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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC

Plaintiff,

vs.

CITY OF OAKLAND,

Defendant.

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

PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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

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.
City Br.	Defendant City of Oakland's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (D.E. 145)
DA	Development Agreement
DCC	Dormant Commerce Clause
DOT	Department of Transportation
EBMUD	East Bay Municipal Utility District
ENA	Exclusive Negotiating Agreement
ESA	Environmental Science Associates
Ex.	Exhibit to the Corrected or Supplemental Declarations of David E. Myre In Support of Plaintiff's Motion for Summary Judgment
GHG	Greenhouse gas
HDR	HDR Engineering, Inc.
HMTA	Hazardous Materials Transportation Act
ICCTA	Interstate Commerce Commission Termination Act
Int. Br.	Defendant Intervenors' Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (D.E. 156)
LDDA	Lease Disposition and Development Agreement
Long Decl. Ex.	Exhibit to the Declaration of Christopher Long in Support of Defendant's Motion for Summary Judgement and Opposition to Plaintiff's Motion for Summary Judgment (D.E. 158)
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

ARGUMENT

I. THE ORDINANCE VIOLATES THE DORMANT COMMERCE CLAUSE

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

Defendants fail to produce any evidence rebutting OBOT's showing that the Ordinance is a per se violation of the Dormant Commerce Clause. Instead, Defendants contend that an Ordinance that undisputedly blocks the interstate rail transportation of Utah coal for export to Asia somehow "does not implicate the movement of goods across state borders" (City Br. at 37) and "does not have the effect of controlling conduct beyond the boundaries of the state." Int. Br. at 3. As set forth below, judgment as a matter of law should be entered in favor of OBOT.

1. The Ordinance Directly Regulates Interstate and Foreign Commerce

There is no dispute that a local ordinance that directly regulates interstate or international commerce is a per se violation of the DCC. *See* Int. Br. at 1. There is also no dispute that where a state or local law "is directed at interstate [or international] commerce and only interstate [or international] commerce," it is a direct regulation of interstate (or international) commerce. *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). And as shown (Mtn. 11-16), the undisputed evidence demonstrates that the Ordinance is directed at, and only at, the interstate transportation of coal and petcoke for export overseas. Indeed, the Ordinance's undisputed purpose and effect is to make it impossible to export Utah coal and petcoke overseas from Oakland—while permitting local entities to store, handle and consume (*e.g.*, burn) these lawful goods:

- The City has admitted that the Ordinance was intended to apply only to, and in fact applies only to, the activities to be conducted at the Terminal—*i.e.*, the interstate transportation of coal and pet coke for export overseas—to the exclusion of local use and consumption of coal. Ex. 25 (Cappio Tr.) at 57:15-20, 58:15-22, 65:7-14; *see also id.* at 58:23-60:17 (Ordinance would also apply to UP or BNSF owned Terminal). The plain text of the Ordinance confirms the same. Ex. 1 (Ordinance) § at 8.60.040(B)-(C); *see also id.* at 8.60.020(B)(1)(c)-(d), (f).

- The City has admitted that the "plans to ship, transport coal and coke through the [T]erminal at the West Gateway" and the City's 2014 "adoption of a resolution to oppose the transportation of fossil fuels, like coal and petcoke" through Oakland were each "an integral part of the City Council's decision to pass the Ordinance." Ex. 25 (Cappio Tr.) at 66:19-69:13; *see also* Ex. 28 (June 23, 2016 Staff Report) at 1 ("Concerns have been raised . . . with respect to transportation, transloading, handling and/or export of coal through the OBOT"), 3-4, 8. The plain text of the Ordinance confirms the same. Ex. 1 (Ordinance) at 3 (§1) & 1 (Recitals 1 & 2).

- The City has admitted that the Ordinance prevents the export of coal from Oakland. Ex. 25 (Cappio Tr.) at 63:18-22; *see also id.* at 61:12-15 ("If you cannot get coal onto a ship, you can't export coal by ship"). The plain text of the Ordinance confirms the same. Ex. 1 (Ordinance) at § 8.60.040(B) ("shall not . . . Load, unload, transload or transfer any Coal or Coke between any mode of transportation, including . . . [a] ship or train").

- In fact, the City has acknowledged that the Ordinance makes it "unlikely" that the Utah coal to be shipped through the Terminal will be exported from the United States at all. Ex. 28 (June 23, 2016 Staff Report) at 19; and

- Even Intervenor-Defendant Sierra Club has admitted that it supported the Ordinance "to block the means by which coal is exported from the United States." Ex. 22 (10/20/17 Intervenor RFA Response 3).

Defendants have produced no evidence to raise a dispute on these dispositive facts.

It is accordingly beyond dispute that, for all practical purposes, the Ordinance provides: ***Coal and petcoke travelling in interstate commerce by rail shall not be exported overseas from Oakland***. There can be no dispute that such an ordinance is an impermissible direct regulation of interstate commerce. *E.g.*, *NCAA*, 10 F.3d at 638; *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 466-67 (9th Cir. 2001) ("Direct regulation occurs when a state law directly affects transactions that take place across state lines . . . ."); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 498-99 (1888) (regulation seeking to "prohibit and stop the[] passage" of liquor through jurisdiction a "regulation directly affecting interstate commerce"); *West v. Kan. Natural Gas Co.*, 221 U.S. 229, 249 (1911) (statute effectively prohibiting export of natural gas unconstitutional under DCC because "to prohibit interstate commerce is more than to indirectly affect it").

Indeed, there could hardly be a more plain violation of the Dormant Commerce Clause. As the Supreme Court has made clear: "[T]he right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it that the commerce clause was intended to secure," *Bowman*, 125 U.S. at 494-95 (quotation marks omitted), and the Dormant Commerce Clause ensures that participants in commerce from every state "will have free access to every market in the Nation [and] that no home embargoes will withhold [their] exports" to foreign lands. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). The Ordinance effectuates just such an embargo—by

undisputedly prohibiting Utah coal producers from exporting their coal overseas from Oakland.

(a) **Defendants' Extra-Territoriality Argument Is Unavailing**

Defendants argue that the Ordinance is not a direct regulation of interstate commerce because it "does not have the effect of controlling conduct beyond the boundaries of the state." Int. Br. at 3. That argument fails to comport with the law and the undisputed facts.

First, Defendants misapprehend the law of "direct regulation." Defendants contend that to be a "direct regulation" of interstate commerce the ordinance must be an "extraterritorial" regulation, and—quoting *Pharmaceutical Research & Manufacturers of America v. County of Alameda*, 768 F.3d 1037, 1043 (9th Cir. 2014)—that "the key inquiry in an extraterritoriality claim is 'whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.'" Int. Br. at 2. In fact, the Ninth Circuit made clear in *Pharmaceutical Research* that controlling conduct beyond the boundaries of the state (or city) is not the only form of direct regulation. Rather: "Direct regulation occurs when a state law directly affects ***transactions that take place across state lines or*** entirely outside of the state's borders." *Pharm. Research & Mfrs. of America*, 768 F.3d at 1043 (quoting *S.D. Myers, Inc.*, 768 F.3d at 467) (emphasis added).[1]

Second, on the undisputed facts, the Ordinance here does both: it prevents coal travelling by interstate rail from Utah from being exported to Asia through Oakland. Such an ordinance, by definition, "directly affects transactions that take place across state lines" and "controls conduct" beyond Oakland. Indeed, any regulation that blocks *interstate transportation* of goods for *export to foreign ports* necessarily has extraterritorial effect and directly affects transactions across state lines. Just as regulation of an *interstate* collegiate association inherently regulates interstate commerce, *see, e.g., NCAA*, 10 F.3d at 638 ("It is clear that the Statute is directed at interstate commerce and only interstate commerce. By its terms, it regulates only interstate organizations . . . ."), regulation of interstate (and international) transportation of goods for sale necessarily regulates interstate (and international) commerce. That is why regulations that block the interstate

[1] Because the Dormant Commerce Clause applies equally to state and local governments, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361 (1992); *S.D. Myers, Inc.*, 253 F.3d at 466-67, its prohibitions on controlling conduct outside of, and affecting transaction across, state lines applies equally to city lines.

transportation and/or export of goods are textbook examples of "direct regulations" of interstate (and foreign) commerce that violate the DCC. *See* Mtn. at 11-16 (and cases cited therein).

(b) **Defendants' Chosen Authorities Are Unavailing**

Defendants' chosen authorities thus miss the critical point: none of the regulations at issue in those cases was directed at inherently interstate (or international) commercial activities—such as ***the interstate transportation of a lawful good for export***, as the Ordinance is here. For example, the law at issue in *Pharmaceutical Research* required prescription drug manufacturers selling certain pharmaceuticals in Alameda County to operate and finance a "stewardship" program for disposal of unwanted prescription drugs within Alameda County. 768 F.3d at 1040. That "stewardship program" set conditions on doing business in Alameda County—which may have had some incidental effect on interstate commerce—but did ***not*** have the sole purpose and effect of prohibiting the interstate transportation of a lawful article for export through Alameda County. The Alameda County "stewardship program" did not "directly affect[] transactions that take place across state [or local] lines" or "control conduct beyond the boundaries of the [county]." *Id.* at 1043. By contrast, an ordinance that blocks Utah coal producers from transporting their product to overseas customers through Oakland, by definition, does both.

Defendants' reliance (Int. Br. at 3) on *Chinatown Neighborhood Association v. Harris*, 794 F.3d 1136 (9th Cir. 2015) is similarly misplaced. In *Chinatown*, the Ninth Circuit determined that a California statute concerning shark fins did not violate the Dormant Commerce Clause. *Id.* at 1140, 1145. Like a local law prohibiting the sale and consumption of liquor in a "dry" town, the statute at issue in *Chinatown* prohibited possession, consumption and sale of shark fins in California—it did ***not*** prohibit the interstate transportation of shark fins through California for export. *Id*. And, the shark fins covered by the statute were not lawful articles of commerce. *Id.* at 1140. Unlike the coal and coke Ordinance here, the legislation in *Chinatown* was not directed at the interstate and international transportation in lawful goods for sale.

Defendants' reliance on *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013), fares no better. Int. Br. at 3. In fact, *Association des Eleveurs* demonstrates that the Ordinance is an impermissible direct regulation of interstate

commerce. *Association des Eleveurs* involved a California statute providing that "[a] product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." *Id.* at 942 (quoting Cal. Health & Safety Code § 25982). Again, like a liquor law in a "dry" town, the statute prevented sale and consumption of foie gras in California—it did not *not* have the sole purpose and effect of prohibiting an inherently interstate commercial activity. Notably, in analyzing whether the foie gras law directly regulated interstate commerce, the Ninth Circuit recognized that a law that "stop[s] the free flow" of goods is an impermissible direct regulation. *Id.* at 949. The court found the foie gras law did not directly regulate interstate commerce because it did not "affect[] the interstate flow of goods." *Id.* On the undisputed facts here, the Ordinance undisputedly "affect[s] the interstate flow of goods": it prevents the interstate flow of goods (coal and pet coke) for export overseas from Oakland.

Defendants are mistaken that "[n]o matter how significant the alleged out-of-state effects, regulations that apply only to in-state conduct do not regulate extraterritorially." Int. Br. at 3. Defendants quote the Ninth Circuit's explanation that "the key inquiry" for extraterritorial regulation "is whether the practical effect of the regulation is to control conduct beyond the boundary of the state." *Id.* at 2 (quoting *Pharm. Research & Mfrs. of America*, 768 F.3d at 1043). The Ninth Circuit's decision in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (*see* Int. Br. at 3),[2] further elaborates that when determining the practical effect of the law, the court must "consider not only the direct consequences of the statute itself, but also how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* at 1101.

Here, the Ordinance regulates transactions across state and local borders, and extraterritorially, by stopping producers of coal in Utah from putting coal on a train to Oakland so as to export it to Asia. Mtn. at 13. Moreover, the Ordinance requires railroads (which absent the Ordinance would transport coal and pet coke to Oakland for export overseas) to conform their

[2] Defendants also cite *Rocky Mountain* to argue that the Ninth Circuit determined that fuel "standards that apply only to fuels consumed in state did not regulate extraterritorially." Int. Br. at 3. *Rocky Mountain* did not involve a municipal ban on interstate transportation of a lawful article of commerce for export. It instead involved emissions standards that applied to the production of "fuels … consumed in California." *Rocky Mountain Farmers Union* at 1079-80.

cargo to the Ordinance at their out-of-state points-of-origin, since coal and petcoke may not be transferred from that train to ships engaged to take them to foreign ports. The effect if every local government adopted laws similar to the Oakland Ordinance here is obvious: neither coal nor petcoke could be exported from the United States at all—from *any* city or state.

Defendants are accordingly incorrect (Int. Br. at 2-3) that *NCAA* "shows why the Ordinance does *not* regulate extraterritorially." The Nevada law at issue in *NCAA* facially applied to conduct in Nevada, but, in practical effect, required the NCAA to "regulate the integrity of its product in every state" in accordance with Nevada law. *NCAA*, 10 F.3d at 639. The Ordinance here does the same. While the Ordinance facially applies to conduct in Oakland, it requires (a) coal producers in every state where coal is mined to design their exports around the Oakland Ordinance; and (b) railroads from every state to conform their cargo according to the Ordinance if they are to export goods through Oakland. By contrast, the stewardship program, shark fin and foie gras laws in *Pharmaceutical Research*, *Chinatown* and *Association des Eleveurs* did *not* require merchants and railroads from every (or any) other state to design their interstate and export shipments around local laws.

(c) **Long-Standing Precedent Requires Judgment for OBOT**

Defendants remark that OBOT cited "century-old cases" (Int. Br. at 4) as if to suggest that these long-standing Supreme Court precedents are not good law. To the contrary, the law providing that a city or state cannot block lawful goods from travelling in interstate and international commerce is so well-settled that these types of Dormant Commerce Clause cases simply do not arise frequently today—and certainly do not reach the Supreme Court. On the one other occasion in recent times (that the parties have been able to identify) when a city passed an ordinance that blocked interstate and international shipping, a United States district court granted the plaintiff summary judgment on its DCC claim. *Pittston Warehouse Corp. v. City of Rochester*, 528 F.Supp. 653, 664 (W.D.N.Y. 1981). That decision, too, relied upon "century-old cases." *See, e.g.*, *id.* at 659-60. In *Pittston*, the court recognized that a purported "public health, safety and welfare" ordinance and resolution banning "roll-on/roll-off trailer ship service" had the "practical operation" of "exclud[ing] commercial and cargo shipping from the Port of Rochester." 528 F.

Supp. at 558, 660.[3] The court recognized this purported health and safety regulation "***directly block[ed]*** the free flow of interstate and foreign commerce by prohibiting the port to be used for commercial interstate and international shipping activities." *Id.* at 660 (emphasis added). The court held that the law was a per se violation of the Dormant Commerce Clause, concluding that the "nation's interest in the free flow of commerce must remain paramount; it must not be burdened by parochial local legislation which seeks to halt commerce and thereby unilaterally redefine a city as an independent economic unit, separate and apart from federal polity."[4]

Defendants fail to recognize that the Supreme Court and Ninth Circuit have reaffirmed these principles in more recent times. Defendants ignore, for example, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978), in which the Supreme Court contemplated that a state or local law that "prohibit[s] the flow of interstate goods" is per se invalid under the DCC. And Defendants ignore the Ninth Circuit's recent reliance upon the same "century-old" authority as OBOT relies upon—*Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898)—which the Ninth Circuit cited in 2013 in recognizing that a law that "stop[s] the free flow" of goods is an impermissible direct regulation of interstate commerce. *Association des Eleveurs*, 729 F.3d at 949; *see also Pharm. Research & Mfrs. of America*, 768 F.3d at 1043 (2014) ("Direct regulation occurs when a state law directly affects transactions that take place across state lines . . . .").

The Ordinance is a direct regulation of interstate and foreign commerce as a matter of law.

2. The Ordinance Discriminates Against Interstate Commerce

Defendants also fail to rebut OBOT's showing (Mtn. at 16-17) that the Ordinance is a per

[3] The court recognized the obvious fact, also relevant here, that "[t]ransportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination." *Id.* at 660 (internal quotation marks and citation omitted).

[4] The court in *Pittston* characterized the local law, which "place[d] an impermissible burden around the borders of the City, barring trade with Canada and inhibiting interstate commerce," as a DCC violation because it "discriminate[d] against interstate and international commerce carried by ships docking at the port." *Id.* at 662. Whether seen as a "direct regulation" or "discrimination against interstate and international commerce," the Ordinance here, as in *Pittston*, is a per se violation of the DCC. *E.g.*, *S.D. Myers, Inc.*, 253 F.3d at 466 (quotation marks and citation omitted) ("When a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck [it] down . . . ."); *NCAA*, 10 F.3d at 638 (statute that "directly regulates" or "discriminates against interstate commerce . . . violates the Commerce Clause per se . . . .").

se violation of the Dormant Commerce Clause because it discriminates against interstate and foreign commerce. Defendants mainly argue (Int. Br. at 5) that "[t]he Ordinance does not discriminate because no in-state entities benefit at the expense of out-of-state competition," but this argument conflates discrimination against interstate or foreign commerce with discrimination against out-of-state interests. As OBOT explained (Mtn. at 16 n.28), while courts sometimes conflate discrimination against interstate commerce and discrimination against competing out-of-state interests, these two forms of "discrimination" are separate grounds for a per se violation of the Dormant Commerce Clause. *See NCAA*, 10 F.3d at 638 (noting that courts "must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; ***or*** 3) favors in-state economic interests over out-of-state interests") (emphasis added).

Because Defendants conflate discrimination against interstate and foreign commerce with discrimination against competing out-of-state interests, Defendants' contention (Int. Br. 6) that "the undisputed evidence shows that [the exempted in-state entities] all *consume* coal or petcoke, and thus do not *compete* with marine terminal landlord OBOT or any out-of-state coal producers" is immaterial. The Ordinance discriminates *against interstate and foreign commerce* by banning interstate rail transportation of coal and petcoke for export through Oakland, in favor of local entities that are *not* engaged in this inherently interstate and international activity. Mtn. at 17.[5]

Defendants attempt to distinguish *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (Int. Br. at 6-7), but ignore their critical language. As shown (Mtn. at 16), *Wyoming* recognized that a law amounting to "simple economic protectionism" is per se invalid, 502 U.S. at 454-55, and *Philadelphia* explained that "the clearest example" of such a law "is a law that overtly blocks the flow of interstate commerce," 437 U.S. at 624. And Defendants have no response to *Pittston*—which relied on *Philadelphia* in holding that an ordinance and resolution blocking commercial shipping at the Port of Rochester were per se invalid under the DCC—other than to suggest that the court did not offer sufficient explanation for its decision. *See* Int. Br. at 7. On the contrary, even though the citizens of Rochester wanted to

[5] Defendants also cite *Pharmaceutical Research* (Int. Br. 6), but that case mentioned competition in analyzing alleged discrimination between in-state and out-of-state interests—not discrimination against interstate commerce. *See* 768 F.3d at 1041-42.

protects its scenic waterfront, the district court quoted the Supreme Court to explain: "The purpose in this [DCC] is to protect commercial intercourse from invidious restrains, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it." *Id.* at 660 (quoting *Pa. v. W.Va.*, 262 U.S. 553 (1922)).

In sum, Defendants fail to rebut OBOT's showing that the Ordinance bans interstate and foreign commerce in coal and petcoke, while exempting in-state interests from the adverse consequences of the ban (Mtn. at 17), and the Ordinance thus impermissibly discriminates against interstate and foreign commerce as a matter of law.

Defendants concede that it is an "unremarkable proposition that Congress's Commerce Clause authority extends to regulating the interstate sale of coal." Int. Br. at 4 n.2. Yet, Defendants fail to refute OBOT's showing that the Ordinance has the undisputed purpose and effect of regulating "the interstate sale of coal"—*i.e.*, preventing overseas exports of coal from Utah (and elsewhere) from Oakland. Whether conceived of as a "direct regulation" or "discrimination against" interstate commerce, the Ordinance is a per se violation of the DCC.

B. The Ordinance Violates the DCC Because It Unduly Burdens Interstate Commerce by Undermining National Uniformity in Rail Regulation

Defendants are also unable to rebut OBOT's showing (Mtn. 17-20) that—in the event the Court reaches the second tier of the Dormant Commerce Clause analysis—the Ordinance unconstitutionally burdens interstate commerce by undermining the necessary uniformity in rail transportation regulation. Instead, Defendants argue that an ordinance that undisputedly prohibits a locomotive from pulling rail cars over a portion of the "last mile" of track in an interstate rail journey to unload the train's cargo "has nothing to do with regulating railroads." Int. Br. at 7.

1. "Owner of a Coal or Coke Bulk Material Facility" Undisputedly Includes Any Rail Carrier That Handles Coal or Coke

Defendants first argue that the Ordinance "has nothing to do with" rail transportation because it only regulates an "Owner or Operator" of a "Coal or Coke Bulk Material Facility." Int. Br. at 8. The Ordinance, however, defines a "Coal or Coke Bulk Material Facility" to include "an

existing or proposed source, site, or facility, including all contiguous land, structures, other appurtenances, and improvements thereon, or any part thereof, where Coal or Coke is or may be Stored or Handled." Ex. 1 (Ordinance) at § 8.60.030(A)(4). And "Owner or Operator means any person who has legal title to any Coal or Coke Bulk Material Facility, who has charge, care or control of any Coal or Coke Bulk Material Facility, who is in possession of any Coal or Coke Bulk Material Facility or any part thereof, and/or who is entitled to control or direct the management of any Coal or Coke Bulk Material Facility." *Id.* § 8.60.030(A)(9). In other words, if a rail carrier (or anyone working on its behalf) handles coal or petcoke in Oakland, it is regulated by the Ordinance. The City's 30(b)(6) witness confirmed this inescapable conclusion:

> "Q. So the Ordinance prevents any rail carrier from handling coal and petcoke at a rail terminal in Oakland; fair? . . . .
>
> THE WITNESS: At a facility including a rail terminal, if by the definition of 'rail terminal' you mean once the train stops and the stuff -- the coal and petcoke get unloaded, stored, and otherwise handled."

Ex. 25 (Cappio Tr.) at 59:13-21.[6]

2. "Transportation" Is Undisputedly Not Limited To a Moving Train

Defendants then appear to argue that the Ordinance "has nothing to do with" rail transportation of coal and petcoke because "transportation" of coal and petcoke, they contend, only involves a train moving across a track without interruption—to the exclusion of all other activities undisputedly involved in transporting coal and petcoke by interstate rail for export, such as unloading coal and petcoke for transfer onto a ship, or temporarily storing coal and petcoke to switch and unload rail cars. *See* Int. Br. at 8. In other words, Defendants assume that all trains are trains to nowhere—running continuously with no need to stop and deliver their cargo.

The testimony from the City's 30(b)(6)'s witness that Defendants rely upon (Int. Br. at 9) makes clear that this is Defendant's (untenable) argument—*i.e.*, that the Ordinance does not impact rail "transportation" because it does not prevent trains from passing through Oakland's borders. "There is a difference," the City's 30(b)(6) witness testified, "between transporting coal

[6] As shown (Mtn. at 4), the dump pits at the Terminal are undisputedly on OGRE's right-of-way, and thus any entity—whether it is OGRE, UP or BNSF—exercising "charge, care or control" of OGRE's right-of-way qualifies as an "Owner or Operator" on the face of the Ordinance.

in rail cars and having them pass through a certain area, and having them stop, unload, store, handle and manage coal." Int. Br. at 9 (citing Long Decl. Ex. 43). The City's 30(b)(6) witness testified that the Ordinance does not apply to "just like . . . a trip across the railroad track," but "if it stopped and unloaded and stored and managed and handled coal, yes, it would be subject to the Ordinance." Ex. 25 (Cappio Tr.) at 60:2-17.

The City's 30(b)(6) witness also, however, acknowledged the obvious:

- "Q. If I want to get coal from a train from Point A to Point B, I have to put the coal on the railcar at Point A; correct? A. Yes. Q. Okay. And if I want to transport coal from Point A to Point B, to deliver it to Point B, I have to also be able to take the coal off at Point B; correct? A. Yes." Ex. 25 (Cappio Tr.) at 62:14-22.

- "Q. . . . If you cannot get coal onto a ship, you can't export coal by ship; right? A. Yes." Ex. 25 (Cappio Tr.) at 61:12-15, 62:14-22.

- The Ordinance states that those subject to it "shall not do any of the following . . . Load, unload, transload or transfer 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***." Ex. 25 (Cappio Dep.) at 63:3-17 (emphasis added); *see also* Ex. 1 (Ordinance) § 8.60.040.

- And, accordingly: "Q. . . . [T]he Ordinance prohibits transferring coal and petcoke from a railcar to a ship for export to a foreign country? . . . . Yes." Ex. 25 (Cappio Tr.) at 63:18-22 (objection omitted).[7]

Similarly, Defendants' "rail operations" expert, Steven Sullivan, confirmed that "rail operations" include the "activities . . . through the handling and unloading process of these trains."[8]

Defendants' argument that "the Ordinance could not be clearer in exempting railroads from its ambit" because the Ordinance states that "the purposes and intent of this chapter are not to regulate the transportation of Coal or Coke" (Int. Br. at 8 (citing Ex. 1 (Ordinance) at § 8.60.010)) is thus of no moment. Not only is that self-serving statement completely at odds with the evidence (including other statements in the Ordinance itself) (Mtn. at 13 & n.24)—but, according to the City, that statement applies only to a trip where the train never stops or delivers its cargo so as to transfer it onto a ship for the next leg of its export journey. The Ordinance undisputedly regulates

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

[8] Ex. 9 (Sullivan Tr.) at 124:14-21.

other integral aspects of transporting coal by interstate rail for export overseas—and thereby blocks this rail transportation all together. Mtn. at 11-16; *supra* I.A(1).[9]

3. The Ordinance Undermines National Uniformity in Rail Regulation

By preventing railroads from carrying coal or pet coke to Oakland for export overseas, the Ordinance necessarily undermines the need for substantial uniformity in railroad regulation.

As shown (Mtn. at 19), in *Union Pacific Railroad Co. v. California Public Utilities Commission*, 346 F.3d 851 (9th Cir. 2003), the Ninth Circuit held that California regulations affecting train configuration had an impermissible effect by creating a "patch-work" regulatory scheme that undermined the need for substantial uniformity in rail transportation and thus violated the Dormant Commerce Clause. *Id.* at 871-72. The Ordinance here has the same impermissible effect—by forcing railroads to conform their cargo to the Ordinance at their out-of-state point of origin or to divert any train carrying coal and petcoke for export to terminals outside of Oakland, the Ordinance undermines the need for federal uniformity in regulation of rail transportation. *See* Mtn. at 19-20. Defendants' attempt to distinguish *Union Pacific* thus fails.

Defendants incorrectly maintain (Int. Br. at 10) that *Burlington Northern v. Department of Public Service*, 763 F.2d 1106 (9th Cir. 1985) is "more apt" than *Union Pacific*. *Burlington Northern* involved a Montana statute regulating maintenance and staffing of rail stations in towns of a certain size. *See id.* at 1108-09, 1114. *Burlington Northern* argued that the statute was a violation of the DCC because it unduly burdened the railroad by forcing it to pay what it saw as unnecessary, wasteful costs (due to its new centralized, computerized service centers). *Id.* at 1109, 1114. The Ninth Circuit held that the plaintiffs failed to establish that this burden (wasteful costs) violated the Dormant Commerce Clause. *Id.* at 1114. "Had Montana restricted the frequency and service of interstate trains," the court observed, "a restraint on interstate commerce might be

[9] Moreover, this statement is not an "exemption" as Defendants claim. The actual operative terms of the Ordinance expressly regulate transportation: "shall not do any of the following . . . Load, unload, transload or transfer any Coal or Coke between any mode of ***transportation***, including . . . [a] ***ship or train***." Ex. 1 (Ordinance) at § 8.60.040(B)(4). Even the City's purported "Findings" in the Ordinance confirm its focus on "rail transport," "rail-switching" and "export[s]. *See, e.g.*, Ex. 1 (Ordinance) at § 8.60.020(B)(1)(c)-(d), (f). Further, a party cannot create a genuine issue of material fact by making contradictory statements, or by saying one thing and doing another. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999).

found." *Id.* But a financial "loss to the company does not, without more, suggest that the Montana statute impedes substantially the free flow of commerce from state to state," or demonstrate that the matter regulated by the statute, "because of the need of national uniformity, can only be regulated by the national government." *Id.* (quotation marks and citations omitted).

Here, the Ordinance not only restricts the service of interstate trains carrying coal and petcoke for export, and "impedes substantially the free flow" of these goods, it blocks them entirely—and thus requires rail carriers to conform their cargo to the Ordinance or divert any train carrying coal and petcoke for export to terminals outside of Oakland. Unlike regulations concerning staffing of terminals, regulations concerning what cargo a train can carry along what route within the interstate rail network undisputedly requires "national uniformity." Indeed, even the City's expert in "rail operations" testified that that the "railroad networks are very vast and integrated," and underscored the need for "railroad operations" with different "geographic footprints" to be "closely coordinated." Ex. 9 (Sullivan Tr.) at 7:11-13, 24:17-29:16, 232:2-4.

Unable to credibly dispute that the Ordinance undermines federal uniformity in freight railroad regulation, Defendants assert (Int. Br. 10-11) that OBOT has not "put forth *any* evidence as to how even its hypothetical burden *outweighs* the Ordinance's putative benefits." That misconstrues OBOT's "undue burden" summary judgment argument. As OBOT explained (Mtn. 17-20), where a local law undermines uniformity of regulation in a system of interstate commerce such as the national freight railroad system, it places an unconstitutional burden on interstate commerce that clearly outweighs any purported justification. *See, e.g.*, *S. Pac. Co. v. State of Arizona*, 325 U.S. 761, 775 (1945); *Union Pac.*, 346 F.3d at 872.

4. Defendants Cannot Show A Lack of Dispute on Local "Benefits"

Nevertheless, if this case proceeds to trial, OBOT will also demonstrate how the illusory local health and safety benefits of the Ordinance could not outweigh any burden on interstate commerce (let alone the undue burden of a complete ban on interstate transportation of coal and coke for export from Oakland). Given the competing expert opinions concerning the local health and safety impacts (or lack thereof), *see, e.g.*, Chinkin Decl. ¶¶ 20-28; D.E. 152 (Sahu Decl.) ¶¶ 8-13, however, OBOT did not raise this argument on summary judgment. To the extent Defendants

are arguing that they should be granted summary judgment because the local health and safety benefits outweigh the burden on interstate commerce, their motion should be denied. As shown by the evidence OBOT submitted in support of its motion (which OBOT expressly incorporates by reference in support of its Opposition), Defendants cannot show the absence of a factual dispute as to their contentions that the "burden is outweighed by [the Ordinance's] public health effects" or that "there is no burden." Int. Br. at 10-11.

5. Defendants' Reliance On "Putative Benefits" Dicta Is Misplaced

In arguing that the Court must consider the "putative" not the "actual" benefits of the Ordinance, moreover, Defendants misplace reliance on dicta from *National Association of Optometrists v. Harris*, 682 F.3d 1144 (9th Cir. 2012). In *National Association*, the Ninth Circuit did not even reach the "balancing" test because the plaintiffs there failed to establish that the law at issue significantly burdened interstate commerce. *Id.* at 1154-55 ("Even if *Pike*'s 'clearly excessive' burden test were concerned with weighing actual benefits rather than 'putative benefits,' we need not examine the benefits of the challenged laws because … the challenged laws do not impose a significant burden on interstate commerce.").[10]

In all events, what is relevant for this motion is that *Union Pacific* makes clear that "the burden of requiring potentially conflicting state [or local] standards"—which the Ordinance does with respect to rail cargo—"is constitutionally infirm" no matter the purported local benefits of a given law. *See* 346 F.3d at 872. Summary judgment should be granted to OBOT on this additional ground.

II. THE ORDINANCE IS PREEMPTED BY ICCTA

The City also fails to refute OBOT's showing that the Ordinance is preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 1101 *et seq.* In fact, Defendants must acknowledge that "ICCTA regulates the business and operation of the rail industry." City Br. at 25. And that is exactly what the Ordinance does, by prohibiting rail carriers

[10] The court in *National Association* noted that "[w]here … a regulation does not regulate activities that inherently require a uniform system of regulation and does not otherwise impair the free flow of materials and products across state borders, there is not a significant burden on interstate commerce." 682 F.3d at 1154-55. The Ordinance here, by contrast, does both—clearly demonstrating the significant burden it places on interstate and foreign commerce.

from transporting coal and petcoke in interstate commerce for export from Oakland. Indeed, the very fact that if this Ordinance is upheld, Union Pacific and BNSF Railroads will never bring coal or pet coke through the Terminal proves the point. The Ordinance regulates "transportation by rail carrier" under ICCTA, and it is accordingly preempted.

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

As demonstrated (Mtn. at 22-26), the Ordinance regulates "transportation by rail carrier"—which is subject to the Surface Transportation Board's ("STB") jurisdiction under ICCTA—because all three statutory prongs under 49 U.S.C. § 101501(a) are met:

- **Transportation:** ICCTA defines "transportation" broadly, as encompassing: "a locomotive, … yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use" and "services related to that movement including receipt, delivery, elevation, transfer in transit, . . . storage, handling, and interchange of … property." 49 U.S.C. § 10102(9)(A)-(B).

  . . . by Rail Carrier: ICCTA defines "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Where a short line carrier "contracts with . . . a large interstate railroad . . . to undertake the last leg of transportation," it "meet[s] the conventional definition of common carrier." *See Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46-47 (1st Cir. 2008). Further, "work done by a non-carrier can be considered activity 'by a rail carrier' if there is a sufficient degree of integration between the work done by the non-carrier and the authorized rail carrier's own operations." *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1074 (9th Cir. 2016). The overarching consideration is "whether the non-carrier's activities are 'an integral part of the rail carrier's provision of transportation by rail carrier." *Id.*

- **. . . As Part of The Interstate Rail Network:** The STB's jurisdiction extends to "transportation" that is "part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A). The Ninth Circuit has applied the STB's definition of "interstate rail network," which "broadly . . . include[s] (but [is] not . . . limited to) facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce." *Or. Coast*, 841 F.3d at 1075 (alteration, internal quotation marks and citation omitted).

On the undisputed facts, the Ordinance thus regulates "transportation by rail carrier" since it regulates, among other things, the unloading, temporary storage and transferring from train to ship of coal and petcoke for export. Ex. 1 (Ordinance) at § 8.060.40; Mtn. at 24; Section II.A, *supra*.

1. "Owner of a Coal or Coke Bulk Material Facility" Includes "Rail Carriers" Under ICCTA That Handle Coal or Coke

Unable to produce evidence to create a disputed issue of fact on OBOT's ICCTA claim, Defendants again argue that the Ordinance "does not regulate transportation *by* rail carriers" because it regulates only the "Owner or Operator of a Coal or Coke Bulk Material Facility"—and "TLS" (they state) "is the proposed 'Owner or Operator of a Coal or [Coke] Bulk Material Facility." City Br. at 25. As shown in Section I.B(1), *supra*, the plain text of the Ordinance makes clear, and the City has confirmed, that any and all "rail carriers" who handle coal or petcoke fall squarely within the Ordinance's definition of an "Owner or Operator of a Coal or Coke Bulk Material Facility"[11]—and are accordingly subject to all of the Ordinance's prohibitions on unloading, loading, storing, transferring between a "ship or train" and otherwise handling coal and petcoke. Ex. 1 (Ordinance) at § 8.60.040; Ex. 25 (Cappio Dep.) at 63:3-17; Mtn. at 21.[12]

Moreover, those who perform activities that are an "integral part of the rail carrier's provision of transportation by rail carrier" are performing "transportation by rail carrier" under ICCTA as well, because it would be "absurd" if railroads could divest the STB of jurisdiction by hiring contractors to perform essential rail services. *Or. Coast*, 841 F.3d at 1074.

Here, there is no dispute that OGRE, UP or BNSF, will perform the "rail operations" (including unloading, transferring, storage and other handling) necessary to get the coal and petcoke from the entrance to the West Gateway, across the rail right of way and into the dump pits on that rail right of way, so that these goods can be transferred onto ships to complete their export journey by water. City Br. at 27 ("OGRE, UP, or BNSF would move the rail cars through the dump pit area, then empty, clean, and return them . . . ."); Mtn. at 12 (and evidence cited therein). In fact, it is undisputed that the unloading of coal (that is prohibited by the Ordinance) will be performed by a UP, BNSF or OGRE locomotive pulling the train cars over the dump pits located

[11] "Coal or Coke Bulk Material Facility" includes "an existing or proposed source, site, or facility, including all contiguous land, structures, other appurtenances, and improvements thereon, or any part thereof, where Coal or Coke is or may be Stored or Handled." Ex. 1 (Ordinance) at § 8.60.030(A). Railroad tracks and rights of way fall within that definition.

[12] Defendants even admit that if the "Union Pacific Railroad decided to build a railroad terminal in Oakland and that terminal [were] to handle coal," it would be "subject to the prohibitions regarding coal and petcoke in the Ordinance." Ex. 25 (Cappio Tr.) at 58:23-59:12.

on the rail right of way across the West Gateway. Mtn. at 12 (and evidence cited therein).[13]

Under ICCTA, the STB has jurisdiction over "transportation by rail carrier" that is "only by railroad" and "by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a).[14] By banning the functions necessary to transport coal and pet coke "only by railroad" and "by railroad and water," the Ordinance plainly regulates "transportation by rail carrier" under ICCTA.

2. Rail "Transportation" Under ICCTA Is Undisputedly Not Limited To When the Train Is Moving

Defendants also recycle their argument that the Ordinance does not regulate "transportation by rail carrier" because the Ordinance says it doesn't. City Br. at 26. As shown above, this argument fails because it assumes that "transportation" includes only an uninterrupted trip "across the tracks" in which the train never stops, unloads or transfers its cargo to a ship for export. Section I.B(2), *supra*. That argument is even more frivolous in the ICCTA preemption context, where "transportation" is expressly defined by the statute to include the very things that the Ordinance regulates. *Compare* 49 U.S.C. § 10102(9)(A)-(B) ("transportation" means "a locomotive, … yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail . . . ." and "services related to that movement including receipt, delivery, . . . storage, handling, and interchange of … property") *with, e.g.*, Ex. 1 (Ordinance) at § 8.60.040(B) ("shall not . . . 4. Load, unload, transload or transfer any Coal or Coke between any mode of transportation, including without limitation . . . a truck[], ship or train").

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[13] Defendants' argument that "OGRE is not an STB-licensed rail carrier" (City Br. at 28) is unavailing. As Defendants acknowledge (*see* City Br. at 26), being a STB-licensed carrier is not the test for being a "rail carrier." The test is whether the carrier provides "common carrier" transportation for compensation, 49 U.S.C. § 10102(5), ***or*** whether "there is a sufficient degree of integration between … work done by [a] non-carrier and [an] authorized rail carrier's own operations" *Or. Coast*, 841 F.3d at 1074. As OBOT demonstrated (Mtn. 24-26), both tests are met. Even if OGRE were not a rail carrier, its services on behalf of UP and BNSF are "essential" to UP and BNSF's provision of "transportation by rail carrier." *See Or. Coast*, 841 F.3d at 1074.

[14] As shown, the coal producer owns the coal from the time it is mined, throughout its transportation by rail carrier through the Terminal and until the "hatch on the ship [closes] and the ship sails." Ex. 7 (Bridges Tr.) at 105:2-14; *see also* Ex. 6 (Wolff Tr.) at 57:14-59:1. At that point, the ownership transfers to the customer abroad. Ex 7 (Bridges Tr.) at 105:2-15.

3. The Ordinance Necessarily Regulates "Transportation by Rail Carrier"

The City then incorrectly argues (City Br. at 28) that the "still-speculative nature of various project arrangements"—including the lack of a final inter-track agreement between OGRE and UP or BNSF—means that it cannot be determined whether conduct that the Ordinance regulates is "transportation by rail carrier." That argument fails on numerous grounds. *First*, Defendants expressly admit that "OGRE, UP, or BNSF would move the rail cars through the dump pit area, then empty, clean, and return them . . . ." City Br. at 27. *Second*, it cannot credibly be disputed that UP and BNSF will have to perform—or have another entity like OGRE perform—the switching, unloading, and other handling necessary to transfer the coal and petcoke from the rail cars onto the ships so that these goods can complete the next leg of their journey by sea.[15] Otherwise, these Class I long haul carriers would fail to comply with their common carrier obligation to carry the coal and petcoke from their point of origin to the ships engaged to carry these goods overseas. *See* Ex. 7 (Bridges Tr.) at 105:2-14; *see also* Ex. 6 (Wolff Tr.) at 57:14-59:1. In other words, the Ordinance regulates conduct that, by definition, regulates "transportation by rail carrier." *Third*, there cannot be a final inter-track agreement precisely because the City passed an unconstitutional Ordinance preventing it. The City cannot avoid a preemption finding by regulating specific rail operations out of existence.[16] Moreover, Defendants ignore the several existing, executed agreements that OGRE has with UP and BNSF, which govern the switching services that OGRE already performs on behalf of UP and BNSF. Mtn. at 25 & n.35; *see also id.* at 3-4 & n.6 ("OGRE's operations presently include switching cars for UP and BN's manifest

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[15] *See, e.g.*, Ex. 9 (Sullivan Tr.) at 144:15-25 (unloading coal involves "pulling the train over the dump pits" by locomotive), 147:17-148:1 ("Q. . . . [T]he railcar unloading process necessarily includes switching unloaded cars to other tracks to facilitate the unloading of more cars; is that right? A. That's correct. Q. And then the railcar unloading process also necessarily includes securing unloaded cars to be left unattended . . . ? A. That's correct."), 124:14-21 ("rail operations" include "activities . . . through the handling and unloading process of these trains . . ."); Ex. 7 (Bridges Tr.) at 105:2-14 (ownership transfers when goods are on ship).

[16] Notably, the Ninth Circuit in *Union Pacific* held that the California regulations at issue, which imposed performance-based standards for train configuration, were unconstitutional based solely on the regulations' *hypothetical* extraterritorial effects. 346 F.3d at 871-72. The Court expressly recognized that the performance-based standards had not yet issued, but nonetheless held those standards unconstitutional "because it [was] clear that any standard required would impermissibly burden interstate commerce." *Id.* at 872 n.22.

traffic ….").[17] *Fourth*, the Ninth Circuit has explicitly rejected that any "agency" relationship is required between a carrier and non-carrier in order for transportation to be conducted "by or under the auspices of a rail carrier." *Or. Coast*, 841 F.3d at 1074.

Put simply, the Ordinance necessarily regulates "transportation by rail carrier" by prohibiting the "rail operations" required to transport coal and pet coke "only by railroad" and "by railroad and water" for export to customers overseas.[18]

4. Defendants Do Not Dispute That The Relevant Rail Line Is "Part of The Interstate Rail Network"

Defendants do not dispute that the rail line over which OGRE—or UP or BNSF—will operate to deliver coal and petcoke to ships at the Terminal is part of the "interstate rail network." *Compare* Mtn. at 26, *with* City Br. As shown, therefore, all three statutory requirements for STB jurisdiction over "transportation by rail carrier" under 49 U.S.C. § 10501(a) are met.

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

The City then fails to rebut OBOT's showing that the Ordinance falls squarely within the express preemption provision of ICCTA, which grants the STB "exclusive" jurisdiction over "transportation by rail carriers," 49 U.S.C. § 10501(b)(1)—and, indeed, "all state laws that may reasonably be said to have the effect of managing or governing rail transportation." *Or. Coast*, 841 F.3d at 1077 (quoting *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt.*, 622 F.3d 1094,

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[17] The City wrongly suggests that *Fayard v. Ne. Vehicles Services*, 533 F.3d 42 (1st Cir. 2008) does not apply because the plaintiffs' argument that the "last-mile" carrier in that case did not constitute a "rail carrier" was not timely, and because the STB has yet to consider whether OGRE is a rail carrier. *First*, the timing of the plaintiffs' argument in *Fayard* is immaterial, since the First Circuit elected to address it. *Id.* at 46-47. *Second*, the First Circuit made that determination *independent* of the STB's determination. *See id.* at 47 & n.4. Indeed, if the STB's determination were dispositive then there would have been no need for the court to consider the short-line railroad's contract with the common carrier.

[18] That is why, among other reasons, the rail-to-ship activities at the West Gateway are critically "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." City Br. 30. The coal and petcoke are undisputedly being transported by rail, through the Terminal, onto ships as part of an "arrangement for a continuous carriage or shipment" to customers overseas. 49 U.S.C. § 10501(a). In other words, the shipment of coal and petcoke from Utah to Asia is "transportation by rail carrier" under ICCTA from at least the moment the coal or petcoke is loaded onto the rail cars in Utah to at least the time they are loaded onto the ships. When an Amazon warehouse receives the goods the "transportation" is complete.

1096 (9th Cir. 2010); *see also N.Y. Susquenhanna*, 500 F.3d at 252 (3d Cir. 2007).

First, Defendants repeat that the Ordinance—which stops UP, BNSF and OGRE from carrying coal and pet coke for export through the Terminal[19]—"does not regulate the operations of UP/BNSF or OGRE" (City Br. at 32) but instead is a "garden variety" (Int. Br. at 1) "health and safety"[20] provision that is not expressly preempted by ICCTA. For all of the reasons set forth herein and OBOT's motion (Mtn. at 28-30), that argument defies the law and undisputed facts.

Second, Defendants offer no response to OBOT's showing that the Ordinance is preempted under 49 U.S.C. § 10501(b)(2) because it indisputably affects operation of spur or switching tracks and facilities at the Terminal. Mtn. at 27. The City thus fails to rebut that the Ordinance is "squarely within [ICCTA's] preemption provision" for this reason as well. *Or. Coast*, 841 F.3d at 1076.[21]

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[19] *See, e.g.*, Ex. 9 (Sullivan Tr.) at 144:15-25 (unloading coal involves "pulling the train over the dump pits" by locomotive), 147:17-148:1 ("Q. And then the railcar unloading process also necessarily includes securing unloaded cars to be left unattended . . .? A. That's correct."), 124:14-21 ("rail operations" are "through the handling and unloading process of these trains").

[20] The City argues (City Br. at 31) that "Congress did not intend the ICCTA to usurp the States' traditional state police powers 'outside the regulated field'" but the Ninth Circuit rejected an identical argument in *City of Auburn v. U.S. Govt.*, 154 F.3d 1025, 1031 (9th Cir. 1998). Like the City here, the City of Auburn argued that its environmental permitting requirements were "a 'traditional state police power' that Congress did not intend to preempt" in passing ICCTA. *Id.* The Ninth Circuit disagreed, holding that "the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute" and that "the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA." *Id.* The City's argument that the Ordinance is not preempted because it is an exercise of the police power is thus foreclosed by *City of Auburn*.

[21] The City attempts (City Br. at 32-33 n.42) to distinguish *Oregon Coast*, mischaracterizing that case as holding that a "State's cease and desist letter … had the 'effect of' regulating rail transportation." In fact, *Oregon Coast* held that an Oregon "removal fill law"—which required a state permit for removal of material from waters designated as salmon habitat—was preempted because, like the Ordinance here, it had "the effect of managing or governing rail transportation." 841 F.3d at 1077 (quotation marks omitted). The City also cites *CFNR Operating Co. v. City of Am. Canyon*, 282 F. Supp.2d 1114 (N.D. Cal. 2003), but that case merely held that the plaintiff was unlikely to succeed on the merits of its claim that the defendant-city's resolution, which denied an application for a conditional land use permit, was preempted by ICCTA. *Id.* at 1116, 1118-19. Unlike the Ordinance here, the resolution at issue in *CFNR Operating Co.* "did not prevent anyone from running a rail operation or otherwise interfere with or attempt to regulate rail operations." *Id.* at 1118. Likewise, *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), merely held that a zoning ordinance of general applicability "enforced against a private entity leasing property from a railroad for non-rail transportation purposes, [was]

Ultimately, Defendants concede that "preemption is fundamentally a question of congressional intent." City Br. at 24. As shown, expanding federal preemption of state regulation of rail transportation was one of Congress's primary purposes in enacting ICCTA. Mtn. at 24-25. In fact, ICCTA's express preemption provision is so broad that the Ninth Circuit has stated that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroads." *City of Auburn v. U.S Gov't*, 154 F.3d 1025, 1030 (9th Cir. 1998). An ordinance with the purpose and effect of stopping trains from carrying coal and pet coke in interstate commerce for export must fall within that broad declaration of federal authority.

III. THE ORDINANCE IS PREEMPTED BY THE HMTA

The City is also unable to overcome OBOT's demonstration (Mtn. at 27-29) that the Ordinance is preempted by the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101 *et seq.* The City's only response is that HMTA preemption can only apply if the Department of Transportation has designated a material as "hazardous." City Br. at 33. Defendants' own chosen authority demonstrates that is wrong.

Defendants rely upon an agency notice from the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). City Br. at 34. Quoting the agency notice, Defendants maintain that "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.* But Defendants ignore that, in the very next paragraph—the PHMSA recognized the "exception to this general principle … where the non-Federal requirement ***purports to broaden the category of hazardous materials to include materials that are not regulated under the [HMTA regulations]***." (citing 74 Fed. Reg. 46644, 46653 (Sept. 10, 2009) (emphasis added).[22]

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not sufficiently linked to rules governing operation of the railroad" and thus was not preempted. *Id.* at 1331. And in *In re Valero Refining Company*, 2016 WL 5904757, at *1, *3 (S.T.B. Sept. 20, 2016), the STB determined that an administrative decision denying a conditional use permit for an off-loading facility was not preempted because the record did "not demonstrate that [the petitioner] is a rail carrier or … is performing transportation-related activities on behalf of UP or any other rail carrier at its off-loading facility." Here, by contrast, the Ordinance regulates OGRE's last-mile activities performed on behalf of UP and BNSF. *Supra* II; Mtn. at 22-26.

[22] The City also cites *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995), but in that case, the Supreme Court considered the express preemption provision of the National Traffic and Motor

Congress vested authority to designate what are hazardous materials in the Secretary of Transportation, upon a determination "that transporting the material in commerce . . . may pose an unreasonable risk to health and safety or property." 49 U.S.C. § 5103(a). That is exactly what the Ordinance seeks to do—designate coal and petcoke as materials that pose "an unreasonable risk to health and safety or property" such that they may not be transported by interstate rail for export from Oakland. Indeed, the City's purported health and safety "Findings" concern alleged impacts from the "rail transport" of coal and petcoke. Ex. 1 (Ordinance) at § 8.60.020(B)(1)(c) ("The rail transport of Coal or Coke . . .would have substantial public health and safety impacts . . . ."); *see also* Ex. 45 (ESA Report) at Table 5.7 (emission estimates based predominantly on purported emissions from the "rail transport" of coal and petcoke). And the effect of such inconsistent designations on a "vastly integrated" rail network is obvious: any railroad will have to conform its cargo to the Ordinance or divert any train carrying coal and petcoke for export to terminals outside of Oakland—defeating the "major purpose of the HMTA" to develop "a uniform, national scheme of regulation regarding the transportation of hazardous materials." *Chlorine Inst., Inc. v. Cal. Highway Patrol,* 29 F.3d 495, 496-97 (9th Cir. 1994) (internal quotation marks omitted).

The City's designation of coal and petcoke as materials too hazardous for rail operations is not "substantively the same" as the DOT's. The Ordinance is expressly preempted by the HMTA.

IV. THE ORDINANCE IS PREEMPTED BY THE SHIPPING ACT

The City is likewise unable to rebut OBOT's showing that the Ordinance is preempted by the Shipping Act, 46 U.S.C. §§ 40101-41309. Defendants argue (City Br. at 36) that the Ordinance does not require a marine terminal operator to violate 46 U.S.C. § 41106(2). But OBOT's preemption claim is not based on 46 U.S.C. § 41106(2). It is based on 46 U.S.C. § 41106(1), which provides that "[a] marine terminal operator may not … unreasonably discriminate in the provision of terminal services."

Defendants' contention (City Br. at 36) that "[e]ven under … *Reed v. City of San*

Vehicle Safety Act of 1966, which, by its terms, only applied "[w]henever a Federal motor vehicle safety standard … is in effect." The HMTA's preemption provision contains no such limiting language. The City also relies on *Waering v. BASF Corp.*, 146 F. Supp.2d 675, 681 (M.D. Pa. 2001), but it considered whether common law ***claims*** are preempted by the HMTA—not whether a local government's inconsistent designation of a "hazardous material" was preempted.

Francisco … the Ordinance would not be preempted" fares no better. The City merely offers (City Br. at 36) the conclusory assertion that "health and safety concerns about combustibility and dust emissions of coal and petcoke" during rail operations "fall within the rubric of transportation conditions" contemplated by the Shipping Act. There is no basis for such a finding.

Because the Ordinance requires any operator of the Terminal to refuse to provide terminal services based on the City's decision that coal and petcoke are politically unpopular, it forces discrimination in violation of 46 U.S.C. § 41106(1). Compliance with both the Shipping Act and the Ordinance is impossible, and the Ordinance is accordingly preempted.

V. THE CITY'S FAILURE TO ACCOUNT FOR THE EFFECT OF OTHER REGULATORY AGENCIES ON THE TERMINAL WAS INSUFFICIENT AS A MATTER OF LAW

A. This Court Reviews *De Novo* Whether The City Breached The DA

The City wrongly contends (City Br. at 11-13) that "OBOT's claim is akin to a petition for writ of [administrative] mandate to reverse a quasi-judicial decision under Cal. Code Civ. Proc. § 1094.5," as the basis for its assertion that the City is entitled to considerable deference under the "substantial evidence" test. But OBOT is not seeking to "reverse" the Resolution. Rather, it alleges that the City *breached the DA*.[23] The City's argument thus rests on a faulty premise to begin with, and, in any event, fails for several additional and independent reasons.

First, unlike this breach of contract action in federal court, a petition for administrative mandamus under Section 1094.5 is only appropriate to challenge an administrative order "made as the result of a proceeding in which by law [(1)] a hearing is required to be given, [(2)] evidence is required to be taken, and [(3)] discretion in the determination of facts is vested in the inferior tribunal." Cal. Code. Civ. Proc. § 1094.5(a); *see Winkelman v. City of Tiburon*, 32 Cal.App.3d 834, 840 (Cal. Ct. App. 1973). The City identifies no law that required it to hold a hearing at which evidence was required to be taken, and which vested fact-finding discretion in the Council. Instead, the proceedings leading up to the City's decision to adopt and apply the Ordinance to the

[23] OBOT alleges that, by adopting and applying the Ordinance to the Terminal without a "public hearing," and in the absence of "substantial evidence" that "failure to do so [would result] in a condition substantially dangerous to … health or safety," the City breached the DA. "Substantial evidence" is the quantum of evidence the parties agreed is necessary for a finding of substantial danger—that contractual term does not impose a standard of review on this Court.

Terminal via the Resolution were required ***by contract***—the Resolution specifically states that "[t]he City Council thus finds and determines that, ***pursuant to DA Section 3.4.2***, the Coal-Coke Ordinance may be applied to the [OBOT] as an exception to any vested right [OBOT] might claim." Ex. 50 (Resolution) at 4 (emphasis added). The City concedes this point on the first page of its brief. *See* City Br. at 1 ("The City commenced a public hearing process ***pursuant to [S]ection 3.4.2*** to consider whether to impose new regulations to prevent substantially dangerous health and safety conditions."). Because the City was attempting to perform its contractual obligations under Section 3.4.2, the administrative mandamus statute is by its terms inapplicable.

Second, administrative mandamus is only appropriate to challenge a decision made "when [an administrative] body is acting in a quasi-judicial function," *Winkelman*, 32 Cal.App.3d at 840, and the City fails to establish that adoption of the Resolution was a "quasi-judicial" decision. "Quasi-judicial power is defined as [a]n administrative agency's power to *adjudicate the rights of those who appear before it*." *People ex rel. Lockyer v. Sun Pac. Farming*, 77 Cal.App.4th 619, 636 (Cal. Ct. App. 2000) (emphasis added and internal quotation marks omitted). Here, the City did not "adjudicate" the rights of any party "appearing before it," in part because there were no "parties" appearing before it at the June 27, 2016 hearing. In fact, quite unlike adjudication of parties' rights, the City itself has characterized City Council resolutions as mere "policy statement[s] clarifying the council's position." Ex. 69 (Cappio Tr.) at 125:25-126:8. Here, plaintiff claims a breach of a development agreement—not an appeal of a quasi-judicial decision. *See Mammoth*, 120 Cal.Rptr.3d at 812-15; *300 DeHaro St. Investors v. Department of Housing. & Community Development*, 161 Cal. App. 4th 1240, 1254-57 (2008) (action for breach of contract, rather than mandamus, was proper where agency decision concerned a provision of a contract).

The Court of Appeal's decision in *300 DeHaro* is instructive regarding the correct standard of review. Recognizing that "[a]s a general proposition, mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity," the Court of Appeal in *300 De Haro* held that the plaintiff-developer could sue the Department of Housing and Community Development ("Department") for breach of contract rather than pursue administrative mandamus. 161 Cal.App.4th at 1254, 1257. Explaining that "the Department *chose* to enter into a written

contract with the plaintiff," and thus "agreed that both parties to the contract would have certain remedies for a breach of contract by the other," the court ruled that the plaintiff was entitled to "pursue its claim in an action for breach for contract," in which general contract principles would apply.[24] *See id.* at 1253, 1256; *accord, Guntert v. City of Stockton*, 43 Cal. App. 3d 203, 213-17 (Cal. Ct. App. 1974) (city's enforcement of a resolution constituted breach of contract).

Finally, even if the standard of review for an administrative mandamus action did apply here (it does not), the City still gets it wrong. The City relies (City Br. at 11) on *Strumsky v. San Diego County*, 520 P.2d 29, 44 (Cal. 1974), but that case *expressly* contradicts the City's position:

> [i]f the order or decision of the agency [challenged under Section 1094.5] substantially affects a fundamental vested right, the trial court, in determining under [S]ection 1094.5 whether there has been an abuse of discretion because the findings are not supported by the evidence, ***must exercise its independent judgment on the evidence*** and find an abuse of discretion if the findings are not supported by the weight of the evidence.

Because the Resolution impairs vested rights conferred on OBOT by the DA, *see* D.E. 71 at 1-2 (Order re: City's Mtn. to Dismiss), this Court would be required to exercise its "independent judgment" even if the administrative mandamus standard did apply. The City's argument that it is entitled to deference under the "substantial evidence" standard is thus entirely without merit.

B. *Stewart* and *Davidson* Apply Here

The City is also incorrect (City Br. at 13) that *Davidson v. County. of San Diego*, 49 Cal. App. 4th 639 (1996) and *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410 (2016), "are inapt." In its Opening Brief, OBOT relied (Mtn. at 30) on *Davidson* and *Stewart* for their holdings that a municipality may impair a vested right by subsequent regulation only if the regulation is "sufficiently necessary". *See Davidson*, 49 Cal. App. 4th at 650; *Stewart*, 248 Cal. App. 4th at 420. In this case, because there are other agencies and laws that protect against any substantial danger the Terminal might otherwise pose, and because the City fails to consider other

[24] The City is also incorrect (*see, e.g.*, City Br. at 15 n.23) that no new evidence is permitted. *See, e.g.*, *Bright Development v. City of Tracy*, 20 Cal.App.4th 783, 795 (Cal. Ct. App. 1993) ("trial court did not err in allowing [new] declarations to be received in evidence" where "it does not appear there were any quasi-judicial proceedings whatsoever"); *see also Mammoth Lakes*, 191 Cal.App.4th at 441 ("[t]he Developer established a breach attributable to the Town by evidence of the actions of town officials"); *Border Business Park, Inc. v. City of San Diego*, 142 Cal.App.4th 1538, 1562 (2006) (noting that "the breach of contract cause of action was submitted to the jury based on evidence of breaches of the development agreement" by the city).

laws or regulations, the Ordinance and Resolution are not "sufficiently necessary." *See* Mtn. at 30-39 and Section V.C, *infra*. In response, the City makes another of its misguided arguments that make no sense, suggesting (City Br. at 13) that *Davidson* and *Stewart* do not apply here because they involve "the scope of a public agency's common law authority to abrogate a vested right" and that "[i]f 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." The City misses the point entirely. As *Stewart* held, vested rights may be obtained by (i) performing substantial work in good faith reliance on a permit (the "common law" rule), (ii) a development agreement or vesting tentative map, or (iii) by local "permit-vesting" ordinance. *See Stewart*, 248 Cal. App. 4th at 418. Nothing in *Stewart* or *Davidson*—or any other case—even implicitly suggests the "sufficiently necessary" standard applies to one type of vested right but not the others.

Stewart presents striking parallels to this case. There, the City of Oakland "relie[d] on numerous items, including the [Alameda County Public Health Department] letters, statements made at [two public] hearings, the public's letters and petitions, and concerns expressed by local businesses" to pass an ordinance depriving the plaintiff of a vested right to construct a crematorium in East Oakland. *See Stewart*, 248 Cal. App. 4th at 420. The Alameda County Public Health Department addressed "'potential health impacts' of crematoria generally and [the City's] 'understand[ing]' that the planned crematorium in particular would 'emit a range of pollutants,'" and "pointing to the high rates of asthma in East Oakland" and the "existing disproportionate burden of disease." *Id.* at 414. The recitals in the crematorium ordinance stated that the ordinance was "necessary to preserve the public peace, health, welfare or safety and to avoid a direct threat to the health, safety, and welfare of the community," and were based on findings that "crematoria emit particulate matter and other toxic pollutants" and a "[r]egional cremation center in Oakland would impact the total environment of our neighborhoods and backslide efforts to address the cumulative impacts of environmental inequalities in less than fortunate areas of Oakland." *Id.* at 415. *Stewart* and this case share another material similarity: in *Stewart*, the City of Oakland made the foregoing findings despite BAAQMD's having granted authority to construct the crematorium (after requiring certain limitations on operations). *Id.* at 413-14.

On review of the trial court's decision to issue a writ of administrative mandamus against the City, the Court of Appeal in *Stewart* agreed with the trial court that while the City's findings "would easily afford a rational basis for an ordinance applicable to proposed projects if no vested right were implicated," the evidence relied upon was not "'actual evidence' of an effect on the public health or any other sufficiently serious impact on the public welfare necessary to impair a vested right." *Id.* at 423. The court found that the "record [was] full of statements about which chemicals crematoria in general can emit and the public health problems, particularly asthma, that East Oakland residents face" and about "what impacts the crematorium *might* have on the public and local businesses," but contained "no evidence that [the plaintiff's] crematorium in particular posed a danger to public health." *Id.* at 423-24. Although the lack of any evidence showing a substantial danger was sufficient to find that the City abused its discretion under administrative mandamus standard,[25] the Court of Appeal also relied on the evidence of BAAQMD's approval of the construction of the building to further support the trial court's decision. *See id.* at 424.

Finally, in *Stewart*, as here, the City "relie[d] on a number of cases that upheld local agency land use decisions based on liberal and broad interpretations of what constitutes substantial evidence of impacts to public welfare." *Stewart*, 248 Cal. App. 4th at 422 (internal quotation marks omitted). The court rejected such reliance, noting in particular that the City's principal case, *Desmond v. County of Contra Costa*, 21 Cal.App.4th 330 (1993) (which is also the first case the City cites in its legal standard section in this case, *see* City Br. at 11) would have supported a general welfare finding but that in the vested rights context, cases such as *Desmond* "and cases like them" do not apply. *Stewart*, 248 Cal. App. 4th at 422. Indeed, the City was correct in 2016 when it wrote that the requirements of Section 3.4.2 permit only a "narrow exception" to OBOT's vested rights, *see* Ex. 24 (2/3/2017 Staff Report) at 2; this admission makes even more glaring the City's failure to recognize *Stewart*'s rejection of its position in this case.[26]

[25] Even under the abuse of discretion standard applicable to the administrative mandamus claims in *Stewart* (which did not involve allegations of breach of a development agreement), the Superior Court and Court of Appeal determined *de novo* whether the ordinance at issue "was sufficiently necessary to the public welfare to justify the impairment of a vested right." *Stewart*, 248 Cal. App. 4th at 420-21.

[26] *Stewart* was decided on June 23, 2016—four days before the Ordinance was adopted.

C. The City Did Not Respond To OBOT's Motion For Summary Judgment

1. The City Does Not Dispute the Facts Showing Its Findings Regarding "Pre-Existing Local, State and/or Federal Laws Were Insufficient

The City fails to offer any evidence to support its "finding" in both the Ordinance and Resolution that "pre-existing local, state and/or federal laws are inapplicable and/or insufficient" to protect health and safety. Ex. 1 (Ordinance) at 2.; Ex. 50 (Resolution) at 5; City Br. at 20-22. Instead, the City merely asserts that the "regulatory requirements of other agencies" does not "disprove or override the substantial evidence before the City Council." City Br. at 20. This statement, however, merely repeats the City's error in adopting the Ordinance and Resolution: by ignoring the multiple regulatory requirements to which the Terminal will be subject, including the BAAQMD air quality permit process (*see* Mtn. at 30-39), the City completely fails to establish that the Ordinance and Resolution were justified impairments of OBOT's vested rights.

2. The City Does Not Dispute Its Own Admissions That BAAQMD Would Protect Against A Substantially Dangerous Condition

The City fails to refute OBOT's showing (Mtn. 30-33) that the BAAQMD permit process will prevent any condition "substantially dangerous" to air quality—because BAAQMD will only issue an air permit if no such condition exists, or it will deny a permit, preventing any such condition from occurring. This is made clear by a number of admissions by the City, none more clearly than those of the City's 30(b)(6) witness, Claudia Cappio,[27] the primary City official responsible for redevelopment of the Oakland Army Base, including development of the Terminal. *See* Cappio Decl., ¶ 4. As the City's 30(b)(6) witness, Ms. Cappio testified on behalf of the City regarding, among other topics, "[t]he purported or intended health, safety, environmental or other benefits or effects associated with the Ordinance and/or Resolution." Long Decl., Ex. 49 at 10.

Nothing offered by the City detracts from Ms. Cappio's testimony that she "ha[s] [no] reason to think that BAAQMD would enforce EPA standards in a way that permitted a substantial danger to people in the City of Oakland." Ex. 27 (Cappio Tr.) at 273:1-12. Nor does the City's

[27] Ms. Cappio was one of two Assistant City Administrators, the second-highest position in City management. *See* Ex. 69 (Cappio Tr.) at 137:10-25. After the September 21, 2015 hearing, the City Council directed Ms. Cappio to "evaluate all the evidence and other information that had been submitted . . . and the testimony that had been given and outline for [the Council] options for action on regulating . . . the health and safety of coal." Ex. 69 (Cappio Tr.) at 187:15-23.

Opposition detract from Ms. Cappio's admission that she never "reach[ed] a determination that BAAQMD's rules and regulations were inadequate to ensure adequate air quality with respect to the OBOT terminal." *Id*. at 180:18-23. The City's assertion (City Br. at 22) that it "has the legal authority to adopt additional regulations" demonstrates the degree to which it has missed the point: while the City can indeed freely adopt regulations for the general public welfare, it can only apply such regulations to the Terminal if substantial evidence establishes that doing so is necessary to prevent a substantially dangerous condition. *See Stewart*, 248 Cal. App. 4th at 420; DA § 3.4.2.

The City also fails to dispute Ms. Cappio's testimony about the reason a BAAQMD permit is required by the exemption in the Ordinance for Oakland manufacturing facilities that consume coal or petcoke. *See* Mtn. at 32-33. She admitted that the exemption requires a BAAQMD permit to be "in compliance with the agency in the Bay Area that would make certain that air quality regulations and requirements were met," *see* Ex. 25 (Cappio Tr.) at 55:7-17, and to ensure that "emission standards and various other requirements of the Bay Area Air Quality Management District were complied with." *Id*. at 87:3-16. Compliance with BAAQMD's emissions standards, she testified, would in turn "make sure that public health and safety are protected." *Id.* at 87:18-88:1. The City has cited no evidence that a BAAQMD permit would protect against a health and safety danger with respect to manufacturing facilities that *consume* coal, but would fail to do so with respect to the Terminal, which would handle but not burn coal. *See* Tagami Decl. ¶ 5.

In an attempt to minimize the air quality effects from AB&I Foundry—which, as a manufacturing facility, is exempted by the Ordinance, *see* Ex. 28 (June 23, 2016 Staff Report) at 4; Ex. 45 (ESA Report) at 2-23—the City states only that this foundry "receives some petcoke to use in manufacturing case iron pipes and fitting," apparently implying that "some" is a small amount. City Br. at 8 n.16. But it can hardly be said that the quantities of petcoke received and consumed by AB&I are de minimus. AB&I has a permitted capacity for a petcoke pile of 13,000 cubic feet and may consume up to 17,280 tons of petcoke per year. *See* Ex. 45 (ESA Report) at 2-23; Supplemental Declaration of Lyle Chinkin at ¶ 2-3. This evidence regarding AB&I, and the Ordinance's manufacturing facility exemption in general, belies the City's entire argument that "any" amount of PM2.5 emissions (*i.e.*, even a small amount) constitutes a "substantial" danger

that BAAQMD cannot safely regulate: if that were true, the Ordinance would not contain a blanket exemption for manufacturing facilities (current or future, of unlimited size) that consume coal or petcoke so long as they operate with a BAAQMD permit.

3. The City Does Not Dispute that Other Coal or Petcoke Terminals Exist in the Bay Area and that the City Did Not Account for Those Terminals

As set forth in OBOT's Opening Brief, there are three terminals in the Bay Area that handle coal or petcoke, all operated pursuant to a BAAQMD permit. *See* Mtn. at 32. The City does not dispute that it made no effort to determine whether these terminals posed a substantial danger, much less was there a finding to that effect. *See* Ex. 69 (Cappio Tr.) at 264:19-265:10. As if to demonstrate the weakness of its position, the City points (City Br. at 21) to two references regarding the Richmond coal terminal, but neither demonstrates that the Richmond terminal poses a substantial danger. The first reference is testimony by BAAQMD representative Henry Hilken at the September 21, 2015 hearing. Contrary to the City's assertion (City Br. at 21) that Mr. Hilken "acknowledged that emissions from coal operations at the Richmond Terminal have negatively impacted nearby residents," Mr. Hilken's testimony contains no such acknowledgment; to the contrary, he testified that he did not have "any information at my fingertips on that particular project." *See* Ex. 29 at OB13681. The second is an email from Mr. Hilken, which makes no mention of any danger associated with the Richmond Terminal. *See* Long Decl., Ex. 56 at OAK4956. Mr. Hilken's email instead stated there could be an increased risk "if the Project was approved without proper mitigation measures," which directly contradicts the City's position that mitigation measures would be insufficient. *See id.* In sum, the City's record contained no evidence regarding any substantial danger associated with local terminals that handle coal or petcoke pursuant to BAAQMD permits, again demonstrating that the Ordinance and Resolution were adopted without the required showing.

4. The City's Position that BAAQMD's BACT Requirement Will Not Eliminate "All" Emissions Cannot Support a Substantial Danger Finding

The City asserts (City Br. at 21-22) that it accounted for BAAQMD's permitting process because ESA assumed that BAAQMD would require OBOT to install Best Available Control Technology ("BACT"). The City now suggests that because "BACT does not eliminate all

emissions," BAAQMD is inadequate to prevent a substantial danger. *Id.* This argument does not overcome the evidence cited above, and fails also because there is no dispute that so long as the air quality in Oakland continues to meet NAAQS standards, it will "provide the requisite degree of health protection, including the health of at-risk populations, with an adequate margin of safety." D.E. 153 (Declaration of City Expert Dr. Moore) ¶ 10; 42 U.S. C. § 7409(b)(1). Indeed, accepting the City's argument would lead to the absurd result that it could invoke Section 3.4.2 of the DA to block ***any activities whatsoever*** at the West Gateway, as it is undisputed that the operation of a terminal regardless of the commodity shipped or even the development of an "office park" would emit PM2.5. Ex. 70 Sahu Tr. At 266:12-267:6 ("a bulk commodity terminal that dealt in soda ash or iron or wheat [would] emit PM2.5"); Ex. 20 (Cashman Tr.) at 171:10-15 (office park). This cannot plausibly be what the parties bargained for in the DA.

The argument that *any* increase in PM2.5 is substantially dangerous fails for several other reasons. *First*, PM2.5 is emitted from essentially every industrial activity, including the manufacturing exempted by the Ordinance. *See supra* Section VI.A(2). *Second*, the City itself uses thresholds of significance in the CEQA context, including for this project,[28] which assume and permit various levels of PM2.5. *See* Ex. 69 (Cappio Tr.) at 289:5-290:24. *Third*, the City's position is not only illogical, it is not scientifically supported. Neither the EPA, CalEPA, the City's own litigation expert, or anyone else offered the opinion that "there is no safe level of exposure to PM2.5." *See generally*, D.E. 153 (Moore Decl.). Rather, while scientific studies have not conclusively identified a "'threshold' concentration" for PM2.5—*i.e.,* the specific level "at which an adverse effect [to health] is first observed" (Moore Decl., ¶ 6)—there is no dispute that attainment with the current NAAQS levels will "protect the health of any sensitive group of the population" with an "adequate margin of safety." Ex. 53 (Moore Tr.) at 42:1-14; 157:7-158:10. This takes into account "the most current scientific knowledge available to protect human health," Moore Decl. ¶ 15, including the "knowledge that there is no threshold for [PM2.5] effects," Ex. 53

[28] In fact, the original EIR for the Oakland Army Base assumed that operations there would result in a release of 12 tons per year of PM2.5. *See* D.E. 49-13 (2012 EIR Addendum) at 149-151. The 2012 Addendum to the EIR estimated that PM2.5 emissions would be 2.7 tons per year. *Id.* Nonetheless, the City now claims that even 4 pounds per day (which is approximately 0.84 tons of PM2.5 per year) constitutes a "substantial danger." *See* City Br. at 15.

(Moore Tr.) at 158:1-6, and the City's expert testified she "agree[s] with [EPA's] assessment." *Id.* at 157:7-158:10.[29]

The City also argues that "even incremental increases [in PM2.5] below the level of the NAAQS harm public health." City Br. at 21. But again the City's own expert rejected this premise, testifying that while the proposed Terminal could "contribute to absolute exposures of [Oakland] residents" to PM2.5, so long as overall "levels would not exceed the [NAAQS]" they "would not be expected to adversely impact the community." Ex. 71 (Moore Tr.) at 218:18-219:6.

Finally, the City claims that (1) PM2.5 exposure *can* "cause premature death" or "adverse health outcomes," and (2) West Oakland is a "vulnerable" community with a disproportionate number of "[c]hildren, the elderly, and people with chronic heart and lung diseases" who are "especially sensitive to PM2.5 pollution." City Br. at 14-15. To the extent these assertions are not improperly speculative under *Stewart*, *see supra* Sectioin V.B, they were ***factored into*** the EPA's determination of the NAAQS sufficiently to protect public health (including of sensitive populations). Ex. 71 (Moore Tr.) at 123:4-22 (the potential adverse health outcomes identified by Defendants "were all considered when conclusions were come to about what the appropriate NAAQS standard . . . should be"); *id*. at 85:8-23 (EPA "specifically consider[s] children, older adults, and persons with preexisting heart and lung disease when setting PM2.5 standards"); *id*. at 63:5-21 (NAAQS are set at a level that is "protective of the most sensitive groups of individuals who may be exposed to particulate matter"). Whether the City could apply a zero-tolerance PM2.5 policy to future operations in Oakland (which would effectively shut down industrial activities in Oakland) is a question for another day; for this case, the possibility of "any" increase in PM2.5 does not render compliance with BAAQMD regulations a "substantial danger." *See Stewart*, 248

[29] The City asserts (City Br. at 16 & n.25) "courts likewise have recognized that no safe threshold for PM2.5 exists," but "findings of fact in another court case" may not be relied on "for the truth of those facts." *Berry v. Evans*, No. 06-cv-3795, 2009 WL 2997411, at *4 (N.D. Cal. Sept. 16, 2009). Moreover, two of the cases found that an outdated NAAQS standard of 15 ug/m was insufficient to protect from harm, but EPA has since lowered its standard to 12 ug/m (and no court has found this level dangerous). *See N. Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 593 F.Supp.2d 812, 822 (W.D.N.C. 2009) (evaluating potential for harm under 15 ug/m standard); *United States v. Cinergy Corp*., 618 F.Supp.2d 942, 950 (S.D. Ind. 2009) (same). The remaining case did not make any finding about PM2.5 levels, noting only the potential for danger. *United States v. Westvaco Corp*., No. 00-cv-2602, 2015 WL 10323214, at *9 (D. Md. Feb. 26, 2015).

Cal.App.4th at 424; Ex. 4 (DA) at § 3.4.2.

5. No Substantial Risk of Fire at the Terminal

The City also asserts that the Ordinance and Resolution are supported by the purported risk of fire at the Terminal. In doing so, however, the City fails to dispute the evidence confirming that the risk of fire is low. The City does not contest, for example, that the Oakland Fire Department ("OFD") stated that bituminous coal is ranked at the "lowest,"—*i.e.*, the safest—level of the various commodities that could be shipped through the Terminal. Ex. 27 (Cappio Tr.) at 163:11-164-10. The City cites (City Br. at 22) the ESA Report, claiming there is a "track record of fires occurring in coal cars and at coal terminals," but ***ignores*** the statement from ESA's subcontractor who authored the Report's fire safety section that "[m]ajor fires at coal terminals are not common or widespread." Ex. 60 (6/15/16 Internal ESA Email) at ESA_036704. This undisputed statement (inexplicably missing from the ESA Report), combined with the written agreement by TLS that it would not ship Powder River Basin coal at the Terminal (which ESA had identified as the type of coal that might cause a fire), Ex. 48 (9/15/15 HDR Report) at OAK0007470, proves the risk of a fire is not substantial.[30] Even more importantly, the City offers no response to the fact that OFD never stated during discussions between the City and OBOT that a "ban" on coal was necessary due to firefighting concerns, and, likewise, the City offers nothing that detracts from ESA's Report that specialized training to respond to the unique dangers of coal combustion is available, *see* Ex. 45 (ESA Report) at ES-5; City Br. at 19, demonstrating that fire-fighting at a coal terminal is entirely feasible. Finally, the City has not offered any evidence that distinguishes the fire risks of coal from any other commodity (other than concrete). *See* Ex. 69 (Cappio Tr.) at 318:8-321:20.

In the end, nothing is left other than the type of speculation rejected in *Stewart, i.e.*, that

[30] The City also cites to the June 24 Staff Report at OAK242432, but that simply reiterates ESA's findings, which do not detract from the fact that "major fires at coal terminals are not common or widespread." Ex. 60 (6/15/16 ESA Email). Further ignored by the City are ESA's findings that spontaneous combustion of coal can be controlled by "[e]arly attention" to potential causes, Ex. 45 (ESA Report) at OAK0230383, or that many of the 13 small rail car fires reported between 2001-2015 "appear to be related to specific coal compositions such as Powder River Basin coal," which, as noted, the City does not dispute that OBOT's proposed sublessee had agreed in writing it would not accept at the Terminal. Ex. 48 (9/15/15 HDR Report) at OAK0007470.

fires are merely *possible* at a coal terminal, without any evidence that they are more likely than at a terminal handling another bulk commodity, or that any resulting fires cannot be adequately controlled. 248 Cal.App.4th at 421. And, if there were any doubt, the Ordinance itself removes it by exempting an unlimited number of manufacturing facilities of unlimited size in Oakland that "consume" coal or coke (which includes heating in the manufacturing processes), thereby directly rebutting the notion that any of the safety issues associated with handling coal rise to the level of a "substantial danger." Ex. 1 (Ordinance) at § 8.60.040(B)-(C).

6. Nothing in the City's Opposition Overcomes OBOT's Showing Regarding Worker Safety or Greenhouse Gases

(a) The City Does Not Dispute that Existing Safety Regulations Render a Ban Unnecessary

In its Opening Brief, OBOT established that (i) OSHA and Cal/OSHA would impose worker safety regulations on the Terminal; (ii) OBOT has always agreed that it will be subject to OSHA and Cal/OSHA regulations; and (iii) the City made no finding—nor could it—that OSHA and Cal/OSHA would permit workers to be exposed to "substantial danger" from coal dust. *See* Mtn. at 37-38; City Br. at 22 n.34. The City has not disputed the foregoing nor has it responded to, much less rebutted, the evidence that ESA evaluated OHSA's regulations for coal dust but did not find them lacking and that the City itself did not "reach a determination that OSHA's rules and regulations would be inadequate to ensure worked safety at the terminal." *See* Mtn. at 37; City Br. at 22 n.34. Given this record, there was no substantial evidence of a substantial danger to workers that justified the ban imposed by the Ordinance and Resolution.[31]

(b) The City Cannot Defend the Greenhouse Gas Finding

The City argues (City Br. at 23) it should be able to consider "local, incremental contributions to climate change" that could "potentially" be caused by overseas combustion of the

[31] The City's entire response to the worker safety issue is one sentence in a footnote. *See* City Br. 22 at n.34. The City relies on one conclusory sentence in a letter from the Alameda County Health Department, which says nothing about workers at any coal terminal as opposed to unspecified "coal workers," which presumably referred to coal miners. *See id*; Long Decl., Ex. 65. This type of conclusory statement is entitled to no more weight than such speculation was accorded in *Stewart*. 248 Cal.App.4th at 421. Likewise, the Chafe Report—which relied on the Health Department—contains no analysis of the existing regulatory framework nor the conditions that would be expected at the OBOT terminal as opposed to a coal mine. *See* Long Decl., Ex. 10.

coal exported from the Terminal. The City, however, offers no evidence to dispute the opinion of OBOT's expert, Lyle Chinkin, that 1) the amount of CO_2 that ESA assumed would be emitted from combusting coal overseas would represent on the order of 0.04% (less than one tenth of one percent) of the global total; 2) even this number may be overstated for a number of reasons; and 3) the theoretical effect of such a small increment on sea levels is far too small to meaningfully measure or estimate. *See* Chinkin Decl. ¶ 40.[32] Nor does the City dispute ESA's own observations on the City's request that ESA evaluate greenhouse gas emissions from the Terminal:

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

See Mtn. at 40. Indeed, the City's argument demonstrates once again that it has entirely ignored the "substantial danger" aspect of Section 3.4.2 and the standards elucidated in *Stewart* and *Davidson*: while the City's views about global warming might permit general welfare regulations, they cannot be allowed to impair vested rights absent substantial evidence of a "substantially dangerous" condition to "adjacent neighbors" of the project, as required by Section 3.4.2.

VI. THE CITY'S EFFORTS AT ESTABLISHING SUBSTANTIAL EVIDENCE OF A SUBSTANTIALLY DANGEROUS CONDITION FAIL

A. The City's Motion For Summary Judgment Should Be Denied

For the foregoing reasons, OBOT's motion for summary judgment should be granted. For the same and additional reasons, the record also reveals that the City's motion for summary judgment should be denied. As set forth below, the City cannot establish that the Ordinance and Resolution were adopted 1) "after a public hearing," or 2) based on substantial evidence of a substantially dangerous health and safety condition. *See* Ex. 4 (DA) at § 3.4.2.

[32] The City asserts (City Br. at 23 n.35) that Mr. Chinkin "acknowledges that potential emissions associated with the Terminal may exceed 18 million metric tons" of CO2 annually, which the City argues would exceed BAAQMD's GHG threshold of significance. However, Mr. Chinkin's opinion is that 18 million metric tons of CO2 would only result if the facilities that consume the coal use no emissions controls, *see* Suppl. Chinkin Decl., at Ex. B p. 43. More importantly, BAAQMD's significance threshold is for greenhouse gasses produced by "stationary sources" *located in the Bay Area*, *see* Long Decl. Ex. 68 at 2-2, *i.e.*, the sources to which BAAQMD issues or withholds permits. *See* Long Decl., Ex. 68 at 1-1. It is undisputed that the OBOT Terminal will not consume coal or petcoke. *See* Tagami Decl., ¶ 5.

1. The City's Decision Was Not "After A Public Hearing"

A public hearing "contemplates a fair and impartial hearing at which competent evidence may be presented before a fair and impartial tribunal." *Saks & Co. v. City of Beverly Hills*, 107 Cal.App.2d 260, 265 (1951), *disapproved of on other grounds by City of Fairfield v. Superior Ct.*, 14 Cal.3d 768, 781-81 (1975).[33] In this case, it is undisputed that the majority of the Councilmembers who voted in favor of the Ordinance and Resolution had made up their mind to ban coal before—not after—the public hearing, contrary to the requirement in Section 3.4.2 of the DA. *First*, in 2014—long before any alleged hearings in this matter—the City Council passed a resolution opposing the transportation of fossil fuels, including coal, through Oakland (*see* Mtn. at 5); among the Councilmembers voting for the 2014 Resolution were Councilmembers Brooks, Gallo, Gibson McElhaney, Kalb, and Kaplan. See Ex. 62 (Resolution No. 85054) at 5.[34] *Second*, the City has not disputed Ms. Cappio's testimony that Councilmembers Kaplan and Kalb had decided to ban coal in the summer of 2015, well before the commencement of hearings leading to the Ordinance and Resolution. Ex. 27 (Cappio Tr.) at 261:3-11. *Third*, the City has not countered the evidence that Councilmembers Gallo and Guillen had decided to ban coal before the ESA Report was begun, much less received. *See* Mtn. at 6-7. Based on this undisputed evidence, therefore, the City Council had made up its mind to ban coal before, not after, the public hearing.

The fact that the Council had made up its mind prior to the June 27 hearing is further reflected by the fact that no Councilmember could have given due consideration to the ESA Report and June 23 Staff Report prior to voting on the Ordinance and Resolution. The undisputed facts reveal that prior to June 24, the City Council had not even seen the Ordinance and Resolution or any of the other materials that were disclosed on June 24, which included the ESA Report. *See* Mtn. at 8; Ex. 27 (Cappio Tr.) at 244:16-245:25, 248:6-9, 401:12-17. The vote by the City Council

[33] The City's assertion that "the motives of decision-makers are irrelevant" (City Br. at 24) may be true in some contexts, but the City again ignores that this is a breach of contract action, and cites no cases arising under similar circumstances. The City's argument was rejected in *Guntert*, 43 Cal. App. 3d at 217.

[34] Eight Councilmembers voted to adopt the Ordinance: Brooks, Campbell Washington, Gallo, Guillen, Kalb, Kaplan, Reid, and Gibson McElhaney. *See* Ex. 1 (Ordinance) at 14. Seven voted to pass the Resolution: Campbell Washington, Gallo, Guillen, Kalb, Kaplan, Reid, and Gibson McElhaney. *See* Ex. 50 (Resolution) at 9. Councilmember Brooks was "excluded." *Id.*

took place on Monday, June 27. Mtn. at 8. As ESA noted, this timing was "crazy." Mtn. at 37; Ex. 37 (5/4/16 Internal ESA Email) at ESA_038570. The timing certainly permitted no occasion for meaningful review or input on the ESA Report or the more than 760 pages transmitted to the City Council on Friday, June 24. City Br. at 7; Suppl. Myre Decl., ¶ 2 (documents cited constitute 764 pages). ESA did not speak at the meeting and certainly no questions were posed to ESA; the City Council never asked any questions about the key chart on page 12 of the Staff Report. *See* Ex. 33 (ESA 10/31/17 Tr.) at 92; Ex. 69 (Cappio Tr.) 298:3-11.

Further establishing that the City Council's decision was preordained is that the City Council (1) rejected ESA's proposal to create quantitative thresholds to evaluate air quality objectively, *see* Ex. 69 (Cappio Tr.) at 227:1-228:7, (2) would not consider allowing the project to "proceed with some conditions or mitigations" and did not have the "political will to solve the problem through mitigation" (*see* Mtn. 6), and (3) circumscribed ESA's scope of work so narrowly that its analysis was a mere "preliminary review based on limited information." *See* Mtn. at 7. To ensure the "right" results, the City Staff and lawyers managed ESA's work, including by revising drafts of the ESA Report, asking ESA to take certain positions in its Report, and requesting that ESA "bolster" certain sections that might be favorable to its desired outcome. *See* Mtn. at 7, 39. None of this is disputed in the City's Motion. Therefore, since Section 3.4.2 requires a "substantial danger" finding "after" a public hearing, the City failed to comply with the DA, and its summary judgment motion should be denied.

2. Under Any Definition of "Substantial Evidence," The City's Evidence Was Not Substantial

Under any definition of "substantial evidence,"[35] the evidence must support a finding that the Terminal will create a substantially dangerous health and safety condition if the ban is not applied. The City fails to demonstrate the evidence it purported to rely on meets this definition.

[35] Pursuant to Section 3.4.2, the City was required to support its finding by "substantial evidence"—a term this Court interprets *de novo*. *See supra* § IV(A). California courts have defined "substantial evidence" two ways: "first, as evidence of 'ponderable legal significance … reasonable in nature, credible, and of solid value …; and second, as 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Desmond*, 21 Cal.App.4th at 335; *see also Bowers v. Bernards*, 150 Cal.App.3d 870, 873 (1984) ("It is now the settled law of

(a) **No Substantial Evidence of a Substantial Danger to Air Quality**

The most important undisputed fact the City overlooked regarding whether there was substantial evidence of a substantial danger to air quality is that BAAQMD would either require appropriate mitigation or not issue a permit. *See supra* § III. For that reason alone, summary judgment should be granted in favor of OBOT, and the City's motion should be denied.

Even aside from the City's failure to consider BAAQMD, there was not substantial evidence of a substantial danger with respect to air quality.[36] For example, the first citation the City offers to support this proposition is the ESA Report, pages OAK230300-301. City Br. at 14. The ESA statements at those pages are telling: they simply recite that "emissions for all activities associated with OBOT for coal export … *could* cause additional local exceedances of ambient air quality standards" and that "OBOT operations *could* impact the health of adjacent neighbors." *See* City Br. at 14 (*citing* Ex. 45 (ESA Report) at OAK230300-301 (emphasis added)). Another source cited by the City simply recites characteristics of coal with no reference to the Terminal. City Br. at 14:26-15:1 (*citing* Long Decl. ¶ 10 (Chafe Report) at 120931). The fact that coal and petcoke "emit fugitive dust" and that some of this dust will be PM2.5 as the City states in its Brief indicates nothing about whether mitigation measures that OBOT proposed or that BAAQMD would require will safely control any such emissions—or whether any other commodity will release the same or greater levels of particulate matter. See Ex. 72 (Chafe Tr.) at 172:9-16 (a wind gust blowing across an empty field would blow PM2.5 into the air); *id.* at 124:9-125:13 (did not compare the dustiness of coal to other bulk goods); Ex. 33 (10/31/2017 ESA Tr.) at 187:3-5 ("Q: You never isolated the effects of coal from the effects of other commodities; correct? A: That's correct"). This type of evidence ("could impact" or general characteristics of the project) is precisely the type

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this state that in civil and criminal cases alike, 'substantial evidence' … is evidence of ponderable legal significance, … reasonable in nature, credible, and of solid value."). In the context of assessing the impairment of vested rights, it is more appropriate to construe "substantial evidence" to mean "evidence of ponderable legal significance … reasonable in nature, credible, and of solid value," *Bowers*, 150 Cal.App.3d at 873, but, in any event, the City fails to establish it is entitled to summary judgment under either definition in light of the "substantial danger" to "adjacent neighbors" requirement of Section 3.4.2.

[36] Indeed, the City's premise that "any" release of PM2.5 could constitute a "substantial danger" sufficient for Section 3.4.2, is unsupported by the record and certainly does not permit summary judgment in the City's favor. *See supra* § V(C)(4).

of evidence Oakland offered and the court rejected in *Stewart*. *See* 248 Cal. App. 4th at 423-24.

The City's conduct and admissions also preclude a finding of substantial evidence of substantial danger. Certainly the City Staff could not have provided "substantial evidence": as Ms. Cappio acknowledged, the Staff did not have the "expertise, knowledge or background" to conclude whether the record contained "substantial evidence." Ex. 27 (Cappio Tr.) at 211:21-212:11. The City Staff therefore sought to retain ESA, which in turn proposed a professional scope of work—a proposal the City Council thoroughly rejected. *See* Mtn. at 5-6. Instead, the City made clear to ESA what it wanted: a report that supported a ban on coal and did not "allow for the possibility" of "mitigation measures." *See* Mtn. at 6-7.[37] Ultimately, the scope of ESA's Report was so circumscribed that ESA's 30(b)(6) witness admitted it was nothing more than "a preliminary review based on limited information" that would not have satisfied CEQA or the air quality permit process, *see* Mtn. at 7; in fact, ESA admitted that the kind of evidence ESA was expected to rely on would not be "kosher" under CEQA. *See* Ex. 67 (08/22/2017 ESA Tr.) at 185:4-25. Even Ms. Cappio admitted that she "didn't like" the scope of the ESA Report because "substantial evidence is based on expert analysis and data … that has been appropriately documented and peer-reviewed," unlike ESA's scope. Ex. 69 (Cappio Tr.) at 235:11-237:2.

ESA's own contemporaneous words undermine the critical Table 5-7 on page 5-17 of its Report, which was reprinted in the June 23 Staff Report and is the only purported quantification of fugitive dust emissions before the City Council. *See* Mtn. at 34-35. Once ESA was retained, it examined emissions estimates that had been supplied to the City in September 2015 by EarthJustice. *See* Mtn. at 7. These original estimates made ESA "nervous," in part because of various flaws. *See* Ex. 41; *see also* Ex. 65 (Internal ESA Memorandum Re: EarthJustice

[37] The outcome of Dr. Chafe's "analysis" (*see* D.E. 162-2 at 10) was likewise never in question. Dr. Chafe was retained by Dan Kalb, a City Councilmember who undisputedly decided to ban coal before evaluating any evidence (*see* Ex. 27 (Cappio Tr.) at 258:25-259:9, 261:3-9), to produce a report with "a series of findings that can be used to support the application of public health or safety regulations pursuant to section 3.4.2 of the development." Ex. 72 (Chafe Tr.) at 58:6-14; Ex. 69 (Cappio Tr.) at 281:14-282:25. Dr. Chafe met with Mr. Kalb on a bi-weekly basis, *see* Ex. 72 (Chafe Tr.) at 64:18-65:7, and during the course of her work submitted approximately 20 drafts of her report for Mr. Kalb's review. *See id.* at 67:4-13. Unsurprisingly, the resulting report and its "findings" conformed to Mr. Kalb's request. *See* Ex. 72 (Chafe Tr.) at 113:14-114:24.

Submission). ESA then produced the estimates that now appear in Table 5-7, which the City's current litigation expert Dr. Sahu testified at deposition were based on insufficient detail about the Terminal. *See* Mtn. at 36-37. Even more significantly, ESA knew at the time that there was an insufficient basis for its emissions estimates: as ESA's project manager and Rule 30(b)(6) witness wrote at the time, ESA did not "have a detailed project description to use to even make revisions to [the original EarthJustice] emissions estimates." *See* Ex. 41.[38]

The foregoing is sufficient to preclude summary judgment in the City's favor that substantial evidence of a substantial danger existed regarding air quality. This conclusion is further supported by Lyle Chinkin, an expert retained in this matter by OBOT. As Mr. Chinkin's expert reports establish, ESA's air quality analysis is riddled with inaccuracies. *See* D.E. 140 (Chinkin Decl.) at ¶¶ 29-36; Supp. Chinkin Decl. ¶¶ 4-5 (attaching reports). The City has objected to consideration of expert declarations from OBOT on the mistaken premise that OBOT's contract claim (and federal claims) in federal court should somehow be limited to the same procedures as an administrative mandamus petition in state court. *See* City Br. at 23. As set forth above, this argument should be rejected. *See supra* § V(A), V(B); *Bright Development*, 20 Cal.App.4th at 795. And the City's litigation conduct shows how little confidence it has in its position: the City deposed all of OBOT's experts and presented five of its own expert witnesses, including three witnesses regarding air quality. *See* Suppl. Myre Decl. ¶ 3.

CONCLUSION

OBOT respectfully requests that the Court grant OBOT's motion for summary judgment and deny Defendants' cross-motions.

[38] The City mistakenly suggests (City Br. at 18-19) that OBOT is somehow responsible for the crippling lack of detail in the ESA Report. In fact, OBOT submitted general information about terminals—including coal terminals—for the September 2015 hearing. *See* Suppl. Tagami Decl. ¶¶ 5-8. This information related to technologies, materials and best practices that would be incorporated into any future Terminal, which OBOT noted had not yet been designed. *Id.* When it became apparent in April 2016 that the City and ESA were planning to "study" the OBOT terminal in particular, OBOT informed the City that not enough was known about the Terminal's final design to evaluate it. *Id.* ¶¶ 13-15. The City nonetheless directed ESA to proceed.

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Respectfully submitted,

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