tr.) at 207:17-212:24. DA Section 3.4.2 provides: “City shall have the right to  
 27 apply City Regulations adopted by the City after the Adoption Date, if such application (a) is  
 28 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.<sup>40</sup>

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 <sup>40</sup> 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  
28 health and safety aspects.” *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 187:6-15; Ex. 32 (1/8/16  
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.

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

6           *First*, the City has admitted this central proposition. Claudia Cappio, the Deputy City  
7 Administrator with overall responsibility for the OBOT project and the principal author and  
8 signatory to the June 24 Staff Report,<sup>41</sup> appeared as the City’s Rule 30(b)(6) witness. Ms. Cappio  
9 testified she “ha[s] [no] reason to think that BAAQMD would enforce EPA standards in a way  
10 that permitted a substantial danger to people in the City of Oakland,” Ex. 27 (Cappio Tr.) at 273:1-  
11 12; likewise, she never “reach[ed] a determination that BAAQMD’s rules and regulations were  
12 inadequate to ensure adequate air quality with respect to the OBOT terminal.” *Id.* at 180:18-23.

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

21           *Third*, the Ordinance itself demonstrates that a BAAQMD permit protects against a  
22 substantial danger. The Ordinance expressly exempts from its scope “on-site manufacturing  
23 facilities” *in Oakland* that “consume” (*e.g.*, burn) coal or coke so long as they are operated  
24 pursuant to “permits granted by the [BAAQMD].” Ex. 1 at § 8.60.040(C). The City’s Rule  
25 30(b)(6) witness admitted that reliance on a BAAQMD permit would ensure safe air quality for

26 <sup>41</sup> *See* Ex. 27 (Cappio Tr.) at 207:12-208:2, 419:1-12.

27 <sup>42</sup> *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 84:16-85:13; Declaration of Lyle Chinkin in  
28 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).



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

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

20 **2. The City’s Evidence Establishes that the BAAQMD Permit Process**  
 21 **Should Have Been Allowed to Proceed**

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

23 <sup>43</sup> As set forth above, the NAAQS are the maximum allowable concentrations of specific  
 pollutants in the ambient air. *See* Chinkin Decl. ¶ 6.

24 <sup>44</sup> The ESA Report contains “emissions estimates.” *See* Ex. 45 (ESA Report) at 5-17. Such  
 25 estimates purport to estimate the amount of emissions of “fugitive coal dust” that would be  
 26 released during the transportation of coal by rail and from the unloading, storage, transfer and  
 27 transloading of coal at the Terminal. *See id.* Emission estimates are only part of the process of  
 28 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”:

19 **SUMMARY OF EMISSIONS ESTIMATES FROM RAIL TRANSPORT,  
 20 STAGING/SPUR TRAVEL, UNLOADING, STORAGE, TRANSFER AND SHIP LOADING OF COAL AT  
 21 OBOT**

Fugitive Coal Dust Emissions Source*	tons/yr			lbs/day		
	TSP	PM <sub>10</sub>	PM <sub>2.5</sub>	TSP	PM <sub>10</sub>	PM <sub>2.5</sub>
<b>Rail Transport*</b>						
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
<b>SUBTOTAL - Oakland</b>	<b>238</b>	<b>116</b>	<b>18</b>	<b>1,357</b>	<b>665</b>	<b>100</b>
<b>OBOT Operations</b>						
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
<b>SUBTOTAL</b>	<b>37.5</b>	<b>17.7</b>	<b>2.7</b>	<b>207.3</b>	<b>98.1</b>	<b>14.8</b>
<b>PROJECT TOTAL** - Oakland</b>	<b>276</b>	<b>134</b>	<b>21</b>	<b>1,564</b>	<b>763</b>	<b>115</b>

1 See Ex. 28 (Staff Report) at 12. Based on this table (hereafter referred to as “Table 5-7”<sup>45</sup>), 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.”<sup>46</sup> *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.<sup>47</sup> 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”).<sup>48</sup>  
 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

21 <sup>45</sup> 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  
 23 Table 5-7 in numerical values. Compare Ex. 28 (Staff Report) at 12 with Ex. 45 (ESA Report) at  
 24 5-17. The differences in the tables are the omission of the phrase “uncontrolled air emissions . . .  
 25 .” and the addition of the double asterisk (\*\*) at the bottom of the Staff Report table.

24 <sup>46</sup> Although Table 5-7 estimates PM10 and PM2.5 emissions, the Staff Report statement  
 25 regarding “substantial danger” based on CEQA thresholds specifically referred to PM2.5  
 26 emissions. See Ex. 27 (Cappio Tr.) at 292:8-17.

26 <sup>47</sup> CEQA Thresholds of Significance are generally used during the environmental review of  
 27 projects to screen for potentially significant sources of pollutants. Chinkin Decl., ¶ 35. If  
 28 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

<sup>48</sup> 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.<sup>49</sup> 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”  
 27

28 <sup>49</sup> *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.

1 from the Terminal “are going to present a significant harm to adjacent folks and impacted  
 2 residents” would require “precis[ion] in the engineering estimates,” *see* Ex. 55 (Sahu Tr.) at 128:7-  
 3 13—the precision he conceded would be required by an air district such as BAAQMD before it  
 4 would issue a permit. *See id.* at 261:14-262:11.<sup>50</sup> The City, however, was in such a “crazy” rush  
 5 to adopt an unnecessary ban<sup>51</sup> that it passed the Ordinance without the required data subs rather  
 6 than permitting BAAQMD to address air quality in the appropriate course.

### 7                   **3.       OSHA and Cal/OSHA Worker Safety Regulations Will Prevent a** 8                   **Substantial Danger to Workers**

9                   The Ordinance included a finding, incorporated into the Resolution, that “[w]orkers would  
 10 be closest to the fugitive coal dust and respirable fine particulates during transport and staging of  
 11 loaded cars for unloading and within the enclosed facilities.” Ex. 1 (Ordinance) at  
 12 § 8.60.020(B)(1)(d). The City failed to make any findings, however, that existing regulations of  
 13 applicable agencies, including the federal Occupational Safety and Health Administration  
 14 (“OSHA”) and Cal/OSHA,<sup>52</sup> would be insufficient to protect workers from a “substantially  
 15 dangerous” condition at the Terminal.

16                   The City acknowledged at deposition that OSHA applies regulations for health and safety  
 17 of workers at the Terminal. *See* Ex. 27 (Cappio Tr.) at 174:16-18, 175:12-15. Critically for  
 18 present purposes, the City has further admitted that it did not “reach a determination that OSHA’s  
 19 rules and regulations would be inadequate to ensure [worker] safety at the terminal.” *Id.* at 181:1-  
 20 9. Nor did the City determine that workers at other coal terminals had suffered any ill effects  
 21 whatsoever from working at those terminals. *Id.* at 338:4-12. Unlike the City, ESA actually  
 22 evaluated OSHA’s “airborne coal dust restrictions,” Ex. 33 (10/31/17 ESA 30(b)(6) Tr.) at  
 23 187:19-24, and did not conclude that the OSHA restrictions were insufficient to protect workers at  
 24 the Terminal. *Id.* at 188:9-11.

25                   Both OSHA and Cal/OSHA set “Permissible Exposure Limits” (“PELs”) for exposure to

26 <sup>50</sup> 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.

27 <sup>51</sup> *See* Ex. 37 (5/4/16 Internal ESA Email) at ESA\_038570.

28 <sup>52</sup> 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** 9 **Danger**

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,  
 24 managed or . . . handled on particular sites throughout the City of Oakland or  
 25 actually when they’re responding to an emergency, let’s say there’s a car accident  
 26 involving a tanker and that tanker has a particular set of ratings, they know  
 27 immediately what some of the dangers or risks may be.

28 *Id.* at 166:3-23. In other words, the OFD would consider bituminous coal a low risk commodity.

And the Ordinance—which refers to coal generally and not to bituminous coal in particular—  
 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           **B. Any Incremental Impact on Greenhouse Gases and Global Pollution**  
 2           **Undisputedly Cannot Impact the Health and Safety of Terminal Occupants**  
 3           **and Adjacent Neighbors “in Any Meaningful Way”**

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

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

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

18           Ex. 61 (1/6/2016 Internal ESA Draft SOW) at ESA\_035975.

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

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

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

29           **CONCLUSION**

30           OBOT’s motion for summary judgment should be granted.



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Dated: November 20, 2017

Respectfully submitted,

By: /s/ Robert P. Feldman

Robert P. Feldman

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