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CITY OF OAKLAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO BAYKEEPER,

Defendants-Intervenors.

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

DEFENDANT CITY OF OAKLAND'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: January 10, 2018
Time: 10:00 a.m.
Ctrm.: No. 2, 17th Floor
Judge: Honorable Vince Chhabria

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LIST OF ABBREVIATIONS

BAAQMD	Bay Area Air Quality Management District
BACT	Best Available Control Technology
BNSF	Burlington Northern and Santa Fe Railway
BoD	Basis of Design
CalEPA	California Environmental Protection Agency
CCIG	California Capital & Investment Group, Inc.
DA	Development Agreement
EBMUD	East Bay Municipal Utility District
ENA	Exclusive Negotiating Agreement
ESA	Environmental Science Associates
GHG	Greenhouse gas
HDR	HDR Engineering, Inc.
HMTA	Hazardous Materials Transportation Act
ICCTA	Interstate Commerce Commission Termination Act
LDDA	Lease Disposition and Development Agreement
NAAQS	National Ambient Air Quality Standards
OBOT	Oakland Bulk & Oversized Terminal, LLC
OGRE	Oakland Global Rail Enterprise, LLC
PHAP	Public Health Advisory Panel
PM	Particulate Matter
STB	Surface Transportation Board
TLS	Terminal Logistics Solutions
UP	Union Pacific Railroad

TO PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC AND ITS ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on January 10, 2018 at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom No. 2, 17th Floor of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, CA, Defendant City of Oakland will and hereby does move the Court pursuant to Federal Rule of Civil Procedure 56, Civil Local Rule 7, and Civil Local Rule 56, for summary judgment, or in the alternative, partial summary judgment, of all claims filed by Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT) against the City on the following grounds:

- Neither the City Council's adoption of Oakland Ordinance No. 13385 (the "Ordinance") nor its application thereof to OBOT pursuant to Resolution No. 86234 (the "Resolution") violated or violates the Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8, cl. 3). The City joins Defendant-Intervenors Sierra Club and San Francisco Baykeeper's ("Defendant-Intervenors") notice of motion and motion for summary judgment or, in the alternative, partial summary judgment with respect to OBOT's Commerce Clause Claim, for which Intervenors are separately and contemporaneously filing a motion and memorandum of points and authorities.

- The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 et seq., does not preempt the City from applying the Ordinance to OBOT, including via the Resolution;

- The Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq., does not preempt the City from applying the Ordinance to OBOT, including via the Resolution;

- The Shipping Act of 1984, 46 U.S.C. § 40101 et seq., does not preempt the City from applying the Ordinance to OBOT, including via the Resolution;

- The City did not breach the Development Agreement, dated July 16, 2013, by adopting or applying the Ordinance to OBOT, including via the Resolution.

The City's motion is based on this Notice of Motion; the accompanying Memorandum of Points and Authorities; the Declarations of Claudia Cappio ("Cappio Decl."), Patrick Cashman ("Cashman Decl."), Heather Klein ("Klein Decl."), John Monetta ("Monetta Decl."), Christopher Long ("Long Decl."), Carlos Fernandez-Pello ("Pello Decl."), Ranajit (Ron) Sahu ("Sahu Decl."), H. Nadia Moore ("Moore Decl.") and Victoria Evans ("Evans Decl.") and their corresponding exhibits; Objections to Evidence; Defendant-Intervenors' contemporaneously filed motion for summary judgment; the pleadings and papers on file in this matter, including those exhibits

attached to the Declaration of David E. Myre filed on November 20, 2017 (Dkt. 141) ("Myre Decl.") that are relied upon by the City, and such other matters as may be presented to the Court at the hearing.

Dated: December 5, 2017

BURKE, WILLIAMS & SORENSEN, LLP

By: /s/ Kevin D. Siegel
Kevin D. Siegel
Timothy A. Colvig
Christopher M. Long
Attorneys for Defendant City of Oakland

I. INTRODUCTION

Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT") proposed to develop a bulk goods shipping terminal ("Terminal") on City-owned land at the former Oakland Army Base. Under the parties' Development Agreement ("DA"), OBOT may develop the Terminal pursuant to City land use laws that existed as of the date of the DA, except that the DA reserves the City's police power to apply new laws to protect health and safety. Specifically, the City reserved the right to apply new laws if, after public hearing and based on substantial evidence, the Council found 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." Myre Decl., Ex. 4 at OAK54168 (§ 3.4.2).

OBOT secretly pursued plans to bring millions of tons of unhealthy, dust-generating, spontaneously-combustible substances (*i.e.*, coal and petcoke) to the Terminal, through arrangements with Bowie Resources Partners ("Bowie") and its wholly-owned subsidiary, Terminal Logistics Solutions LLC ("TLS"). OBOT plans to convey the Terminal to TLS, for TLS to operate. Once disclosed, the plans created intense interest from the public and the City.

The City commenced a public hearing process pursuant to section 3.4.2 to consider whether to impose new regulations to prevent substantially dangerous health and safety conditions. Throughout the nearly yearlong process, the City provided multiple opportunities for OBOT, its supporters, and the public to offer evidence and comments. The City and third parties submitted extensive, substantial evidence showing that the storage and handling of coal and petcoke at the Terminal would create substantially dangerous health and safety conditions. The conditions include both emission of fugitive coal dust containing fine particulate matter ("PM"), toxins, and heavy metals—in a West Oakland community already disproportionately impacted by pollution—as well as fire and explosion risks. In response, OBOT only offered unsubstantiated contentions, aspirational assurances, and contradictory claims that the Terminal plans were so uncertain that City should not bother evaluating the health and safety impacts.

After development and consideration of an extensive record, the City adopted Ordinance No. 13385 ("Ordinance") and Resolution No. 86234 ("Resolution"), prohibiting the storing and

handling coal and petcoke at the Terminal. Myre Decl., Exs. 1, 50. OBOT filed suit, alleging breach of contract, preemption by three federal statutes, and violation of the Commerce Clause. Under undisputed facts, the claims lack merit.

The City did not breach the DA. OBOT cannot meet its burden to show the absence of substantial evidence in the record supporting the City Council's finding that the failure to apply the Ordinance to OBOT would create substantially dangerous health and safety conditions.

Neither can OBOT meet its high burden to show that federal law preempts application of the Ordinance to OBOT. OBOT improperly offers hypotheticals and purported "admissions" from City staff regarding the applicability of the Ordinance. OBOT clearly cannot prove that the Interstate Commerce Commission Termination Act ("ICCTA"), Hazardous Materials Transportation Act ("HMTA"), or the Shipping Act prevent a ban on the storage and handling of coal and petcoke at the Terminal.

Finally, OBOT cannot show that the Commerce Clause precludes application of the Ordinance, as discussed in Defendant-Intervenors' contemporaneously filed papers.

II. STATEMENT OF FACTS

A. The City Entered into Contracts with OBOT's Predecessors for Development at the Former Oakland Army Base, including a Development Agreement that Authorizes the City to Impose New Laws to Protect Public Health and Safety.

In 2002, the City adopted a Final Reuse Plan for the former Oakland Army Base, which envisioned redevelopment options that would provide community benefits, including environmentally-sound ("green") development. Cashman Decl., Ex. 1 [5/30/12 Agenda Report], at OAK146466, 74.[1] In 2003, the U.S. transferred approximately 170 acres to the City, including the West Gateway on which OBOT proposes to build the Terminal (immediately south of the Bay Bridge Toll Plaza). Myre Decl., Ex. 3 [LLDA], Recital A; Ex. 4 [DA], at Exs. D-1 & D-2; *see also* Long Decl., Ex. 34 [Tagami Tr.], pp. 294:4-296:17; Ex. 29 [Drawing X-1796].

In 2008, the City requested proposals to develop the former Army Base for mixed or

[1] Some of the foregoing actions were undertaken by City affiliates and predecessors-in-interest, such as the Oakland Base Reuse Authority. *See, e.g.,* Cashman Decl., Ex. 1 [5/30/12 Agenda Report], at OAK146466. For simplicity, we refer herein to the City.

industrial uses, including green development. In 2012, the City selected a development group that included CCIG (OBOT's parent/predecessor).[2] Cashman Decl., Ex. 1, at OAK146471, 74; Myre Decl., Ex. 3, Recitals L, M, U, W, X [LDDA]. In December 2012, the City and OBOT's predecessor entered into a Lease Disposition and Development Agreement ("LDDA")[3] for the West Gateway and other City property. Myre Decl., Ex. 3.[4]

On July 16, 2013, the City and OBOT's predecessor entered into the DA. The DA discusses the Terminal in general terms, describing it as a "rail-to-ship terminal designed for the export of non-containerized bulk goods and the import of oversized or overweight cargo." Myre Decl., Ex. 4, at Ex. D-2, § C(4); *see also* Ex. 4, Recital H. The DA does not discuss coal or any other commodity. *See* Myre Decl., Ex. 4.[5] Nor did the DA negotiations. OBOT Br., p. 30 n.39; Long Decl., Ex. 35 [McClure I Tr.], pp. 51–53; Ex. 37 [Ranelletti Tr.], pp. 221:9–222:14.

The DA preserved the City's police power authority to apply subsequently-adopted regulations that prevent substantially dangerous health and safety conditions. Section 3.4.2 states:

> Regulation for Health and Safety. Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by City after the Adoption Date, if such application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety. The Parties agree that the foregoing exception to Developer's vested rights under this Agreement [does not apply to] City Fees ….

Myre Decl., Ex. 4.

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[2] OBOT is owned by CCIG. Phil Tagami and Mark McClure are CCIG's (hence OBOT's) principals. Long Decl., Ex. 44 [OBOT's Supplemental Objections & Responses to City's First Set of Interrogatories ("OBOT Rog Responses")], No. 1; Ex. 34 [Tagami Tr.], p. 15:6–22.

[3] A disposition and development agreement concerns the conveyance of public property. *See Wilson & Wilson v. City Council of Redwood City*, 191 Cal.App.4th 1559, 1563-64 (2011). A development agreement (typically for private property) governs the applicability of land use laws.

[4] The City and the developers envisioned that OBOT's project—which required public infrastructure improvements—would need over $200 million in taxpayer funds. Myre Decl., Ex. 3, Recitals O, Q, V, W, X and ¶¶ 3.3.1.1.1, 3.3.1.1.3, 3.4, 3.5; Cashman Decl., Ex. 1, at OAK146465, 69, 74, 77 [May 30 2012 Agenda Report, pp. 3, 4, 8, 13, 16]; *see also* Long Decl., Ex. 36 [McClure II Tr.], at pp. 144:12–145:9 (public infrastructure funding for OBOT).

[5] Neither is coal discussed in the LDDA or any other agreement or City-issued approval for the Terminal. *See, e.g.,* Myre Decl., Ex. 3 [LDDA]; Cappio Decl., ¶ 8.

The operative language of section 3.4.2 was imported from a prior City development agreement without negotiation or discussion of its terms. OBOT Br., p. 30, n.39; Long Decl., Ex. 35 [McClure I Tr.], pp. 64–66; Ex. 37 [Ranelletti Tr.], pp. 207:17–212:24.

B. OBOT Principals Surreptitiously Sought to Bring Coal to the Terminal.

Beginning in 2011, OBOT principal Phil Tagami discussed coal with potential business partners. Long Decl., Ex. 34 [Tagami Tr.], p. 405. Meanwhile, OBOT communicated with the City about plans for other products at the Terminal, but was silent as to any plans regarding coal. Cashman Decl., ¶ 4; Cappio Decl., ¶ 9; Long Decl., Ex. 34 [Tagami Tr.], pp. 431:7–432:14.[6]

Shortly after the entry of the DA, Mr. Tagami denied any "purported plan to develop a coal plant or coal distribution facility as part of the Oakland Global project" as "simply untrue." He alleged that "[t]he individuals spreading this notion are misinformed. CCIG is publicly on record as having no interest or involvement in the pursuit of coal-related operations." Long Decl., Ex. 32 at OAK72785; Ex. 34 [Tagami Tr.], pp. 160-64, 405:14–21, 470.[7]

Despite the denials, OBOT pursued plans to bring coal to the Terminal. In 2014, OBOT entered into Exclusive Negotiating Agreements ("ENA") with TLS, granting TLS an option to sublease the property (although OBOT had yet to lease the ground from the City), in exchange for $1.2 million. Myre Decl., Ex. 5, at OB119605-13 [original ENA]; Long Decl., Ex. 19 [Amended and Restated ENA], at Recitals F, G, ¶¶ 1, 3, 4, 5. TLS is wholly-owned by Bowie, a major coal producer and marketer. Long Decl., Ex. 38 [Wolff Tr.], pp. 25:4, 26:20; Ex. 39 [Bridges Tr.], pp. 14:23–15:1. Bowie is TLS's sole source of revenue. *Id.*, Ex. 39 [Bridges Tr.], p. 27:11–19.[8]

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[6] Mr. Tagami knew that OBOT "could create a political storm" if it disclosed efforts to bring coal to the Terminal. Long Decl., Ex. 34 [Tagami Tr.], pp. 453–56; Ex. 30 at OBOT_B_020341. In February 2012, when Mr. Tagami considered whether to identify the commodities that the developers were discussing, including coal, for purposes of review under the California Environmental Quality Act ("CEQA"), a business associate cautioned Mr. Tagami to "stick with 'bulk goods,' unless they ask." Long Decl., Ex. 31, at OBOT_B_022084–86. OBOT did not identify potential commodities for CEQA review. Long Decl., Ex. 34 [Tagami Tr.], pp. 467–68.

[7] Given that OBOT and City staff were regularly discussing iron ore and other commodities throughout 2012 and 2013, and that OBOT expressed no interest in coal to the City, the City reasonably expected that coal was not on the table. *See* Cashman Decl., ¶ 5. When asked to provide an estimate of when coal was first listed as a commodity on any pro forma shared with the City, Mr. Tagami could not. Long Decl., Ex. 34, [Tagami Tr.], p. 438:18-21.

[8] In addition, CCIG and TLS entered into a Development Management Agreement. Long

OBOT and TLS amended the ENA approximately ten times, with TLS (*i.e.*, Bowie) repeatedly paying OBOT substantial sums. *See* Long Decl., Ex. 21 [Tenth Am. to ENA], ¶ 2; Ex. 34 [Tagami Tr.], pp. 440–448. OBOT intends to convey the Terminal to TLS. *Id.*, Ex. 34 [Tagami Tr.], pp. 56:9–16; 68:22–69:9.[9] TLS is ultimately responsible for the design, construction, maintenance, and operation of the Terminal. *Id.*, Ex. 39 [Bridges Tr.], pp. 46:5–46:18, 68:7–70:11, 93:18–96:10; *id.*, Ex. 34 [Tagami Tr.], pp. 69:3-9 (TLS "would be the owner and operator"); Ex. 23 [TLS Operating Framework] at OB82061. TLS will own and operate the Terminal dump pit, conveyor systems, ship loading apparatus, and storage sheds or domes. *Id.*, Ex. 39 [Bridges Tr.], 66:15–18, 70:1–11.[10]

C. The City Provided a Nearly Year-Long Public Hearing Process.

On August 28, 2015, the City notified interested persons, including OBOT, that it would hold a public hearing on the health and safety impacts of coal on September 21, 2015. *See* Long Decl., Ex. 2 [Sept. 8, 2015 Letter from OBOT counsel], at OAK159661. The City solicited public comment. Long Decl., Ex. 3 [2015 09 21 Agenda Report], at OAK34145.[11]

On September 8, 2015, OBOT, CCIG and TLS submitted the Basis of Design, dated July 21, 2015 ("BoD"). Long Decl., p. 5 n.1; *id.* Ex. 7 [BoD]; Ex. 9 [Sep. 8, 2015 Letter from TLS]; Ex. 34 [Tagami Tr.], p. 82. While voluminous, the BoD represents only about an 8-10% level of design completion. Long Decl., Ex. 7 [Tagami Tr.], at OAK4712; Ex. 34, p. 80:4-12.

The BoD obfuscated OBOT's plans for coal. It discussed and depicted plans to store and

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Decl., Ex. 34 [Tagami Tr.], pp. 25, 240; Ex. 21. TLS pays CCIG to be its manager and agent for the design, permitting and construction of the Terminal. *See* Long Decl., Ex. 21, at ¶ 1.01.

[9] Meanwhile, TLS worked to obtain commitments from Utah counties to provide approximately $50 million in funding in exchange for reserving approximately 50% of the Terminal for their coal. Long Decl., Ex. 35 [McClure I Tr.], pp. 98:20 99:19, Long Decl., Ex. 38 [Wolff Tr.], pp. 36:9-37:18; 39:5-39:21; *see also* Ex. 39 [Bridges Tr.], pp. 148:18-150:7, Ex. 34 [Tagami Tr.], pp. 147:6-148:20, Ex. 69 [Update Memo and Term Sheet re proposed Utah deal].

[10] Bowie/TLS is also funding this lawsuit. Long Decl., Ex. 38 [Wolff Depo.], pp. 202:24-203:5, 203:14-204:20]; *see id.*, Ex. 39 [Bridges Tr.], pp. 52:12–53:5.

[11] OBOT was surely not surprised that the City commenced the section 3.4.2 public hearing process. In June 2014, the Council had adopted a policy statement directing the City staff to contact other public agencies and rail carriers to ensure potential impacts from the transportation of fossil fuels are addressed (but not regulating any activity). Myre Decl., Ex. 26.

handle "Commodity A" and "Commodity B." Myre Decl., Ex. 49 at OB4326-27; Long Decl., Ex. 7 [BoD Intro through Section 3] at OAK4717; Ex. 8 [BoD Sections 16 through 18] at OAK4654. But OBOT knew and does not dispute that Commodity A was and is coal.[12]

The BoD provides for Commodity A (*i.e.*, coal) to be blended and stored on site. Myre Decl., Ex. 49, at OB4326-27; *see also* Long Decl., Ex. 7, at OAK4717; Ex. 27, at OB68203 ("[t]here is a requirement to blend coal"); Ex. 39 [Bridges Tr.], pp. 76:6-24, 77:3–19. Coal will not be conveyed directly to ships. Long Decl., Ex. 39 [Bridges Tr.], p. 93:10–17.

Initially, OBOT representatives proffered evidence to claim that Terminal operations would not cause any health and safety impacts. *See, e.g.*, Long Decl., Ex. 2 [9/8/15 Stice & Block letter]. CCIG submitted a report by HDR Engineering, Inc. that provided conclusory "analysis" purportedly supporting a finding that "coal dust emissions … will be negligible, and that impacts from coal dust emissions and deposition will not harm health." Myre Decl., Ex. 47.

On September 21, 2015, the City Council held the public hearing, for which it received approximately 215 written submissions and heard from hundreds of speakers.[13] *See* Myre Decl., Ex. 45 [ESA Report], at OAK230309 and Appx. A; Ex. 28 [6/23/16 Agenda Report], at OAK34167. The City Council desired to receive additional evidence on 18 topics, and thus extended the comment period. Long Decl., Ex. 11 [9/28/15 Follow-Up Qs Letter]. On October 6, 2015, CCIG, OBOT and TLS jointly submitted a packet of materials. Myre Decl., Ex. 48.

The City commissioned a report by Dr. Zoe Chafe, PhD, MPH, a City employee, through Councilmember Kalb's office. Chafe Tr., pp. 47:23–48:11; Long Decl., Ex. 16 [2016-06-23 Kalb memo]. The City also retained Environmental Sciences Associates ("ESA") to prepare a report

[12] OBOT possessed an earlier version of the BoD that expressly referred to Bituminous Coal and Soda Ash instead of Commodities A and B. *See, e.g.*, Long Decl., Ex. 27, at OB68196, OB68200, OB68203 ("Products to be handled by the terminal are coal and soda ash"). OBOT even had two versions of the same map ("BMH-100") prepared: one showing Commodity A and Commodity B, which was provided to the City and another showing "Coal" and "Soda Ash," respectively, in the same places that "Commodity A" and "Commodity B" appear. *Compare* Long Decl., Ex. 14, at OAK4654, *with id.*, Ex. 28, at OB82314.

[13] TLS paid purported "community organizations" to offer public comment in support of the Terminal. Long Decl., Ex. 39 [Bridges Tr.], pp. 172:21–177:7; 180:8–181:2; 184:17–186:3.

analyzing potential health and safety impacts. Myre Decl., Ex. 45 [ESA Report].[14]

OBOT changed positions, urging the City not to evaluate any evidence. Its counsel asserted that ESA's analysis would be "premature and at worst, unsubstantiated [and] speculative." Cappio Decl., Ex. 1, at OAK54732; *see also* Ex. 2 (Mr. Tagami asserted that it would be "hypothetical and speculative" (in other words impossible) to determine whether there would be "the presence **or absence** of a 'condition substantially dangerous to [workers or surrounding residents'] health or safety ….'").

The City posted the extensive evidence and comments it received from interested citizens and organizations, OBOT supporters and others on its website. Myre Decl., Ex. 28 at OAK242421; *see also* Klein Decl., ¶¶ 4–7; Monetta Decl., ¶¶ 4–7.

On June 17, the City notified interested parties (including OBOT) of a special meeting and public hearing set for June 27, 2016. Klein Decl., ¶ 8 and Ex. 1; Long Decl., Ex. 5. The morning of June 24, 2016, the City published an agenda report regarding whether to (1) introduce for first reading an ordinance to prohibit the storage and handling of coal and coke at bulk materials facilities, and (2) adopt a resolution applying the ordinance to OBOT. Long Decl., Ex. 13 [2016 06 27 Meeting Agenda]; Myre Decl., Ex. 28 [2016 06 23 Agenda Report].[15] The City Council was presented with the Agenda Report, ESA Report, Chafe Report, a report by a Public Health Advisory Panel ("PHAP") comprised of physicians and scientists with doctorates and other advanced degrees, reports from the Sierra Club and Earthjustice, and other evidence offered by the City and third parties. *See, e.g.*, Myre Decl., Exs. 28, 45; Long Decl., Exs. 10, 17, 57, 67.

At the June 27 public hearing, the Council received and considered the evidence, introduced the Ordinance and adopted the Resolution. Myre Decl., Exs. 1, 50. On July 19, 2016, the City Council unanimously adopted the Ordinance (Myre Decl., Ex. 1 § 6 and p. 14), and the Resolution became effective (Myre Decl., Ex. 50, § 9). OBOT did not offer further objections or

[14] BAAQMD did not have coal terminal regulations, a supplemental reason for the City to consider further local regulation. Myre Decl., Ex. 28, at OAK242423 n.1; *see also* Long Decl., Ex. 34 [Tagami Tr.], pp. 88:9–89:2.

[15] Pursuant to the Oakland Sunshine Ordinance, the City was required to provide notice of the agenda and agenda materials by noon on Friday for the special meeting. OMC § 2.20.070(C). State law (the Brown Act) would have required 24 hours' notice. Cal. Gov't Code § 54956.

evidence prior to adoption of the Ordinance. *See* Long Decl., Ex. 53, at OAK33249.

D. The Ordinance Prohibits Storing and Handling of Coal at Bulk Goods Terminals.

The Ordinance applies to "any Owner or Operator of a Coal or Coke Bulk Material Facility, and to any other person who Stores or Handles Coal and Coke at a Coal or Coke Bulk Material Facility, unless exempt or excepted …." Myre Decl., Ex. 1, § 8.60.040(A). The Ordinance prohibits such persons from "Stor[ing] or Handl[ing] any Coal or Coke" at a Coal or Coke Bulk Materials Facility. *Id.* A Coal or Coke Bulk Materials Facilities is a site "where Coal or Coke is or may be Stored or Handled." *Id.*, § 8.60.030(4). "Store or Handle … means to store, load, unload, stockpile, transload or otherwise handle and/or manage, temporarily or permanently, physical material including without limitation Coal and Coke." *Id.*, § 8.60.030(12). The Ordinance exempts non-commercial facilities consuming coal for personal, scientific or recreational use, and on-site manufacturing facilities. *Id.*, § 8.60.040 (C).[16]

The Ordinance expressly does not regulate the transportation of coal, including by rail:

> 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. Rather, the purpose and intent of this chapter is to address the unique and peculiar health, safety and/or other impacts of Coal or Coke in Oakland, and specifically West Oakland.

Id., § 8.60.010. Trains carrying coal continue to travel through Oakland. Long Decl., Ex. 34 [Tagami Tr.], pp. 556:8-17; 553:20-554:15; 554:17-19; Ex. 43 [Cappio Tr.], pp. 61:16-23, 62:9-13. Bowie ships coal by rail to other California ports, which will continue even if the Terminal is not constructed. Long Decl., Ex. 38 [Wolff Depo.], pp. 59:20-23; 83:20-84:3; Ex. 61 at OB169764-65.

E. OBOT's Property Rights and Agreements with Third Parties; Third Party Roles.

OBOT is neither a terminal operator nor rail carrier. *See, e.g.*, Long Decl., Ex. 22 [DMA];

[16] East Bay Municipal Utility District (EBMUD) uses a small amount of coal for water filtration. Long Decl., Ex. 34 [Tagami Tr.], p. 96:13-17. AB&I Foundry receives some petcoke to use in manufacturing cast iron pipes and fittings. Myre Decl. Ex. 45 [ESA Report], at OAK230333-34. OBOT does not consider EBMUD or AB&I Foundry to be competitors since OBOT is in the business of leasing land for a multi-commodity terminal, not manufacturing a product. Long Decl., Ex. 34 [Tagami Tr.], pp. 213;4-17, 280:13-14, 282:22-283:6.

id., Ex. 34 [Tagami Tr.] 213:4-17 (OBOT is in the business of leasing land for a multi-commodity terminal, and its competitors are Levin-Richmond, Kinder Morgan, Sacramento, Long Beach, and Port of San Francisco, among others). McClure I Tr., 83:20-84:2 (Oct. 12, 2017).

In February 2016, the City conveyed to OBOT possessory interests in the Terminal site and other West Gateway property for installation of rail infrastructure. Dkt. 20-4 [Memorandum of Ground Lease]. OBOT previously granted TLS an option to sublease these portions of the West Gateway. Long Decl., Exs. 19, 20, 21; *see also* Myre Decl., Ex. 5.

TLS is a not a rail carrier and will not provide rail services at the Terminal. Long Decl., Ex. 39 [Bridges Tr.], pp. 40:21–41:3. Initially, the ENA contemplated that TLS would enter into a rail services agreement with a third party, Oakland Global Rail Enterprises ("OGRE"). Long Decl., Ex. 19 [Amended ENA], at OB26583, ¶ 4.1. OGRE is an independent entity, in which CCIG has an interest. *Id*., Ex. 44 [OBOT Rog Responses], at 5; Myre Decl., Ex. 11 [OGRE Operating Agreement]. After adoption of the Ordinance, OBOT entered a sublease with OGRE, rather than TLS, for the property underlying the to-be-constructed rail infrastructure. Long Decl., Ex. 24. TLS does not, and will not, have a direct contractual relationship with rail carriers such as UP or BNSF pertaining to the delivery of railcars to the Terminal. *Id*., Ex. 39 [Bridges Tr.], pp. 156:25–159:3. TLS is responsible for setting rates, billing, and collecting fees for the services it expects to provide to shippers or beneficial cargo owners at the Terminal. *Id*., Ex. 63 at TLS19215; Ex. 64 at TLS19487.

OGRE is not a rail carrier under the ICCTA. *See* Long Decl., Ex. 26 [2015 WL 5637093] (Sept. 25, 2015 STB order granting OGRE's motion to withdraw notice of exemption to operate as a common carrier); Ex. 25, at OB17420 ("Oakland Global Rail Enterprise, LLC (OGRE) [is] a noncarrier"); Long Decl., Ex. 36 [McClure II Tr.], pp. 138:25-139:4 ("it remains [OGRE's] intention to apply for [STB] Class III status"). OGRE is not presently providing any rail services in the [West] Gateway Area. Long Decl., Ex. 36 [McClure II Tr.], pp. 83:15–84:25. OGRE's current operations in the Port area are not those of a rail common carrier. Rather, it provides contract switching services on behalf of UP and BNSF. *See Oakland Global Rail Enterprise, LLC, etc.–Petition*, Docket No. FD 35822, 2014 WL 3673414, *1 (STB. July 24, 2014).

While OBOT seeks a Rail Access Agreement that would provide it or a rail operator rights to bring rail cars across Port property to the Terminal, there is no agreement in effect. Cappio Decl., ¶ 9. Neither OGRE nor OBOT has an agreement with a rail carrier. OBOT Br., p. 3 n.5.

III. ARGUMENT

A. Summary Judgment and Statutory Interpretation Standards.

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the burden of establishing the nonexistence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986).

OBOT must establish "beyond controversy every essential element" of its claims,[17] with credible evidence that would entitle it to a directed verdict if not controverted at trial. *Celotex*, 477 U.S. at 331. If OBOT meets its burden, the City must produce evidence establishing that a genuine dispute of material fact precludes summary judgment for OBOT. Fed. R. Civ. P. 56(c); *Thomas v. Newton Intern. Enterp.*, 42 F.3d 1266, 1270 (9th Cir. 1994).

The City's cross-motion must be granted if undisputed facts reveal that OBOT cannot establish one or more of the elements of its causes of action. *Celotex*, 477 U.S. at 322-23.

The Ordinance must be interpreted in a manner that supports its constitutionality. *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 468, 472 (9th Cir. 2001); *see also* Myre Decl., Ex. 1, § 9 ("Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law").

B. The City Council's Application of the Ordinance to OBOT Complied with the DA.

The DA preserved the City's authority to impose post-DA laws if, after public hearing, the Council found that the section 3.4.2 conditions were met.[18] The standards were met. Substantial

[17] *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232-33 (9th Cir. 2010) (commerce clause); *Fed. Exp. Corp. v. Cal. Pub. Util. Com'n*, 716 F.Supp. 1299, 1302 (N.D. Cal. 1989) (preemption); *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (breach of contract).

[18] Under common law, a "developer's right to complete a project as proposed does not vest until a valid building permit, or its functional equivalent, has been issued" and the developer has commenced construction in good faith reliance thereon. *Toigo v. Town of Ross*, 70 Cal.App.4th 309, 321 (1998). The Development Agreement Statute (Cal. Gov't Code §§ 65864 – 65869.5) allows cities and developers to enter into a contract to govern the circumstances in which the

evidence established that allowing the storage and handling of coal and petcoke "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."

1. Standard of Review Under the Substantial Evidence Test.

a. California Law Applies.

California law applies, pursuant to the express language of the DA as well as case law governing supplemental claims in federal court. Myre Decl., Ex. 4, § 14.11 ("This Development Agreement … shall be governed by and interpreted in accordance with" California law); *Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011).

As OBOT acknowledges, it challenges the City's decision to *apply* the Ordinance to OBOT, via the Resolution. OBOT Br., p. 1:15-16. Thus, its challenge is to the "application of [] a rule to a specific set of existing facts," and should be evaluated as a challenge to *quasi-judicial* agency action. *Strumsky v. San Diego Cnty. Employees Ret. Assn.,* 11 Cal.3d 28, 35 fn. 2 (1974). Also, because the issue is whether substantial evidence supported the City's decision to *apply* the Ordinance—following the requisite hearing, the taking of evidence, and the City's exercise of discretion—OBOT's claim is akin to a petition for writ of mandate to reverse a quasi-judicial decision under Cal. Code. Civ. Proc. § 1094.5. *McGill v. Regents of Univ. of Cal.,* 44 Cal.App.4th 1776, 1785-86 (1996) (where a hearing was required, evidence was required to be taken, and discretion in determining the facts was vested in the agency, the courts evaluate whether the quasi-judicial decision was supported by substantial evidence in the record). Indeed, the DA provides that it may be enforced by mandate, injunctive relief or specific performance. Myre Decl., Ex. 4, ¶ 8.7.

b. Courts Defer to City Decisions if They Are Based on Any Substantial Evidence; the Challenger Bears the Heavy Burden to Prove the Absence of Any Substantial Evidence in the Entire Record.

Judicial review commences with the presumption that the city's decision is correct and supported by substantial evidence. *Desmond v. Cnty. of Contra Costa*, 21 Cal.App.4th 330, 335

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developer may rely on the city's pre-existing land use laws. *See, e.g.,* Cal. Gov't Code § 65866.

(1993); Cal. Evid. Code § 664. A court does not "weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from it." *Do v. Regents of the Univ. of Cal.*, 216 Cal.App.4th 1474, 1492 (2013); *Quail Botanical Gardens Found., Inc. v. City of Encinitas*, 29 Cal.App.4th 1597, 1603 (1994) (court gives city "benefit of the doubt on any legitimate, disputed issues of credibility"). Substantial evidence may include summarizing statements of city staff who reviewed the data, *see, e.g.*, *Architectural Heritage Assn. v. Cnty. of Monterey,* 122 Cal.App.4th 1095, 1115-16 (2004), and logical inferences. *Kuhn v. Dept. of General Servs.*, 22 Cal.App.4th 1627 1633 (2004). Regarding experts, "a public agency may choose between differing expert opinions." *Oakland Heritage All. v. City of Oakland*, 195 Cal.App.4th 884, 900 (2011). A court will defer to a city's reliance on experts of its choosing, even when the city rejected the analysis by third party regulatory agencies with unique expertise regarding the subject matter. *Cal. Native Plant Soc. v. City of Rancho Cordova*, 172 Cal.App.4th 603, 626 (2009).[19]

The challenging party bears the heavy burden to show no substantial evidence in the **entire record** before the city supported its decision. *Do*, 216 Cal.App.4th at 1490; *McGill,* 44 Cal.App.4th at 1785-86 (the trial court erred by evaluating whether the plaintiff's claim was supported by record evidence, rather than whether the agency's decision was); *accord Benetatos v. City of Los Angeles*, 235 Cal.App.4th 1270, 1280 (2015).

Thus, a court "must affirm … if there is any substantial evidence, contradicted or uncontradicted, to support" the decision. *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal.4th 1086, 1114 (2015); *accord Kutzke v. City of San Diego*, 11 Cal.App.5th 1034, 1042 (2017) (court must uphold decision unless "no reasonable municipality could have reached the same decision as the City"); *Ogundare v. Department of Industrial Relations, Division of Labor Standards Enforcement,* 214 Cal.App.4th 822, 829-30 (2013) (court "may not overturn [the decision] merely

[19] Thus, "a court's role in reviewing evidence under the substantial evidence ... test[] is different from the agency's role in reviewing that same evidence. Agencies must weigh the evidence and determine which way the scales tip, while courts conducting substantial evidence ... review generally do not. If courts were to independently weigh conflicting evidence …, this would [] usurp the agency's authority and violate the doctrine of separation of powers. *W. States Petroleum Assn. v. Superior Court*, 9 Cal.4th 559, 576 (1995) (internal quotation marks omitted).

because a contrary finding would have been equally or more reasonable"); *Sequoyah Hills Homeowners Assn. v. City of Oakland*, 23 Cal.App.4th 704, 717 (1993) (court "may neither substitute [its] view for that of the city council, nor reweigh conflicting evidence").[20] Courts thus regularly defer to city decisions based on substantial evidence, despite contrary evidence.[21]

c. OBOT Erroneously Suggests Heightened Scrutiny Applies.

OBOT suggests that the Court should independently determine whether the imposition of the Ordinance was "'necessary' to protect health and safety." OBOT Br., p. 30:6-7 (citing *Stewart Enterp., Inc. v. City of Oakland*, 248 Cal.App.4th 410, 421 (2016), and *Davidson v. Cnty. of San Diego*, 49 Cal.App.4th 639, 648-49 (1996)). But the cases cited by OBOT involved the scope of a public agency's common law authority to abrogate a vested right. Here, OBOT granted the City a contractual right to apply post-DA regulations based on the section 3.4.2 standard. If OBOT had wanted a right to rely on common vesting law rules, it should have insisted on the omission or modification of section 3.4.2. It did not. Moreover, OBOT conceded that the substantial evidence test applies. Cappio Decl., Ex. 1 [2016 05 02 Letter], pp. 4-5 (invoking substantial evidence standard discussed above). Thus, *Stewart* and *Davidson* are inapt.

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[20] Review of federal agency decisions under the Administrative Procedures Act is in accord:

> Although our inquiry must be thorough, the standard of review is **highly deferential**; the agency's decision is "entitled to a presumption of regularity," and **we may not substitute our judgment for that of the agency**. Where the agency has relied on "relevant evidence [such that] a reasonable mind might accept as adequate to support a conclusion," its decision is supported by "substantial evidence." Even "[i]f the evidence is susceptible of more than one rational interpretation, [the court] must uphold [the agency's] findings." [emphasis added; citations omitted]

San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014).

[21] *See, e.g., Cal. Native Plant Soc.*, 172 Cal.App.4th at 626 (court deferred to city's finding that substantial evidence showed that mitigation measures would prevent significant impacts to wetlands, despite contrary evidence submitted by expert regulatory agencies); *ABS Inst. v. City of Lancaster*, 24 Cal.App.4th 285, 290, 294 (1994) (testimony to city by chemist and other, non-expert witnesses regarding the suitability of a type of plastic pipe for plumbing, including regarding flammability and suitability for use in a desert environment near a seismic fault line provided substantial evidence supporting the ban); *Browning-Ferris Indus. v. City Council*, 181 Cal.App.3d 852, 866 (1986) (regarding impacts from release of asbestos, court deferred to city's reliance on substantial evidence of its choosing, despite extensive contrary evidence).

2. Substantial Evidence Supports the City's Action Under Section 3.4.2.

a. The Record Contains Abundant Substantial Evidence.

(1) The Terminal Is Proposed for a Sensitive, Impacted Site.

OBOT does not and cannot dispute facts regarding the sensitivity of the Terminal's location in West Oakland, immediately south of the Bay Bridge Toll Plaza, and a little more than a mile upwind from a residential community that includes schools and a day care center. Myre Decl., Ex. 45 at OAK230300, 318, 374; *see also* Long Decl., Ex. 18 [color copy of map].; see also Ex. 29 [Drawing X-1796]. The Terminal is adjacent to a bicycle and pedestrian path, and near Raimondi Park, where more than 27,000 person-visits occur annually, including youth and adult athletes. Long Decl., Ex. 17 at OAK8465.

BAAQMD identified West Oakland as an area with high concentrations of air pollution and populations "most vulnerable to air pollution's health impacts." Myre Decl., Ex. 45 at OAK230300. The California EPA ("CalEPA") similarly designated much of West Oakland as a "disadvantaged community"—*i.e.*, as an area "disproportionately burdened by and vulnerable to existing multiple sources of pollution." *Id.* West Oaklanders experience high rates of chronic disease that increase susceptibility to air pollution (*e.g.*, asthma, heart disease, cancer). Long Decl., Ex. 17 [PHAP] at OAK8438, 8449-60; Ex. 65 [County corr.] at OAK4020–21. Air quality monitoring in West Oakland has detected exceedances of both the state and federal air quality standards for ambient levels of fine particulate matter ($PM_{2.5}$). Myre Decl., Ex. 45 at OAK230300–301.[22] BAAQMD staff testified that "[t]here is a lot of work to be done to continue … to reduce exposure of the public to pollution in West Oakland." Myre Decl., Ex. 29 at OB13677-78.

(2) OBOT's Terminal Proposal Will Emit Harmful Air Pollutants.

It is undisputed that coal and petcoke storage and handling activities planned for the Terminal would increase air pollution in the vulnerable, disproportionately impacted West Oakland community. Myre Decl., Ex. 45 [ESA] at OAK230300–301; Long Decl., Ex. 10 [Chafe]

[22] $PM_{2.5}$ and PM_{10} refer to particles less than 2.5 and 10 micrometers in diameter, respectively. Long Decl., Ex. 10 at OAK120931 [Chafe].

at OAK120931.[23] Coal and petcoke emit fugitive dust, especially when handled or jostled as will occur during operations at the proposed Terminal. Myre Decl., Ex. 28 at OAK242429, 34; *id*., Ex. 45 at OAK230301; Long Decl., Ex. 10 [Chafe] at OAK120931, 933–935, 937; Ex. 17 [PHAP] at OAK 8443, 8475. Some of this fugitive dust will consist of $PM_{2.5}$. Myre Decl., Ex. 45 at OAK230301; Long Decl., Ex. 10 at OAK120924; *id*., Ex. 17 at OAK 8461.

Even at low doses, $PM_{2.5}$ can cause premature death in people with heart or lung disease, heart attacks and irregular heartbeats, aggravated asthma, decreased lung function, irritation of airways, coughing, and difficulty breathing. Myre Decl., Ex. 28 [Agenda Report] at OAK242423; Long Decl., Ex. 17 [PHAP] at OAK 8443, 8475, 8477; Long Decl., Ex. 10 [Chafe] at OAK120941, 46. Fine particles such as $PM_{2.5}$ are particularly dangerous because they penetrate deep into the lungs. Long Decl., Ex. 10 at OAK120931, 120942–46. Children, the elderly, and people with chronic heart and lung diseases are especially sensitive to $PM_{2.5}$ pollution. Myre Decl., Ex. 45 at OAK230368–69; Long Decl., Ex. 10 at OAK120931, 42–43. Exposure to such particles is associated with increased frequency of childhood illnesses. *See* Long Decl., Ex. 10 at OAK120931, 42-43. Even "[s]hort-term exposure (from less than 1 day up to several days) to $PM_{2.5}$ is likely causally associated with mortality from cardiopulmonary diseases, increased hospitalization and emergency department visits for cardiopulmonary diseases, increased respiratory symptoms, decreased lung function, and changes in physiological indicators for cardiovascular health." 72 Fed. Reg. 54112, 54128 (Sept. 21, 2007); *accord*, Myre Decl., Ex. 45 at OAK230368–369; Long Decl., Ex. 10 at OAK120940; *id*., Ex. 17 at OAK 8466. Mortality and adverse health outcomes decrease when concentrations of $PM_{2.5}$ decrease. Long Decl., Ex. 10 at OAK120939-43; Ex. 17 at OAK8461.

OBOT tries to minimize the dangers posed by the proposed Terminal's expected $PM_{2.5}$ emissions, falsely claiming that "[t]here is absolutely no evidence that the release of 'any' quantum of particulate matter poses a danger." OBOT Br., p. 34. The U.S. EPA, CalEPA, the

[23] Even OBOT's improper, post-record counter-evidence admits that the Terminal would emit about 4 lbs per day of fugitive coal dust. Chinkin Decl., ¶ 28. The reality is substantially higher, as shown by the record evidence (and as the City's experts would testify at trial, if necessary).

World Health Organization, and an expert panel convened by the National Academy of Sciences all concluded there is no safe level of exposure to $PM_{2.5}$. Long Decl., Ex. 10 at OAK120939; Ex. 17 at OAK 8465-66; *cf.* Myre Decl., Ex. 45, at OAK230353. Indeed, in its 2013 rulemaking to set $PM_{2.5}$ air quality standards, the EPA stated that "no population threshold, below which it can be concluded with confidence that PM2.5-related effects do not occur, can be discerned from the available evidence." 78 Fed. Reg. 3086, 3098 (Jan. 15, 2013).[24] The courts likewise have recognized that no safe threshold for $PM_{2.5}$ exists. *See e.g., United States v. Westvaco Corp.*, No. CV MJG-00-2602, 2015 WL 10323214, at *9 (D. Md. Feb. 26, 2015) ("majority scientific consensus, accepted by the Court, is that the harm from exposure to $PM_{2.5}$ is linear, and there is no known threshold below which $PM_{2.5}$ is not harmful to human health").[25]

In addition, coal dust contains toxic heavy metals (*e.g.*, mercury, lead, cadmium arsenic) and minerals (*e.g.*, silica) that are harmful when ingested or inhaled. Myre Decl., Ex. 28 at OAK242429, 434; Long Decl, Ex. 10, at OAK120931, 933, 935, 937, 946; *id.*, Ex. 17 at OAK 8443, 8475. Exposure to toxic heavy metals from coal dust is linked to cancer, genetic defects, endocrine disruption, fetal defects, neurological damage, and other severe health effects, even at very low doses. Long Decl., Ex. 10 at OAK120946; *id.*, Ex. 17 at OAK 8475, 8477. Exposure to silica from coal dust can cause silicosis, pulmonary disease, lung cancer, interstitial inflammation, emphysema, fibrotic granulomata and sclerotic nodules, among other diseases. Myre Decl., Ex. 28 at OAK242434; Long Decl., Ex. 10 at OAK120947; *id.*, Ex. 17 at OAK 8478.

[24] OBOT cites the testimony of Dr. Nadia Moore selectively, effectively misrepresenting her opinions. OBOT Br., pp. 31, 34. As Dr. Moore explains in her declaration, compliance with the $PM_{2.5}$ NAAQS is no guarantee against harm to community members for several reasons, including the fact that "the NAAQS is not a threshold below which no $PM_{2.5}$ effects would be expected in exposed communities." Moore Decl., ¶ 9; *accord id.* ¶¶ 5-15.

[25] *Accord North Carolina v. Tenn. Valley Auth.*, 593 F.Supp.2d 812, 821 (W.D.N.C. 2009) *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010) ("PM2.5 exposure has significant negative impacts on human health, even when the exposure occurs at levels at or below the NAAQS"); *United States v. Cinergy Corp.*, 618 F.Supp.2d 942, 963 (S.D. Ind. 2009), order clarified, No. 1:99CV01693-LJM-JMS, 2009 WL 6327415 (S.D. Ind. June 23, 2009), *and rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010) ("Because the relationship between the dose-response curve for PM2.5 and mortality is linear, any reduction in PM2.5 concentration would have a corresponding reduction in mortality rate").

(3) Large Volumes of Coal Dust Emissions Will Harm Health.

OBOT had nearly a year to submit estimates of coal dust emissions, but conspicuously failed to do so. Instead, OBOT offered only bald assurances that prospective control measures necessarily would limit fugitive coal dust emissions to de minimis quantities. Myre Decl., Ex. 47 at OB18548–49, 53; Ex. 48, at OAK7464 PC_007653, PC_007674. Substantial evidence refutes OBOT's contention.

OBOT asserted to the City that coal would be delivered in covered cars to minimize emissions. But covers have neither been tested nor used for coal cars, a key fact which both EcoFab (the cover manufacturer), and the Federal Railroad Administration confirmed. Myre Decl., Ex. 45, at OAK230321–325, 361, 364; Long Decl., Ex. 10, at OAK120988; *see also* Long Decl., Ex. 66 [2016-06-02 Comment Letter from No Coal in Oakland/Lora Jo Foo].[26]

OBOT's other assurances proved to be equally illusory. Although OBOT has touted a state-of-the-art Basis of Design, the design document is only 8-10% complete. [OBOT Br., p. 36:22-23; Myre Decl., Ex. 49 08004322; Long Decl., Ex. 7 [BoD], at OAK4712; *id*. Ex. 34 [Tagmi Tr.], p. 80:4–12. Moreover, during the public hearing process, OBOT disclaimed the reliability of the BoD, admitting that the BoD "is simply not, nor was it ever intended to be, specific or detailed enough" to perform a facility-specific analysis of health and safety impacts. Cappio Decl., Ex. 1; *see also* Ex. 2 [May 16, 2016 letter from Tagami to Cappio]; Long Decl., Ex. 15, at OAK54721.

OBOT presented the City with reports from two consultants, HDR and Cardno. Myre Decl., Ex. 47 [HDR Report]; Ex. 48 [Response to City Follow-Up Questions], at OAK7523 [Cardno Best Practices Report]. However, a former Chief of the Air Pollution Epidemiology Section at CalEPA identified numerous and significant shortcomings in the HDR report. Long Decl., Ex. 54, at OAK4306–10; *accord* Long Decl., Ex. 67 at OAK5433–41 [Earthjustice comments on HDR report]. In addition, this Cardno Report on purported "best practices" omitted

[26] Mr. Tagami admitted this in deposition. Long Decl., Ex. 34 [Tagami Tr.], pp. 89:17–91:12; 142:17–143:23. Moreover, the proposed terminal operators and coal suppliers have never utilized covered coal cars. *Id*., Ex. 39 [Bridges Tr.], p. 163:16-19; *id*., Ex. 38 [Wolff Tr.], pp. 174:17-22, 176:8-13; 221:4-222:5.

significant operational and design shortcomings that Cardno *itself* identified in another report it simultaneously produced, but which OBOT kept secret. The shortcomings included that (1) the plans for transporting coal by conveyor belt are inadequate and "may overload [the system] resulting in excess spillage," and (2) "the entire tripper and support and building structure is subjected to coal dust accumulation, making clean-up and prevention of spontaneous combustion difficult." Long Decl., Ex. 55 at OB75983, 88.

The City-commissioned and third party reports demonstrated that large amounts of coal dust would be emitted, even with control measures. Fugitive coal dust emits from the bottom-dump/rapid discharge gates (which OBOT admits it will use) and from the top of loaded coal cars. Myre Decl., Ex. 45, at OAK230325–329, 364–367; Long Decl., Ex. 10 at OAK120949. Even if topping agents like surfactants are applied to the coal when loaded for rail transport, dust will escape through the bottom of the car, and the topping agent will wear off prior to arrival in Oakland. Myre Decl., Ex. 45 at OAK230325–329, 364–367.

ESA calculated the amount of coal dust that would be emitted from the trains' arrival at the Port Railyard and from staging, storage, transfer and transloading. Myre Decl., Ex. 45 at OAK230369–377. ESA accounted for the use of Best Available Control Technology ("BACT"), which it assumed BAAQMD would require. *See, e.g.*, *id.* at OAK230372–373. ESA calculated that despite the use of best practices/controlled operations, the Terminal would still emit each day 98 pounds of PM_{10} and 14.8 pounds of $PM_{2.5}$ from fugitive coal dust. *Id.* at OAK230372, 376.[27]

Rather than offer evidence on these issues before or at the hearings, OBOT complained that its plans were too uncertain, and that any offered evidence would be "hypothetical and speculative." Cappio Decl., Exs. 1, 2. Now, after forfeiting its opportunity to submit substantial evidence for the Council to consider, OBOT offers alternative emissions estimates based on improperly submitted, post-decision testimony and criticisms of the ESA Report. The Court should reject OBOT's tardy, weak effort to undermine substantial evidence in the record before

[27] The measure(s) to be implemented as BACT at a given facility are not determined until BAAQMD issues an operating permit; ESA therefore made reasonable assumptions about what measures might be instituted by BAAQMD for emissions reduction at the proposed Terminal. *See*, *e.g.*, Myre Decl., Ex. 45 at OAK230371-72.

the Council.[28]

(4) The Record Includes Substantial Evidence of Safety Impacts.

The June 23, 2017 Agenda Report and the ESA and Chafe Reports also provide substantial evidence of safety impacts related to coal fires and explosions.

Coal self-heats and can spontaneously combust, even explode, when stored in stockpiles or during transport. Myre Decl., Ex. 28 at OAK242432; *id*., Ex. 45 at OAK230382; Long Decl., Ex. 10, at OAK120931, 0120979-80. Not all combustion factors can be controlled, *e.g.*, coal's inherent characteristics. Myre Decl., Ex. 45 at OAK230382. Large stockpiles are especially prone to self-heating and spontaneous combustion. *Id*. at OAK230382–83. When coal dust explodes, it can generate sufficient air pressure to draw-in additional coal dust further fueling the fire. *Id*. at OAK230383–84. Firefighters need specialized training to respond to the unique dangers of coal combustion. *Id*. at OAK230384.

Utah coals are highly volatile and emit gases such as methane. These gases may explode if concentrations rise, as railroad carrier BNSF has acknowledged. Long Decl., Ex. 10 at OAK120980–81. Indeed, the Utah coal has a history of spontaneous combustion when stored in enclosures, *e.g.*, domes. Long Decl., Ex. 10 at OAK120981. When it combusts, coal emits toxic smoke that contains mercury, lead, other heavy metals, and polycyclic aromatic hydrocarbons such as benzo(a)pyrene which cause cancer and reproductive harm. Myre Decl., Ex. 45, at OAK230385; Long Decl., Ex. 10 at OAK120949.

Despite safety protocols, fires and explosions have occurred on trains and at coal storage and handling facilities, causing injuries and deaths to workers, first responders, and others.[29] Several explosion tragedies that occurred from 1999 to 2011 involved coal dust collected from arriving coal trains and in coal storage areas. For example, there were at least two separate fires

[28] But if the Court does offer OBOT's post-decision evidence, it should also consider the declarations submitted herewith by the City, which debunk OBOT's evidence (as discussed at pp. 23-24 below).

[29] Federal agencies are evaluating the need for additional regulations to address coal combustion risks, suggesting current regulations are insufficient. Myre Decl., Ex. 28 OAK242435.

in the early 2000's on conveyors at the now-shuttered coal-handling terminal at the Los Angeles Export Terminal, fires at terminals in Scotland and Australia, and 13 reported coal fires on U.S. trains. Myre Decl., Ex. 45, at OAK230331, 382–383; Long Decl., Ex. 10 at OAK120982–84. In 2009 and 2011, fires at coal transfer and handling facilities injured workers and killed firefighters in Wisconsin and South Dakota. Long Decl., Ex. 10 at OAK120983.[30]

(5) The Foregoing Is More than Enough Substantial Evidence to Meet the Requirements of Section 3.4.2.

The substantial evidence summarized above is more than sufficient to affirm the application of the Ordinance pursuant to section 3.4.2. Whether the Court relies upon the health-related or combustion-related evidence, or both cumulatively, it is beyond dispute that substantial evidence supported the City Council's decision, as reflected in the Resolution. Myre Decl., Ex. 50. And under the substantial evidence test, any contrary evidence, even if offered by experts, should be disregarded.[31]

b. Other Agency Regulations Do Not Override the Substantial Evidence.

Unable to dispute the extensive body of substantial evidence amassed by the City, OBOT suggests that general regulatory requirements of other agencies somehow disprove or override the substantial evidence before the City Council. OBOT Br., p. 30 et seq. They do not.

The issue in this motion is whether the evidence before the City satisfied the standards in section 3.4.2, which it did. The fact that other agencies, such as BAAQMD, may fulfill different, subsequent roles in regulating the proposed Terminal has no bearing on this issue.

The thrust of OBOT's argument is that BAAQMD, in administering the federal and state Clean Air Acts, will guarantee no harm from the proposed Terminal's air pollution. According to OBOT, because BAAQMD is statutorily responsible for complying with the National Ambient Air Quality Standards ("NAAQS"), and likewise cannot issue a permit to a facility if it would cause an exceedance of the NAAQS, emissions of coal or petcoke from the Terminal cannot

[30] The accompanying Declaration of Dr. Carlos Fernandez-Pello confirms the soundness of ESA's, Dr. Chafe's and the City's analysis and conclusions on fire safety issues.

[31] *Cal. Native Plant Soc.*, 172 Cal.App.4th at 626; *ABS Inst.*, 24 Cal.App.4th at 290, 294

possibly be harmful. OBOT Br., pp. 32-33. But OBOT wrongly assumes that $PM_{2.5}$ levels are only harmful at levels that exceed the NAAQS. To the contrary, as discussed above, it is well established that there is no safe level of $PM_{2.5}$ and that even incremental increases below the level of the NAAQS harm public health. *See* pp. 15-16, *ante*; *accord* 78 Fed. Reg. 3086, 3129 (noting $PM_{2.5}$ NAAQS standards were set while "recognizing the absence of a discernible population threshold below which effects would not occur"); *id.* at 3158 (there is no "'bright line' at and above which effects have been observed and below which effects have not been observed"); *see also* Moore Decl., ¶¶ 5-15.

OBOT also points to several existing coal or petcoke terminals that already operate in the Bay Area pursuant to BAAQMD permits, asserting there is no "evidence that these nearby terminals pose a substantial danger to anyone." OBOT Br., p. 32. But in testimony before the City Council, a representative of BAAQMD acknowledged that emissions from coal operations at the Richmond Terminal have negatively impacted nearby residents. Myre Decl., Ex. 29 at OB13681. BAAQMD's follow-up comments to the City elaborated that while "the Air District does not have readily available data on specific health impacts to Richmond residents of coal shipments in Richmond …. we do know that Richmond is exposed to relatively high levels of air pollution and residents suffer the health effects of these elevated emissions due to multiple sources of air pollution in close proximity," including its local coal terminal. Long Decl., Ex. 56 [BAAQMD response], at OAK4956. Moreover, OBOT's vague references to circumstances at other terminals cannot prove that the larger OBOT Terminal, adjacent to a population "most vulnerable to air pollution," would not create substantially dangerous health and safety conditions.[32] Long Decl., Ex. 56 [BAAQMD response], at OAK4956.

OBOT also mistakenly suggests that the City did not account for BAAQMD's permitting processes. For example, ESA assumed that if BAAQMD issued a permit to the Terminal, it would require OBOT to install BACT. *See, e.g.*, Myre Decl., Ex. 45 at OAK230372–373.

[32] The Ordinance's exemption for existing manufacturing facilities similarly sheds no light on whether the particular facility at issue—the Terminal—would, in this particularly sensitive location, create substantially dangerous health and safety conditions.

However, use of BACT does not eliminate all emissions; it only reduces emissions to the extent feasible—subject to explicit considerations of cost. Long Decl., Ex. 60 [BAAQMD Reg. 2, Rule 2, § 202 (defining BACT)]; Long Decl., Ex. 58 [Chinkin Tr.] pp. 103:20-105:12; 106:19-110:16; *see* Sahu Decl., ¶¶5-7. Nor can BACT or BAAQMD prevent accidents, upsets or violations.

Thus, the City properly accounted for BAAQMD regulation.[33]

Finally, in lieu of any actual evidence that undercuts the City's findings, OBOT offers Ms. Cappio's deposition testimony as to whether BAAQMD would, generally, enforce EPA standards in a manner that endangered Oakland residents. That statement is immaterial. Not only does the extensive and specific substantial evidence in the record document how existing regulations are inadequate for this particular project, the City has the legal authority to adopt additional regulations. Further, in testifying about the purpose of the exemption (to which the City objected), she merely opined that the City would defer to BAAQMD attempts to prevent health and safety impacts. That opinion provides no evidence that the BAAQMD regulations will necessarily prevent any substantially dangerous conditions at such sites or, more importantly, at the Terminal.[34]

c. OBOT Cannot Refute the Greenhouse Gas Evidence.

As the record reflects, climate change attributable to greenhouse gas emissions is an ongoing phenomenon that poses numerous substantial dangers to residents of Oakland. For

[33] Further, BAAQMD has considered, but not adopted, specific regulations for coal terminals. The City thus faced a choice: (1) it could delay regulating based on speculation about if and when BAAQMD would adopt regulations, or (2) it could impose its own requirements intended to prevent the substantially dangerous health and safety conditions that the Terminal would cause. Myre Decl., Ex. 28 at OAK242423. The choice lay within the City Council's discretion.

[34] OBOT likewise contends that existing regulations will prevent any danger to workers and will prevent all risk of fires, based on cherry-picked, post-Ordinance deposition testimony. OBOT Br., pp. 37-39. OBOT ignores the substantial evidence of danger to workers that was before City Council, including the Chafe Report and correspondence from Alameda County Public Health Department. Long Decl., Ex. 10, at OAK0120954 , 120957 (workplace coal dust standards appear to be unsuccessful at preventing coal-dust related disease); *id.*, Ex. 65 at OAK0004021. OBOT's claim that existing regulations will "prevent" any substantial fire danger, OBOT Br., p. 38, defies common sense and is contradicted by record evidence showing that "spontaneous combustion of coal is a well known phenomenon," as well as the track record of fires occurring in coal cars and at coal terminals. Myre Decl., Ex. 28 [ESA Report] at OAK242536, 538; *accord* Long Decl., Ex. 10 [Chafe], at OAK0120979-84; *see also* p. 19, *ante*; *see also* Fernandez-Pello Decl.

example, extremely hot days increase mortality risk among the elderly and other sensitive populations and exacerbate harm from other air pollutants; climate change also increases the likelihood of drought, wildfire, and flooding from sea level rise. Long Decl., Ex. 10 [Chafe] at OAK12100-11; Long Decl., Ex. 17 [PHAP] at OAK8513-8529. OBOT argues that concerns expressed by residents and the City regarding the potential for Terminal operations to contribute to climate change are *per se* invalid because climate change is an issue of global scale. OBOT Br., p. 40. But the unique, global nature of climate change doesn't mean communities cannot or should not consider local, incremental contributions to climate change. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (regulators "do not generally resolve massive problems in one fell regulatory swoop … but instead whittle away over time"); *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Govs.*, 3 Cal.5th 497, 515 (2017) ("because of the global scale of climate change, any one project's contribution is unlikely to be significant by itself," but "[t]he solution to climate change requires the aggregation of many small reductions in greenhouse gas emissions by public and private actors at all levels").[35]

d. Extra-Record Evidence, if Considered, Supports the Council's Action.

This Court should reject OBOT's offer of post-decision, extra-evidence to undermine substantial evidence in the record that the Terminal would be substantially dangerous to health and safety. But if the Court does consider OBOT's newly proffered evidence, it should also consider the Declarations of Ranajit (Ron) Sahu, Nadia Moore, Victoria Evans and Carlos Fernandez-Pello, submitted herewith. These declarations debunk OBOT's contentions and further demonstrate that the ESA and other reports and evidence in the record were correct, and thus the City Council's decision was supported by substantial evidence. And the law is clear that

[35] In his declaration for OBOT, Lyle Chinkin asserts that potential greenhouse gas emissions from the Terminal are too small to be consequential. Chinkin Decl. at pp. 13-14. But Mr. Chinkin acknowledges that potential emissions associated with the Terminal may exceed 18 million metric tons of climate-changing pollution annually. As a point of comparison, BAAQMD has established CEQA "thresholds of significance" for evaluating the magnitude of environmental impacts under that statute, and BAAQMD's guidance states that GHG emissions as low as 10,000 metric tons per year for a single stationary project are "significant." Long Decl., Ex. 68 at p. 2-2. Chinkin cites thresholds of significance for $PM_{2.5}$ pollution, Chinkin Decl., p. 13 (citing the City's thresholds, which track BAAQMD's), but he ignored BAAQMD's threshold of significance for greenhouse gas emissions.

the Court must defer to the City's judgment in weighing and resolving disputed factual issues, including with respect to disputed expert opinions. *See, e.g., Oakland Heritage All.*, 195 Cal.App.4th at 900, and discussion at page 11-12, *ante*.

e. The Court Should Disregard OBOT's "Predetermination" Contentions.

In its Statement of Facts, OBOT suggests that the City had predetermined to ban coal. This suggestion is both false and misleading, as well as a classic red herring.

OBOT does not actually ask the Court to determine that the City breached the DA by "predetermining" that it would prohibit the storing and handling of coal. Nor could it. The only issue is whether OBOT can meet its heavy burden to show that the City's decision is not supported by any substantial evidence in the record, which it cannot, as discussed above.

Moreover, the law unequivocally provides that OBOT's purported "evidence" of Council intent is irrelevant. A city official "has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance," such as regarding a development project that "could significantly influence" the quality of life in the city. *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 780 (1975). Prehearing statements of positions are irrelevant, particularly where the decision-makers compile a public record and adopts formal findings. *Id.* at 778-80. Further, the motives of the decision-makers are irrelevant. *Breneric Assocs v. City of Del Mar,* 69 Cal.App.4th 166, 184 (1998). Courts instead consider whether the record justified the public agency's action. *Id.* at 185-86; *Stubblefield Constr. Co. v. City of San Bernardino*, 32 Cal.App.4th 687, 697-98, 714 (1995) (councilmembers' motives concerning development project were irrelevant, even when their opposition had been publicly stated outside of the public process; the issue is whether the record justifies the public action). Here, the City was rightfully concerned about this matter of significant public interest.

C. Federal Law Does Not Preempt the Ordinance.

1. OBOT Bears a Heavy Burden to Prove Preemption.

"[T]wo cornerstones [govern] pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, preemption is fundamentally a question of congressional intent. *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Becerra,* 870 F.3d 1140, 1146 (9th Cir. 2017)

(*Canards*). Second, courts must presume that the "historic police powers shall not be superseded by federal law unless that is shown to be the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Canards*, 870 F.3d at 1146. This presumption is "particularly" strong, *Wyeth*, 555 U.S. at 565, where the local powers historically extend to "safeguarding the health and safety of citizens," *Canards*, 870 F.3d at 1146, such as preventing air pollution, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 443, 445-46 (1960). Local laws protecting health "are entitled to [a] presumption of validity under the Supremacy Clause." *Fla. East Coast Ry. v. City of West Palm Beach,* 266 F.3d 1324, 1328 (11th Cir. 2001). Accordingly, a party seeking to overcome the presumption against preemption bears a heavy burden. *De Buono v. NYSA–ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).[36]

2. ICCTA Does Not Preempt the Ordinance.

ICCTA, 49 U.S.C. § 10101 et seq., does not preempt the Ordinance. As a threshold matter, the Court should not engage in an ICCTA preemption analysis because the Ordinance expressly does not regulate transportation *by* rail carriers. The Ordinance prohibits TLS, who is the proposed "Owner or Operator of a Coal or Bulk Material Facility" and is undisputedly not a "rail carrier," from "Storing and Handling"[37] coal at the Terminal. But it does not regulate the "transportation of coal to or from a Coal or Coke Bulk Material Facility" like the Terminal. Myre Decl. Ex. 1 at § 8.60.010. Because the Ordinance does not regulate "transportation by a rail carrier," ICCTA preemption is not triggered.

Even if the Court reaches preemption, the result is the same. ICCTA regulates the business and operation of the rail industry. The Ordinance, in contrast, protects the health and safety of Oakland residents by regulating facilities not owned or operated by rail carriers.

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[36] The applicable preemption provision must be read narrowly "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (2008) (quotations omitted). Courts thus must "ordinarily 'accept the reading that disfavors preemption.'" *Canards,* 870 F.3d at 1146 (citations omitted). Further, the challenger cannot establish preemption based on "[t]he existence of a hypothetical or potential conflict …." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

[37] The Ordinance defines "Storage and Handling" as "to store, load, unload, stockpile, transload, or otherwise handle and/or manage, temporarily or permanently, physical material including Coal or Coke." Myre Decl., Ex. 1, § 8.60.030(A)(12).

a. ICCTA Preemption Is Not Triggered Because the Ordinance Does Not Regulate Transportation By or Under the Auspices of a Rail Carrier.

ICCTA preemption is only triggered if a state or local law regulates transportation by or under the auspices of a rail carrier. *Or. Coast Scenic R.R. v. Or. Dep't of State Lands*, 841 F.3d 1069, 1073-74 (9th Cir. 2016); *see also Valero Refining Co.*, No. 36036, 2016 WL 5904757, at *3 (STB Sept. 20, 2016). The ICCTA defines "rail carrier" in relevant part as "a person providing common carrier railroad transportation for compensation …." 49 U.S.C. § 10102(5). A "common carrier" is an entity that holds itself out to the public as engaged in transporting persons or property for compensation. *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187 (1920); *N.Y. Susquehanna v. Jackson,* 500 F.3d 238, 250 (3d Cir. 2007). The City's motion should be granted because the Ordinance, as applied to the undisputed facts of this case, does not regulate transportation by or under the auspices of a rail carrier.

The Ordinance prohibits the "Owner or Operator" of a "Coal or Bulk Material Facility" or any person who "Stores or Handles" "Coal or Coke" at such a facility from, among other things, "load[ing], unload[ing], transload[ing] or transfer[ing] any Coal or Coke between any mode of transportation, including without limitation between or among a motor vehicle (e.g., a truck), ship or train." Myre Decl., Ex. 1, § 8.60.040(A) & B(4). But the Ordinance contains an important express limitation on this prohibition. "***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***." *Id.* at § 8.60.010 (emphasis omitted and added). Confirming this limitation, section 8.60.040(A) states that the regulations apply "unless exempt or excepted from this chapter." In other words, the Ordinance's prohibitions apply except to the extent that an activity constitutes "transportation …. to or from a Coal or Coke Bulk Material Facility." *Id.* The Ordinance was thus carefully crafted to avoid regulating transportation by rail carriers. This Court must "construe the Ordinance narrowly and resolve any ambiguities in favor of the interpretation that most clearly supports constitutionality." *S.D. Myers, Inc.*, 253 F.3d at 468;

Fla. East Coast Ry., 266 F.3d at 1328.

Class I rail carriers like UP and BNSF would transport coal from Utah to the Port of Oakland rail yard. OBOT Br., p. 3. Once there, long haul trains would be broken into two pieces ("cuts") and BNSF, UP, or OGRE would transport the cuts from the railyard to TLS's Terminal. *Id.* TLS would contact OGRE (or perhaps BNSF and UP) when it wants cargo to be moved over its dump pits. Long Decl., Ex. 39 at 63:11-16; OBOT Br., pp. 3, 24-25. OGRE, UP, or BNSF would move the rail cars through the dump pit area, then empty, clean, and return them to the Class I rail carriers. *Id*., Ex. 39 at 74:1-75:4; OBOT Br., pp. 3, 24-25. Undisputed facts establish that TLS – not OGRE – will construct, own, operate, and maintain the Terminal and it dump pits, sheds over the dump pits, conveyors transporting bulk goods from the dump pits to the storage domes, and storage domes. Long Decl., Ex. 23 at OB82061; Ex. 34 at 68:20-69:9; Ex. 39 at 93:18-96:10. Together, OBOT's assertions and other undisputed fact establish that the Ordinance does not regulate transportation by a rail carrier.

TLS Activities. TLS is not a rail carrier, and OBOT does not claim otherwise. Rather, OBOT argues that the Terminal operations are subject to ICCTA preemption because they are connected to the delivery of material by a rail carrier. But the courts and the STB have repeatedly rejected this argument, concluding that the "mere fact" that a facility uses rail cars to transport material does not "morph" ***that facility's activities*** into "transportation by rail carrier" subject to the STB's exclusive jurisdiction. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004); *see also Valero Refining,* 2016 WL 5904757, at *3 (refinery that can receive rail service not carrier; not performing services on behalf of carrier); *SEA-3, Inc.*, No. 35853, 2015 WL 1215490, at *4 (STB Mar. 17, 2015) (no carrier control where transloading facility offering services directly). As the Second Circuit explained in reaching the same conclusion, "the STB correctly points out that there is, indeed, a difference between transportation to a rail carrier and transportation by a rail carrier – one is an independent business providing a service to a rail carrier and its customers, the other a facility that the rail carrier controls and represents as integral part of its services." *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 636 F.3d 66, 72-73 (2d Cir. 2011). Likewise here, TLS's handling of coal or any other material at the Terminal does not

become transportation "by rail carrier" merely because the material is received by rail.

OGRE Activities. Because OBOT is not a rail carrier (OBOT Br., pp. 24-25) and UP/BNSF tracks do not come into the Terminal (Long Decl., Ex. 36 [McClure II Tr.], pp. 187:5–18), the only remaining question is whether OGRE's activities at the Terminal constitute transportation by or under the auspices of a rail carrier. *See Or. Coast Scenic R.R.*, 841 F.3d at 1073-74. OBOT has not met and cannot its burden to show that it is a rail carrier, or that the Ordinance regulates transportation by a rail carrier.

First, OGRE is not an STB-licensed rail carrier. There are formal procedures that must be followed to obtain the STB's authorization to act as a rail carrier. *Hi Tech. Trans.*, 382 F.3d at 305. For example, common carriers must obtain certificates of public convenience and necessity to operate, or exemptions, from the STB. See 49 U.S.C. § 10901; 49 CFR § 1150; see also 49 U.S.C. § 20102. OGRE has not complied with these requirements. In fact, OGRE has withdrawn its STB application for rail carrier status twice. Long Decl., Ex. 25, [2014 WL 664841] [2/21/14 STB Decision]; Ex. 26 [2015 WL 5637093] [9/25/15 STB Decision].

Second, given the still-speculative nature of various project arrangements, OBOT cannot even establish that "last mile" rail services—those between the Port of Oakland rail yard and the Terminal—will be performed by or under the auspices of a rail carrier. As OBOT admits, the relationship between OGRE and bona fide rail carriers (*e.g.*, UP and BNSF) is still under negotiation. OBOT speculates that "[e]ither UP or BNSF, or short line rail carrier [OGRE] on behalf of UP and BNSF … [will perform] 'last-mile' rail service" to the Terminal pursuant to a "*forthcoming* inter-track" agreement that is or will be negotiated with OGRE. OBOT Br., pp. 3, 25 fn. 33. Courts and the STB scrutinize the contracts between STB-certified rail carriers and third parties to determine whether the third parties are actually operating "under the auspices of" the rail carrier. *E.g.*, *New York & Atl. Ry. Co.*, 636 F.3d at 72-73 (collecting STB decisions). At this juncture, OBOT does not even know with certainty who will be doing what on the tracks between the Port of Oakland rail yard and the Terminal, or what the contractual/agency relationship among OGRE, TLS, and/or UP/BNSF will be, if any. OBOT's unsupported assertion that last mile services will be performed by or on behalf of a rail carrier is thus

hypothetical. And a hypothetical conflict between the Ordinance and the ICCTA "is insufficient to warrant the pre-emption" of the Ordinance.[38] *Rice*, 458 U.S. at 659; *see also Simmons v. ICC*, 871 F.2d 702, 713 (7th Cir. 1989) ("difficult to understand how a tribunal can interpret [whether a] contract whose legal effect is disputed [as to whether it is a trackage rights agreement] without having a copy of the document before it").[39]

Third, even if OBOT could establish that "last mile" service between the Port of Oakland rail yard and the Terminal constitutes "transportation by a rail carrier," OBOT's argument still fails because the Ordinance expressly does ***not*** regulate transportation by a rail carrier "to or from a Coal or Coke Bulk Material Facility." Myre Decl., Ex. 1, §§ 8.60.010, 8.60.040(A). And even if the Ordinance could be read as regulating transportation by a rail carrier, this court is obligated to "construe the Ordinance narrowly and [to] resolve any ambiguities in favor of the interpretation that most clearly supports constitutionality." *S.D. Myers, Inc.*, 253 F.3d at 468; *see also Fla. East Coast Ry.*, 266 F.3d at 1328.

Finally to the extent that OBOT is arguing, obliquely, that the Ordinance is preempted because it prohibits the handoff from the last mile service provider to TLS, the argument fails. Given the City's overarching intent not to regulate any activity that would constitute transportation or run afoul of federal law, it makes no sense to conclude that the singular act of

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[38] Regardless of who performs these "last mile" rail services, it is TLS—not UP, BNSF, or OGRE—who will direct that activity, and whose activities are regulated by the Ordinance: "Q: What does 'discharge' mean? A: That means that the cargo is taken from the railcar and dumped into our receiving pits. Q: And how would TLS direct that? A: TLS will tell OGRE when they want particular series of cargo to be moved over the dump pits and delivered to the terminal." Long Decl. Ex. 39 at 63:11-16.

[39] *Fayard v. Ne. Vehicle Servs., LLC,* 533 F.3d 42 (1st Cir. 2008), is inapposite. In remanding Fayards' nuisance suit against a short line railroad for failure to find "complete preemption," the Court explained that Fayards "belatedly" argued in a motion for reconsideration that the short line railroad was not a "rail carrier." *Id.* at 46. In a single sentence, the court rejected the argument, *id.* at 45, stating "it appears" the railroad contracts with a common carrier and "apparently provides its services indiscriminately to any shipper who wants them, meeting the conventional definition of a common carrier." *Id.* at 46. Unlike in *Fayard,* where the STB had determined the short line railroad there to be a common carrier, *id.* n.4, OGRE (1) is not a common carrier in STB's view, Long Decl., Ex. 25 [2014 WL 664841] [2/21/14 STB Decision]; Ex. 26 [2015 WL 5637093 [9/25/15 STB Decision]; (2) has no contracts with an interstate carrier for last mile services, OBOT Br., p. 25 n.33, and (3) has submitted no evidence that it will provide its forthcoming services indiscriminately.

transferring material at the end of its rail journey to TLS constitutes the kind of "transloading" that can trigger ICCTA preemption analysis. In this sense, the Terminal is no different than an Amazon warehouse that receives product by rail, repackages or reconfigures that product, and subsequently ships that product off to retailers or other customers via truck or ship. No one would seriously argue that that Amazon's operation of the warehouse is an integral part of the railroad's business services or that local police powers over the warehouse are preempted by the ICCTA's exclusive remedies for "regulation of rail transportation." 49 U.S.C. § 10501(b). Indeed, that very argument was rejected in the context of an ICCTA preemption claim that a city could not deny a use permit to a bulk material transfer facility that used rail services, where this Court explained that "[t]aken to its logical conclusion, plaintiffs' argument would mean that any … company who picks up goods from a railroad terminal for delivery to a customer would be free from local regulations." *CFNR Operating Co. v. City of Am. Canyon*, 282 F.Supp.2d 1114, 1118-19 (N.D. Cal. 2003). As is applicable here, "Congress, however, could not have intended such an expansive interpretation of the ICCTA's reach." *Id.* at 1119; *cf. Dan's City Used Cars, Inc. v. Pilkey,* 569 U.S. 251, 262 (2013) (state claim for illegal towing after transportation has ended not preempted under very similar FAAAA provision).

In short, the ICCTA preemption analysis is not triggered because the Ordinance does not regulate "transportation *by* a rail carrier."

b. The Ordinance Is Not Preempted.

Assuming, *arguendo*, that this Court determines that the Ordinance regulates transportation by a rail carrier, the Ordinance must still be upheld unless it falls within the scope of ICCTA's preemption clause. That clause provides that, "[e]xcept as otherwise provided in this part, the **remedies provided under this [rail] part** with respect to **regulation of rail transportation** are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b) (emphasis added).

Preemption is fundamentally a question of congressional intent, see pp. 24-25, above. Congress described the STB's core responsibilities under ICCTA as regulating "railroad rate reasonableness, mergers, line acquisitions, new rail-line construction, abandonments of existing

rail lines, and the conversion of rail rights-of-way into hiking and biking trails," as well as "overseeing and monitoring railroad commercial practices nationally; enforcing the railroads' common-carrier obligation; [and] monitoring rail carriers to ensure they are able to earn adequate returns necessary for the health of the rail system." S. Rep. No. 114-52, 1st Sess., at 2-3 (2015); *see generally Friends of Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 702, 706-11 (2017) (ICCTA history and current coverage).

ICCTA's preemption clause retains "the exclusivity of Federal remedies with respect to the regulation of rail transportation," "while clarifying that the exclusivity is related to remedies with respect to rail regulation – not State and Federal law generally." H.R. Conf. Rep. No. 104-422, 1st Sess., at 167 (1995). While broad, ICCTA only preempts state and local laws that regulate areas that the STB also regulates. *E.g.*, *City of Auburn v. U.S. Gov't*, 154 F.3d 1025 (9th Cir. 1998). Congress did not intend the ICCTA to usurp the States' traditional state police powers "outside the regulated field." *Friends of Eel River*, 3 Cal.5th at 711.

The Ordinance is not preempted for several reasons. First, no ICCTA remedies preempt the remedies provided under the Ordinance. The two laws cover different spheres: ICCTA regulates rates and encourages competition; the Ordinance protects Oakland residents' health and safety. *See* Myre Decl., Ex. 1 at §§ 8.60.010, 8.60.020. OBOT does not claim that the STB regulates the City's redevelopment authority or Oakland's health and safety.

Second, the Ordinance is not "regulation of transportation" within the meaning of the preemption provision. "Regulate" means to "manage or govern" rail transportation. *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.,* 622 F.3d 1094, 1097 (9th Cir. 2010).[40] Unlike

[40] For purposes of establishing the STB's exclusive jurisdiction, the salient phrase is "transportation by rail carrier." Where, as here, the Ordinance does not regulate "transportation by a rail carrier," this jurisdictional trigger is not satisfied, even if the activity can otherwise by classified as "transportation" as that terms is defined by statute. *See, e.g., Hi Tech,* 382 F.3d at 306, 308-09 (discussing 49 U.S.C. § 10501(a), (b)). But for preemption purposes, the salient language is "regulation of rail transportation" rather than "transportation by rail carrier." 49 U.S.C. § 10501(b). The targets of the ICCTA's "transportation" definition and its preemption provision are altogether different. The definition of "transportation" includes a wide range of facilities and services to ensure "adequate protection against excessive and discriminating charges" against small shippers. *Fla. East Coast Ry.,* 266 F.3d at 1332-39; *see also Erie R. Co. v. Shuart*, 250 U.S. 465, 467-68 (1919).

In contrast, the phrase "regulation of transportation," as used in the preemption provision,

regulations that govern or manage the rail business or operations, for the reasons stated above, the Ordinance does not regulate the operations of UP/BNSF or OGRE (assuming, *arguendo*, that OGRE is or will become a "rail carrier"). *CFNR Operating,* 282 F.Supp.2d at 1118 (no preemption concern to deny city permit to a bulk material facility served by rail); *Fla. East Coast Ry.,* 266 F.3d at 1331 (zoning ordinance enforced against a rail-served material supply company held "not sufficiently linked to rules governing the operation of the railroad" to be managing or governing rail transportation); *see also Valero*, 2016 WL 5904757, at *3 (disapproval of a conditional use permit applied only to a refinery's facility and not to UP, the carrier serving the facility, and therefore did "not attempt to regulate transportation").[41] Finally, OBOT argues that the Ordinance is preempted because it "ban[s] cargo that railroads can handle in Oakland." OBOT Br., p. 27 n.37. As OBOT recognizes, this argument relies on the same argument as its dormant Commerce Clause argument. *Id.* But the Ordinance does not implicate the dormant Commerce Clause because it does not discriminate against out-of-state interests, directly regulate interstate commerce, or unduly burden rail transportation. See Intervenors' Motion, p. 7 *et seq*. Indeed, the Ordinance does not regulate transportation by rail carriers; it regulates transportation by owners and operators of "Coal or Coke Bulk Material Facilities."[42] Myre Decl. Ex. 1, §§

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should be read more narrowly to comport with the target of the preemption provision. *Oneok, Inc. v. Learjet, Inc.,* 135 S.Ct. 1591, 1595, 1599-1660 (2015) (emphasizing "the importance of considering the target at which the state law aims in determining whether the law is pre-empted"); *Dan's City*, 569 U.S. at 261-62. The Ordinance's purpose is to protect the health and safety of Oakland residents, not to regulate rail transportation. *See Fla. E. Coast Ry.,* 266 F.3d at 1337 (ICCTA target not "incidental effects that inhere in the exercise of traditionally local police power such as zoning").

[41] The cases OBOT cites are distinguishable as they involve either carrier-controlled facilities or direct regulation of transportation. *Or. Coast,* 841 F.3d at 1070 (track maintenance done for carrier); *Grosso v. Surface Transp. Bd.,* 804 F.3d 110, 114, 120 (remanding for further fact finding about carrier-owned facility); *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (ordinance controlling construction of railroad embankment); *Norfolk So. Ry. Co. v. City of Alexandria*, 608 F.3d 150 (carrier operation); *Green Mt. R.R. Co. v. Vermont,* 404 F.3d 638, 640 (2d Cir. 2005) (rail carrier); *City of Auburn v. U.S. Gov't,* 154 F.3d 1025 (local attempt to bar rail carrier construction under STB-regulated rail merger).

[42] OBOT's reliance on *Oregon Coast Scenic Railway, LLC*, 841 F.3d 1069, is misplaced. OBOT Br., pp. 25-27. There, the State issued a cease and desist letter to a non-profit corporation that was repairing a portion of track owned by a federally regulated railroad. *Id.* at 1071. Relying on the contract between the nonprofit and the railroad, the Ninth Circuit held that the nonprofit was repairing the track under the auspices of the railroad. *Id.* at 1074. Thus, the State's cease and desist letter – which stopped the non-profit's repair of the railroad's tracks – had "the effect of"

8.60.010; 8.60.040(A) & (B); s*ee also Fla. East Coast Ry.*, 266 F.3d at 1339 ("unlike direct regulation of railroads," zoning ordinances with which *non-carriers* must comply do not burden rail); *SEA-3, Inc.*, 2015 WL 1215490, at *4 (rejecting similar burden argument from a rail-served propane storage and distribution terminal that was denied city approval for facility expansion; STB denying petition without considering the effect on rail transportation where transloading was not performed by a rail carrier).[43] Because the Ordinance does not conflict with or regulate an area regulated by ICCTA or STB, it is not preempted.

3. The Hazardous Materials Transp. Act Does Not Preempt the Ordinance.

The Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101 et seq., also does not preempt the Ordinance. The HMTA is intended "to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce." *Id.* § 5101. It expressly preempts only those state or local laws that impose conflicting shipping requirements on substances designated as "hazardous material" by the Secretary of Transportation. Because the HMTA does not designate or regulate coal or petcoke as "hazardous," it does not preempt the Ordinance.

The HMTA directs the Secretary to (1) designate material as "hazardous" upon a finding that "transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property" and (2) "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5103(a)-(b). "Hazardous material" is defined as "a substance or material the Secretary designates under 5103(a)" of the statute. 49 U.S.C. § 5102(2). The Secretary has adopted a table of such "hazardous materials" designated and regulated under the HMTA. 49 C.F.R. § 172.101. For these designated hazardous materials, the Secretary has

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regulating rail transportation. *Id.* at 1077. As explained above, OBOT has not and cannot establish that the Ordinance regulates transportation by or under the auspices of a rail carrier.

[43] Finally, this Court should reject OBOT's argument that the Ordinance specifically targets *coal* transportation and thus is not a law of general applicability. OBOT Br., p. 27 n.37. Laws of general applicability mean only that such laws are not targeting rail transportation. *See, e.g., N.Y. Susquehanna,* 500 F.3d at 256.

promulgated rules on labeling, emergency response information, training, safety and security plans, and packaging, among other topics. *Id.*, Parts 172-177. It is undisputed that neither coal nor petcoke is designated as "hazardous" under the HMTA for transportation purposes. OBOT Br. at 28-29.

To avoid shippers being subject to conflicting label, packaging, and other rules, the HMTA expressly preempts state or local transportation requirements for *designated* "hazardous material." 49 U.S.C. § 5102(2). As to five specific subject areas (including the "designation, description, or classification of hazardous material"), section 5125(b) preempts state and local requirements that are "not substantively the same" as the HMTA or its implementing regulations. *Id.* § 5125(b)(1)(A).[44]

OBOT attempts to flip section 5125(b) on its head, arguing that a local government concerned about public safety may *not* impose bulk handling regulations on a dangerous material that the Secretary has *not* otherwise regulated and for which there are *no* federal shipping rules or requirements. OBOT Br. at 28. This argument is inconsistent with the *plain language* and intent of the preemption provision. *See* 49 U.S.C. § 5125(b) (preemption if local rule not the same); 74 Fed. Reg. 46644, 46653 (Sept. 10, 2009) (agency notice stating HMTA regulations "do not … preempt non-Federal requirements imposed on the transportation of materials that are not hazardous materials as defined in the [regulations]"); *id*. (finding "State-only" requirements for classification and regulation of electronic waste were not preempted because they did not "pertain to the 'designation, description, and classification of hazardous material' … as the term 'hazardous material' is used in the HMTA). Here, the Ordinance does not concern any designated material; it merely seeks to prohibit, as a local public health and safety matter, handling and storage of two substances not covered by HMTA that pose particular long-term health and safety risks to the already-overburdened West Oakland community.

OBOT's preemption-by-nonregulation argument should be rejected also because, taken to its logical conclusion, this position would broadly prohibit local governments from adopting *any*

[44] OBOT relies solely on subsection 5125(b)(1)(A). The remaining subsections cover other activities other than designation, description, and classification.

health or safety regulation for *any* materials not already designated as "hazardous." Such a sweeping result ignores not only the presumptions against preemption but that preemption-by-nonregulation may be considered only where Congress has affirmatively decided no state or local regulation should be permitted. *See Freightliner v. Myrick*, 514 U.S. 280, 286 (1995); *Waering v. BASF Corp.*, 146 F.Supp.2d 675, 681 (M.D. Pa. 2001) (the Secretary's "apparent silence with respect to [a] chemical is simply not enough to support the inference that Congress intended section 5125 to preempt [local law]"). Here, there is no evidence that the Secretary has made any decision that coal and petcoke should not be regulated.[45]

The Court thus should grant summary judgment to the City on the HTMA claim.[46]

4. The Shipping Act Does Not Preempt the Ordinance.

The Shipping Act of 1984, 46 U.S.C. § 40101 et seq., regulates agreements between ocean common carriers and marine terminal operators, with a focus on prohibiting certain discriminatory acts. As OBOT concedes, the Shipping Act contains no express preemption clause. OBOT Br., p. 29. The Ordinance, on the other hand, is a health and safety regulation of general application. *See Huron*, 362 U.S. at 446 (finding no overlap in purpose of federal ship inspection laws and local air pollution ordinance and thus no conflict).

The Shipping Act clearly does not sweep up all local regulations in its prohibitions on discriminatory behavior. *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 919 F.2d 799, 807 (1st Cir. 1990) ("nothing… indicates that Congress intended to regulate local governments when they were acting in such traditional governmental roles as providing police and regulatory functions.").

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[45] OBOT has not asserted any preemption argument based on 49 U.S.C. § 5125(a). Nor could it. It is "possible" for OBOT to comply with both the Ordinance and (non-existent) HMTA requirements. 49 U.S.C. § 5125(a)(1); *Freightliner*, 514 U.S. at 289 ("it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard … to comply with"). The Ordinance likewise poses no "obstacle to accomplishing and carrying out" the HMTA, 49 U.S.C. § 5125(a)(2), because the Ordinance does not "pertain[] to an area already regulated under the [HMTA regulations]." *Chlorine Inst., Inc. v. Cal. Hwy. Patrol*, 29 F.3d 495, 497 (9th Cir.1994).

[46] OBOT's reliance on *Riffin v. Surface Transportation Board*, 733 F.3d 340 (D.C. Cir. 2013), is misplaced. The court there merely upheld the STB's denial of a request by a common carrier subject to STB jurisdiction for an exemption from common carrier obligations for a particular railroad track. Here, of course, OBOT is not a rail carrier subject to STB's jurisdiction. Further, the Ordinance does not prevent anyone from carrying coal or petcoke on any rail line.

Subsection (1) of 46 U.S.C. section 41106 dictates that a marine terminal operator may not "agree with another marine terminal operator or with a common carrier to [] unreasonably discriminate in the provision of terminal services."[47] Subsections (2) and (3) also prohibit a marine terminal operator from giving "unreasonable preference" to any person or "unreasonably refus[ing] to deal."[48] Ocean carriers or other entities alleging discrimination must show that they were charged a higher rate or given unfavorable treatment by a terminal operator, compared to a similarly situated entity or competitor. *See, e.g., Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 1997 WL 35281266 *31-33 (FMC Oct. 10, 1997) (requiring complainants to show differential treatment). A health and safety regulation on storing and handling a potentially dangerous commodity that applies equally to all operators and carriers simply gives no rise to an "unreasonable" preference or prejudice.

Even under the state court case OBOT cites, *Reed v. City & County of San Francisco*, 10 Cal.App.4th 572, 573-75 (1992), the Ordinance would not be preempted. There, plaintiffs sought to enforce an anti-apartheid divestment ordinance that the City itself argued it could not apply in its role as a port operator. The court confirmed that such differential treatment would be improperly based on the shipper's identity, rather than on allowable "transportation conditions," which relate to the characteristics of a particular commodity or conditions at the port. Here, the health and safety concerns about combustibility and dust emissions of coal and petcoke that lie at the heart of the Ordinance fall within the rubric of transportation conditions (for the purposes of the Shipping Act) and qualify the Ordinance as "reasonable" pursuant to 49 U.S.C. section 41106. *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958, 963 (D.C. Cir. 1988) (Shipping Act "clearly contemplates the existence of *permissible preferences or prejudices*") (emphasis added).

The Shipping Act thus does not preempt the Ordinance.

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[47] OBOT relies entirely upon 46 U.S.C. § 41106(1) in its motion, but shows no such agreement.

[48] That OBOT cannot even name a "marine terminal operator" fitting the statutory definition, 46 U.S.C. § 40102(14), and ignores that the exclusive remedy for discrimination is to file a complaint before the Federal Maritime Commission, 46 U.S.C. § 41306—both key elements of a Shipping Act violation—further shows how ill-suited the Shipping Act is to its claim.

D. The Ordinance Does Not Violate the dormant Commerce Clause.

The City hereby incorporates Intervenors' arguments with respect to OBOT's dormant Commerce Clause claim, but provides these brief additional points. With its Commerce Clause claim, like its preemption claims, OBOT attempts to federalize a contract dispute. OBOT is a local real estate developer, not an out-of-state entity or railroad. As the master tenant for the West Gateway property, OBOT was charged with developing a bulk materials facility as part of the City's larger Gateway plan to bring significant community benefits to historically-disadvantaged West Oakland, in the form of publicly-funded waterfront amenities, environmentally-sustainable businesses, and well-paying, high-quality jobs.

The City's Ordinance and Resolution are not driven in any way by economic protectionism, the touchstone of dormant Commerce Clause analysis. If anything, the Ordinance financially disadvantages the City by foregoing potential revenues (e.g., taxes) in order to protect constituents from public health risks. A nondiscriminatory local ban on particular types of facilities or activities simply does not implicate the movement of goods across state borders or substantially burden interstate commerce. *See, e.g., Wal-Mart Stores, Inc. v. City of Turlock*, 483 F.Supp.2d 987, 1020 (E.D. Cal. 2006) (local ban on discount superstores). Nor does the Ordinance undermine the national rail system. Railroads may and do continue to carry bulk coal and coke into and through the City; the Ordinance is designed only to prevent bulk goods terminals from storing and handling large quantities of two particularly dangerous bulk commodities – a policy judgment that is well within the City's historic police power authority.

In essence, OBOT asks the Court to second-guess the City's local legislative judgment under the guise of "national uniformity" – a judicial concept that has been limited to state regulation of modes of interstate transportation that actually affect movement of goods across borders (e.g., truck or train length, truck mud flaps) and interstate sports leagues. *Valley Bank of Nevada v. Plus Sys., Inc.,* 914 F.2d 1186, 1192 (9th Cir. 1990). Beyond these narrow categories, "when or if … uniformity is desirable is not a question for courts." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1105 (9th Cir. 2013); *see also South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177, 190 (1938) (Congress may pass "legislation

designed to secure uniformity … [b]ut that is a legislative, not a judicial function, to be performed in light of the Congressional judgment of what is appropriate regulation of interstate commerce"). Here, the Ordinance does *not* regulate or impose any burden on railroad (or any other mode of) transportation. The Court should reject OBOT's attempt to turn a local policy disagreement into a federal constitutional issue because, as the Supreme Court has explained, "[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

IV. CONCLUSION

For the foregoing reasons, this Court should deny OBOT's motion and grant the City summary judgment, or, in the alternative, summary adjudication as to particular claims.

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