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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC, Plaintiff, v. CITY OF OAKLAND, Defendant, and SIERRA CLUB and SAN FRANCISCO BAYKEEPER, Defendant-Intervenors.	Case No. 16-cv-7014-VC **SIERRA CLUB AND SAN FRANCISCO BAYKEEPER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Hearing: Jan. 10, 2018 Time: 10:00 a.m. Judge: Hon. Vince Chhabria Place: Courtroom 4, 17th Floor Action Filed: Dec. 7, 2016

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I. INTRODUCTION

OBOT's opposition misapprehends dormant Commerce Clause doctrine and presents no evidence to support its theories. The court should grant Defendant-Intervenors' motion for summary judgment on each part of this claim: the Ordinance is a legitimate exercise of municipal police power that does not regulate conduct outside of Oakland, does not discriminate against out-of-state interests in favor of local ones, and has no effect on railroad operations. Defendant-Intervenors join Defendant City of Oakland's Reply in Support of its Motion for Summary Judgment.

II. ARGUMENT

A. The Ordinance does not directly regulate interstate commerce.

The Ordinance does not "directly regulate" interstate commerce; rather, it simply regulates in-state conduct—the storage and handling of coal and coke at "Coal and Coke Bulk Material Facilities" in Oakland—in order to protect public health and safety. At most, like virtually every other state law and local ordinance, the Ordinance will have incidental out-of-state effects which do not offend the Commerce Clause. OBOT's argument to the contrary is based on a series of false factual and legal premises.

1. OBOT's factual misconceptions.

OBOT begins by claiming that it is "undisputed" that the Ordinance's "purpose and effect" are to prevent coal and coke exports through the Terminal. Pl.'s Reply Br. ("Reply") at 1. But the Ordinance's express purpose is to prevent dangerous local health and safety conditions caused by the storage and handling of coal and coke, and the City's application (via the Resolution) of the Ordinance to the Terminal was based entirely on preventing those conditions. Myre Decl., Ex. 1 [Ordinance] § 8.60.010, and Ex. 50 [Resolution] § 4. The most that can be said, which Defendants have never denied, is that the Ordinance will incidentally prevent exports of coal or coke from the Terminal. As shown in Intervenors' opening brief ("Int. Br.") at 5, 10–11, and below at 5–8, such incidental effects of local health and safety regulation do not offend the dormant Commerce Clause.

OBOT utterly fails to support its claim (Reply at 5–6) that the Ordinance regulates transactions across state borders by forcing coal producers in other states to "design their exports around" it, and railroads to "conform their cargo" to it. As explained in Section C, below, the

Ordinance does not impose such requirements, and 18 months after being enacted OBOT is unable to provide any evidence to support these claims: the record contains not a single declaration, document, or fact concerning these alleged impacts on any coal producer or railroad. And, even if OBOT had produced *any* such evidence, any effect the Ordinance might have on such third parties would be irrelevant to OBOT's as-applied challenge to the Ordinance, and OBOT would have no standing to assert a Commerce Clause claim based on such injuries.

2. OBOT's legal misconceptions.

OBOT misconstrues the precept that states may not regulate any transaction that "takes place across state lines" to mean that the Commerce Clause overrides any state or local law that has any effect on interstate commerce. Not a single court has ever adopted OBOT's theory.

a. The dormant Commerce Clause does not override state or local governments' police powers that may affect interstate commerce.

OBOT argues that the Ordinance violates the dormant Commerce Clause because it prevents OBOT from receiving coal and coke at the Terminal. But "the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in consists of diseased cattle or fraudulent or unsound insurance." *Robertson v. California*, 328 U.S. 440, 458–59 (1946) (footnote omitted). Relying on "the decisions which have sustained various measures of exclusion in protection of the public health, safety and security not only from physical harm but from various forms of fraud and imposition," *Robertson* rejected a Commerce Clause challenge to California's insurance regulations, concluding, "[e]xclusion there is, but it is exclusion of what the state has the power to keep out, until Congress speaks otherwise." *Id.* at 459.

In *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455, 463–64 (1886), the Court upheld Louisiana's ship quarantine system, and affirmed that states may impose stringent restrictions on the movement of goods in interstate commerce to protect public health and safety:

> Undoubtedly it is, in some sense, a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the States when the vessel is coming from some other State of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it

> provides a rule by which this power is exercised, it cannot be denied that it regulates commerce.

Despite these significant effects on goods moving in interstate commerce, "quarantine laws belong to that class of State legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of congress." *Id*. at 465. The same is true of other health and safety laws.

Even the cases upon which OBOT relies support Intervenors' position. In *Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888), the Court invalidated a state law that prohibited common carriers from transporting liquor across state lines. But the Court acknowledged that states may exercise their police power to "justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive." *Id.* at 492.

More recently, in *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986), the Court held that "[e]ven overt discrimination against interstate trade may be justified where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources . . . ." In *Maine*, the state banned imports of live baitfish because they might carry parasites damaging to Maine's wild fish population:

> [W]e agree with the District Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. "[The] constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences."

Id. at 148 (alteration in original) (citation omitted).

Likewise, the Commerce Clause does not require Oakland "to sit idly by" when handling and storing large quantities of two combustible and polluting products that threaten its residents. Courts routinely reject challenges to such state and local laws that affect interstate commerce; since virtually *any* such law "affects" interstate commerce, courts distinguish between laws that regulate

in-state conduct, which do not "directly regulate" interstate commerce even when they have out-of-state effects, and those that regulate conduct wholly outside of the state.

b. A law "directly regulates" commerce only when it controls conduct wholly outside the state.

OBOT's argument that the Ordinance "directly regulates" interstate commerce by compelling coal producers and railroads to conform to it is not only factually unsupported, but also legally infirm. OBOT continues to misconstrue the direct regulation doctrine, grasping at shreds of language in cases while ignoring their facts and holdings.

In bold italics (with underlining to boot), OBOT proclaims that the Ninth Circuit said: "Direct regulation occurs when a state law directly affects ***transactions that take place across state lines or*** entirely outside of the state's borders." Reply at 3 (quoting *Pharm. Research & Mrfs. of Am. v. Alameda Cnty.*, 768 F.3d 1037, 1043 (9th Cir. 2014)). But the decision's very next sentence explains: "The critical inquiry is whether the practical effect of the regulation is to *control conduct beyond the boundaries of the State*." *Id*. (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added). Since the Ordinance does not have the effect of controlling conduct beyond Oakland, let alone California, there is no direct regulation here.

OBOT does not—and cannot—cite a single case overturning a law based on its interpretation of the "transactions across state lines" language. To the contrary, "courts finding direct regulation of interstate commerce consistently require restraint or control over *wholly* extra-territorial transactions and/or conduct." *Rosenblatt v. Santa Monica*, No. 2:16-CV-04481-ODW-AGR, 2017 WL 1205997 (C.D. Cal. Mar. 30, 2017), *appeal docketed* No. 17-55879 (9th Cir. June 22, 2017) (citing, *inter alia, Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 949–50 (9th Cir. 2013) and *Healy*, 491 U.S. at 337). Thus *NCAA v. Miller*, 10 F.3d 633 (1993), on which OBOT principally relies (Reply at 1–3, 6–8), overturned a Nevada law because it would force the NCAA "to regulate the integrity of its product in every state according to Nevada's procedural rules," which meant that "the Statute could control the regulation of the integrity of a product in interstate commerce *that occurs wholly outside* Nevada's borders. That sort of extraterritorial effect is forbidden by the Commerce Clause." 10 F.3d at 639 (emphasis added); *see also Sam Francis Found. v. Christies,*

Inc., 784 F.3d 1320, 1323–24 (9th Cir. 2015) (en banc) (law regulating sales taking place outside California violated the dormant Commerce Clause because it "involves regulation of wholly out-of-state conduct").

Indeed, both of the Ninth Circuit cases OBOT cites as using the "transactions that take place across state lines" language (Reply at 3) *rejected* challenges to local legislation that affected out-of-state activities. *See Pharm. Research*, 768 F.3d 1037 (local ordinance requiring out-of-state drug manufacturers to provide for disposal of unneeded drugs regulates only in-state conduct); *S.D. Myers, Inc. v. San Francisco*, 253 F.3d 461, 465, 468–49 (9th Cir. 2001) (local ordinance requiring contractors to provide employees working on city contracts, wherever located, with nondiscriminatory benefits does not directly regulate interstate commerce). These cases are fully consistent with the conclusion that "direct regulation" means controlling conduct "*wholly* outside" of the state. In fact, every case in which the challenged law regulated *in-state* conduct has held that the law did not "directly regulate" interstate commerce, no matter how significant any resulting out-of-state effects.

Chinatown Neighborhood Association v. Harris, 794 F.3d 1136 (9th Cir. 2015), shows that incidental effects on interstate commerce do not violate the Commerce Clause even if they include a ban on particular goods. OBOT attempts to distinguish *Chinatown* on the grounds that the statute "prohibited possession, consumption, and sale of shark fins in California," but did not prohibit the "interstate transportation of shark fins through California for export." Reply at 4. That is simply wrong: a law making it illegal to possess shark fins most certainly prohibits transporting shark fins through the state for export. And the Chinatown plaintiffs *specifically alleged that the law's impact on exports* violated the dormant Commerce Clause "because it regulates extraterritorially by curbing commerce in shark fins between California and out-of-state destinations, and by preventing the flow of shark fins through California from one out-of-state destination to another." 794 F.3d at 1145. But, "[e]ven when state law has *significant extraterritorial effects*, it passes Commerce Clause muster when, *as here, those effects result from the regulation of in-state conduct*." *Id*. (emphasis added).

There is simply no distinction between the shark fins in *Chinatown* and the coal and coke at issue here. In fact, the law upheld in *Chinatown* imposed restrictions orders of magnitude greater

than those imposed by the Ordinance—prohibiting import, possession and export of shark fins throughout the entire state of California, as opposed to prohibiting export of two products from a single port, as an incident of banning storage and handling at the site.[1]

Another case dealing with an ordinance that had the incidental effect of banning imports and exports of physical goods is *American Promotional Events, Inc. v. City and County of Honolulu*, 796 F. Supp. 2d 1261 (D. Haw. 2011), which included a "direct regulation" challenge to a municipal ordinance that effectively banned the import of fireworks (from both the mainland U.S. and foreign countries), and likewise prevented the export of those fireworks to the other Hawaiian Islands. The Court found that the ordinance did not "directly regulate" because the "purpose of the Fireworks Ordinance is to protect the health and well-being of the City's residents from the harmful effects of consumer fireworks" and "the City is not attempting to regulate conduct in another state. We are instead faced with a local Fire Code ordinance having only an incidental or indirect effect on commerce." *Id*. at 1277.

As a legal matter, the Ordinance is also indistinguishable from other local laws having such incidental impacts on interstate commerce. In *Wood Marine Service, Inc. v. City of Harahan*, 858 F.2d 1061 (5th Cir. 1988), the Court upheld a local zoning ordinance enacted in response to plaintiff's plans to expand its Mississippi riverfront facilities so as to be able to accept dry bulk cargo. Despite the fact that the ordinance prevented the plaintiff from receiving shipments of crushed limestone and other materials, there was "no evidence of even an incidental burden on interstate commerce." *Id*. at 1065; *see also Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006) (zoning ordinance enacted in part to protect local air quality did not violate the Commerce Clause even when it effectively barred out-of-state corporations from the city).

OBOT's attempt to distinguish *Association des Eleveurs de Canards et d'Oies du Quebec* also fails. Reply at 4–5. In that case, the plaintiffs claimed that California's ban on the sale of foie gras made from force-fed geese "directly regulates" interstate commerce, in part because it banned

[1] OBOT's attempt to distinguish *Chinatown* on the basis that shark fins, unlike coal or coke, were not a "lawful article of commerce" makes no sense, as it was the challenged law that made shark fins unlawful and, in any event, shark fins legally taken in other states were nevertheless banned from transiting California for export overseas.

the sale of foie gras "unless all [out-of-state] farmers comply with California's standards." 729 F.3d at 949. But the fact that out-of-state farmers would have to change their production methods in order to sell foie gras in California did not offend the Commerce Clause, because "the dormant Commerce Clause does not . . . guarantee Plaintiffs their preferred method of operation." *Id.* (quoting *Nat'l Ass'n of Optometrists v. Harris*, 682 F.3d 1144, 1181 (9th Cir. 2012)). Likewise (and even if there were any evidence that they had to do so) the dormant Commerce Clause does not guarantee that out-of-state coal producers will not have to "conform" their shipments to the Ordinance, which means no more than continuing to ship coal through other ports. Indeed, OBOT admitted that if coal does not ship through the Terminal, "the product will continue to be shipped as it is today, through Stockton, CA; Levin Terminal in Richmond, CA; Pier G in Long Beach, CA," and may be shipped through Canadian and Mexican ports as well. Myre Decl., Ex. 48 at OAK7485.

Finally, OBOT attempts to distinguish *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), on the grounds that *Rocky Mountain* dealt with fuels consumed in California, while this case concerns a "ban" on interstate transport of a commodity for export. Reply at 5 n.2. That logic manages to misapprehend both the Ordinance (which, like the fuel standards in *Rocky Mountain*, regulates solely conduct within the state) and *Rocky Mountain* (where the plaintiffs indeed alleged—unsuccessfully—that the regulation at issue was a "barrier" to importing high-carbon ethanols into California, *id.* at 1105).[2] *See also Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186 (9th Cir. 1990) (law prohibiting interstate banking networks from restricting Nevada banks' ability to charge fees for ATM transactions in Nevada does not directly regulate commerce even when the card-issuing bank is out of state); *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 432–33 (9th Cir. 2014) (law requiring CNN to provide closed captioning of website's videos "as they are accessed by California viewers, does not have the practical effect of directly regulating conduct wholly outside of California").

Because it regulates *only* in-state conduct, by definition the Ordinance does not "directly

[2] OBOT cites *Rocky Mountain* for the proposition that, under the Commerce Clause, a court must examine the prospects of other states enacting similar legislation. Reply at 5. But because there is *always* the possibility of other jurisdictions enacting similar legislation, the plaintiff must show "that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent," *S.D. Myers*, 253 F.3d at 469–70, which OBOT fails to do.

regulate" interstate commerce. The court should grant Intervenors summary judgment on this claim.

B. The Ordinance does not discriminate against "interstate commerce".

OBOT responds to Intervenors' showing (Int. Br. at 5–7) that the Ordinance does not discriminate under the Commerce Clause (because it does not favor in-state over competing out-of-state interests) by expressly disavowing any claim based on in-state versus out-of-state interests. Reply at 8. Instead, OBOT asserts a new and truly novel claim, based on an imaginary distinction between "discrimination against competing out-of-state interests" and "discrimination against interstate commerce." *Id.* While "discrimination against out-of-state interests" requires that those interests compete with the favored in-state ones, *see Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997), the apparent purpose of OBOT's newly-coined "discrimination against interstate commerce" claim is to avoid this requirement: OBOT never identifies *who* is being discriminated against beyond undifferentiated "interstate and foreign commerce." Reply at 8–9.

This claim fails because while, as OBOT notes, both phrases appear in *NCAA v. Miller*, no court has ever distinguished between the two—including *NCAA* itself, which said not a word more about this since it was *not* a discrimination case, but rather an extraterritoriality one. There is no such distinction: a discrimination claim does not exist absent a disfavored out-of-state interest. In fact, OBOT relies on *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992), where the Court *explicitly equated the two terms*, and then proceeded to use them interchangeably to describe an Oklahoma statute that "expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States"—as clear a case of favoring in-state interests over out-of-state ones as can be imagined:

> It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to *discriminate against interstate commerce.* This 'negative' aspect of the Commerce Clause prohibits *economic protectionism*—that is, regulatory measures designed to *benefit in-state economic interests by burdening out-of-state competitors*. When a state statute clearly *discriminates against interstate commerce*, it will be struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to *economic protectionism*.

Id. at 454 (citations and internal quotations omitted, emphasis added).

OBOT's reliance on *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1992), fares no better.

Philadelphia, like all such cases, addresses discrimination against out-of-state interests in favor of in-state ones: "But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id*. at 626–27.[3]

That leaves OBOT clinging to *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981), as the lonely example of dormant Commerce Clause "discrimination against interstate commerce" where there is no discrimination in favor of in-state versus out-of-state interests. Reply at 8–9. For the reasons given in Intervenors' opening brief (Int. Br. at 7), *Pittston* is an anomaly that this Court should decline to follow.

C. The Ordinance does not unduly burden interstate commerce by interfering with national uniformity in railroad operations.

Intervenors have shown that the Ordinance does not apply to railroads, but only to a "Coal or Coke Bulk Material Facility" instead, and that more than 18 months after enactment, there is not a shred of evidence that the Ordinance has affected any railroad operation anywhere in the country. Int. Br. at 8. Indeed, OBOT's 30(b)(6) witness confirmed that the same coal trains that rolled through Oakland before the Ordinance have continued to do so. *Id*.

OBOT's response is that the Ordinance violates the need for railroad uniformity because it does not allow trains to (1) unload coal or coke for loading on to a ship and (2) temporarily store coal or coke "to switch and unload railroad cars." Reply at 10. According to OBOT, the Ordinance thus is "forcing railroads to conform their cargo to the Ordinance at their out-of-state point of origin or to divert any train carrying coal and petcoke for export to terminals outside of Oakland . . . ." Reply at 12. OBOT presents no evidence to support either of these contentions.

1. Applying the Ordinance to the Terminal does not interfere with railroad uniformity.

Because the "dump pits" at the Terminal would be a Coal or Coke Bulk Material Facility where coal and coke could not be accepted under the Ordinance, OBOT claims that the Ordinance

[3] OBOT seizes upon the phrase "a law that overtly blocks the flow of interstate commerce" from *Philadelphia*'s recitation of the contours of the discrimination doctrine, but did not include the citation—to *Welton v. Missouri*, 91 U.S. 275 (1875)—that followed that phrase. Reply at 8. *Welton* was yet another case where a state discriminated against out-of-state goods in favor of goods made in-state, by requiring a license to sell the former but not the latter.

forces railroads to "divert" trains carrying coal to other ports that can export the coal. Reply at 12. But it is impossible to understand how such trains could be "diverted" since the City does not currently serve as a port for coal or coke and so these trains would not have been destined for Oakland in the first place. Moreover, OBOT presents *no* evidence that applying the Ordinance to the Terminal has caused *any* railroad to "divert" *any* train, or make *any* change to *any* train operations (or *would* cause any railroad to do so in the future).[4]

Moreover, it is now clear that OBOT has no standing to assert even these alleged injuries, because OBOT will not own or operate the dump pits or the Terminal. Long Decl., Ex. 39 [Bridges Tr.] at 66:2–18, 68:7–70:11; Reply at 10 n.6 ("the dump pits at the Terminal are undisputably on OGRE's right-of-way"). Even if the Ordinance did injure OGRE or TLS by preventing TLS from accepting coal or coke, OBOT lacks Article III standing to assert injuries to what is at most an affiliated entity. *See, e.g., Virginia Sur. Co. v. Northrop Grumman Corp.*, 144 F.3d 1243, 1246 (9th Cir. 1998) (parent company does not have standing to pursue claim based even on injury to subsidiary).

2. The Ordinance does not apply to trains temporarily stopping in Oakland.

OBOT also claims that the Ordinance does not allow trains carrying coal or coke to temporarily stop in Oakland to switch railcars, reaching that conclusion by straining to read the Coal or Coke Bulk Material Facility definition to include trains temporarily stopping in Oakland. Reply at 10. But despite OBOT's best efforts, none of the City's testimony that OBOT quotes says that it does; instead, the quoted testimony (Reply at 10–11) repeatedly says no more than that the Ordinance applies to unloading coal or coke at a terminal.

OBOT's strained reading of the Coal or Coke Bulk Material Facility definition also ignores the Ordinance's explicit language excluding from its reach any railroad operations:

> Notwithstanding anything to the contrary contained in this chapter, the purposes and intent of this chapter are **not** to regulate the transportation of Coal or Coke, for example, by train or marine vessel, including without limitation through the City of Oakland or to or from a Coal or Coke Bulk Material Facility; nor does this chapter actually regulate such.

[4] In fact, as noted above, both OBOT and TLS have admitted that coal trains from Utah will continue to go to the same ports as before the Ordinance. Myre Decl., Ex. 48 at OAK7485.

Myre Decl., Ex. 1 [Ordinance] § 8.60.010 (emphasis in original). OBOT responds that this section of the Ordinance is nothing more than a "self-serving statement" that is "of no moment." Reply at 11. That is not, however, how statutory interpretation works, and the Coal or Coke Bulk Material Facility definition must be read in conjunction with this limitation. Moreover, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to" the legislative intent. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Once again, OBOT provides *no* evidence that *any* trains carrying coal or coke—which it admits continue to transit Oakland—*ever* need to stop to switch railcars, or that any railroad has ever had to "conform" its cargo in order to avoid having the Ordinance applied to any train. Nor is there any evidence that any railroad has had to "divert" any train in order to avoid going through Oakland. In fact, given that this (fictional) effect could only injure the railroads that run through the City, it is again clear that OBOT would suffer no injury even if the Ordinance did apply to trains stopping in Oakland, and would not have Article III standing to raise such a claim.[5]

III. CONCLUSION

The Court should grant Defendant-Intervenors' motion for summary judgment on the dormant Commerce Clause and deny Plaintiff's motion for summary judgment.

[5] If this Court were ever to reach the point of weighing the Ordinance's benefits and burdens, OBOT mistakenly implies that *Union Pacific Railroad Co. v. California Public Utilities Commission*, 346 F.3d 851 (9th Cir. 2003), held that any interference with railroad uniformity violates the Commerce Clause "no matter the purported local benefits." Reply at 14. Not so. *Union Pacific* reached its conclusion only after expressly weighing the benefits and burdens that were at issue. *Id.* at 872.

DATED: December 29, 2017

Respectfully submitted,

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