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

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

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NOTICE

TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

PLEASE TAKE NOTICE, pursuant to Civil Local Rules 7 and 56, that on January 10, 2018, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince Chhabria, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Sierra Club and San Francisco Baykeeper, by counsel, will move the Court for an order granting summary judgment on all claims.

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Sierra Club and San Francisco Baykeeper respectfully move to for summary judgment on all claims filed by Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT"). Defendant-Intervenors make this motion on the grounds that:

- The City Council's adoption of Oakland Ordinance No. 13385 (the "Ordinance") and application to OBOT pursuant to Resolution No. 86234 (the "Resolution") do not violate the Commerce Clause of the United States Constitution (U.S. Const. art. I, § 8, cl. 3).
- The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 et seq., the Hazardous Materials Transportation Act, 49 U.S.C. § 5101, and the Shipping Act of 1984, 46 U.S.C. § 40101 et seq. do not preempt the City from applying the Ordinance to OBOT, including via the Resolution; further, there is no breach of the Development Agreement dated July 16, 2013. Defendant-Intervenors join the City's contemporaneously filed notice of motion, motion for summary judgment, and memorandum in support with respect to these claims.

This motion is supported by the accompanying Memorandum; Defendant City of Oakland's contemporaneously filed Notice of Motion, Motion for Summary Judgment, and Memorandum in Support, its accompanying declarations and exhibits, and Objections to Evidence; and such oral argument as the Court may allow.

WHEREFORE, Sierra Club and San Francisco Baykeeper pray that the Court grant the instant motion, and thereby grant summary judgment for Defendant-Intervenors on all claims.

DATED: December 5, 2017

/s/ Joanne Spalding
JOANNE SPALDING
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COLIN O'BRIEN
Attorney for Defendant-Intervenors Sierra Club and San Francisco Baykeeper

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MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS AND STANDARD OF REVIEW

Defendant-Intervenors adopt the statement of facts and standard of review contained in the City of Oakland's contemporaneously filed Memorandum in Support of its Motion for Summary Judgment (hereafter "City's Br.") at secs. II, III.A.

II. ARGUMENT

The Court should grant Defendant-Intervenors' motion for summary judgment (and deny OBOT's motion for summary judgment) because the Ordinance is a garden variety exercise of municipal police power that does not run afoul of the dormant Commerce Clause. OBOT's shifting theories—first in its Complaint, recast in opposition to the motion to dismiss, and now revised once again on summary judgment—evidence a futile struggle to fit a square breach of contract peg into any of the round holes of dormant Commerce Clause jurisprudence. OBOT fails because the dormant Commerce Clause has nothing to say about a municipal ordinance that regulates only conduct within its borders, does not favor any local interest over any out-of-state one, and has nothing to do with, and thus no effect on, railroad operations.

A. The Ordinance does not violate the dormant Commerce Clause.

The Constitution provides Congress with the power to regulate commerce between the states. U.S. Const. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994).

Courts apply a two-tier test to dormant Commerce Clause claims. "The first tier asks whether the Ordinance either discriminates against or directly regulates interstate commerce." *Pharm. Research & Mfrs. of Am. v. Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) (internal quotation omitted). The first prong of this tier deals with "[d]iscriminatory" laws, which "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citations omitted).

The second prong of the first tier test deals with laws that "directly regulate" interstate commerce, often referred to as "extraterritorial" regulation. In "'cases concerning extraterritorial effects . . . the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders . . .'" *Sam Francis Found. v. Christies*, 784 F.3d 1320, 1323–24 (9th Cir. 2015) (en banc) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). 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." *Pharm. Research*, 763 F.3d at 1043 (citations omitted). OBOT's claims that the Ordinance "directly regulates" ((Pl. Mot. for Summ. J. (hereafter "OBOT Br.") at 11-16)) and "discriminates against" (*id*. at 16–17) interstate commerce are both first-tier claims.

A law that does not discriminate against out-of-state interests or directly regulate interstate commerce may still run afoul of the dormant Commerce Clause's "second tier" by imposing a substantial burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pharm. Research*, 763 F.3d at 1044 (quoting *Pike v. Bruce Church*, 397 U.S. 137 (1970)). OBOT asserts that the Ordinance imposes such a burden by interfering with the "national uniformity" of the rail system. OBOT Br. at 17–20.

1. The Ordinance does not "directly regulate" interstate commerce.

Because the Ordinance applies exclusively to conduct within Oakland, by definition it does not "directly regulate" commerce occurring wholly outside of the state. In fact, the principal case OBOT relies on, *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), shows why the Ordinance does *not* regulate extraterritorially.

In *NCAA*, Nevada required the NCAA to follow certain procedures in dealing with Nevada schools, but in such a way that the NCAA, a national organization, "would have to use the Statute in enforcement proceedings in every state in the union." *Id*. at 639. This was obvious extraterritorial regulation because it "would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules." *Id*. And "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority[.]" *Id*. (quoting *Healy*, 491 U.S. at 336.). Nevada's law also violated the extraterritoriality

doctrine "because of its potential interaction or conflict with similar statutes in other jurisdictions," since other states had adopted similar legislation that "could easily subject the NCAA to conflicting requirements." *Id.*

Unlike that Nevada law, the Ordinance does not have the effect of controlling conduct beyond the boundaries of the State. It does not regulate any product or conduct outside City limits, let alone in other states. It does not regulate transportation of coal across state lines or even within Oakland; in fact, since it was enacted, coal trains have continued to run undisturbed through the City. *See infra* pp. 7–11. Nor does the Ordinance subject OBOT to "conflicting requirements"—it is hard to imagine what law in any other jurisdiction could conflict with a ban on OBOT trafficking in coal or petcoke at a bulk material terminal in Oakland.

No matter how significant the alleged out-of-state effects, regulations that apply only to in-state conduct do not regulate extraterritorially. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013) (standards that apply only to fuels consumed in state did not regulate extraterritorially); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) (ban on the sale of foie gras from certain out-of-state geese regulates only in-state conduct); *Pharm. Research*, 768 F.3d 1037 (ordinance requiring out-of-state drug manufacturers to provide for disposal of unneeded drugs regulates only in-state conduct).

A particularly apposite case is *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015), which upheld California's law making it illegal to "possess, sell, offer for sale, trade, or distribute a shark fin" within the state. *Id.* at 1139. The plaintiffs alleged that the statute violated the dormant Commerce Clause "because it regulates extraterritorially by curbing commerce in shark fins between California and out-of-state destinations, and by preventing the flow of shark fins through California from one out-of-state destination to another." *Id*. at 1145. Substitute "coal" for "shark fins", and these become OBOT's allegations about the Ordinance. However, "even when state law has significant extraterritorial effects, it passes Commerce Clause muster when, as here, those effects result from the regulation of in-state conduct." *Id*.

Remarkably, OBOT never even claims that the Ordinance "controls commerce wholly outside of" California (or even outside of Oakland), the *sine qua non* of an extraterritoriality claim.

Instead, it argues that the Ordinance is "not a law of general applicability," OBOT Br. at 12–13; that "the Terminal will engage in interstate transportation of goods for export overseas," *id*. at 13; and that "the Ordinance prohibits the Terminal from engaging in the interstate transportation of coal and petcoke for export," *id*. at 14–15. But all of these issues are irrelevant to whether the Ordinance "directly controls commerce occurring wholly outside the boundaries of a State." *NCAA*, 10 F.3d at 639 (quoting *Healy*, 491 U.S. at 336).

OBOT then ignores contemporary decisions in favor of century-old cases that deal with pure economic protectionism and have nothing to do with extraterritorial regulation. In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), Oklahoma enacted a law under which "[p]ipe line construction is confined to corporations organized under the laws of the State, and . . . shall only transmit gas between points in the State and shall not transport to or deliver to . . . points outside of the State." *Id.* at 249–50. Similarly, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), West Virginia enacted a law "to give local consumers, present and prospective, a preferred status and to permit surplus gas only to be carried into other States." *Id.* at 594. Neither was an attempt to regulate beyond state borders.[1]

OBOT also cites *Bowman v. Chicago & Northwest Railway Co.*, 125 U.S. 465 (1888), which overturned a law restricting the import of "intoxicating liquors," and *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898), which overturned an import ban on oleomargarine. Today, these might be characterized as undue burden or discrimination cases, but neither implicates the "direct regulation" doctrine, which addresses laws controlling out-of-state conduct.[2]

In sum, because the Ordinance regulates only in-state conduct, by definition it does not "directly regulate" interstate or foreign commerce, and the Court should deny OBOT's summary judgment motion and grant Defendant-Intervenors' motion for summary judgment.

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[1] Nor was the statute in *Railroad Co. v. Husen*, 95 U.S. 465 (1878), where Missouri restricted the import of "Texas, Mexican, or Indian cattle" because "[t]he object and effect of the statute are, therefore, to obstruct inter-state commerce, and *to discriminate between the property of citizens of one State and that of citizens of other States.*" *Id.* at 470 (emphasis added).

[2] OBOT also cites *Minnesota Rate Cases*, 230 U.S. 352 (1913), which *reversed* a lower court's holding that Minnesota's intra-state rail rates interfered with interstate commerce, and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1941) and *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922) for the entirely unremarkable proposition that Congress's Commerce Clause authority extends to regulating the interstate sale of coal. OBOT Br. at 15–16.

2. The Ordinance does not discriminate against interstate commerce or favor in-state interests.

"The modern law of . . . the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state *competitors*.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (citation omitted) (emphasis added). Competition is the key: "[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). The Ordinance does not discriminate because no in-state entities benefit at the expense of out-of-state competition.

The Ordinance is an unexceptional exercise of the City's police power, and not some plot to gain an economic advantage for local interests: "[T]he purpose and intent of this chapter is to address the unique and peculiar health, safety, and/or other impacts of Coal and Coke in Oakland, and specifically West Oakland." Myre Decl. (Dkt. 141), Ex. 1 [Ordinance] § 8.60.010. As to West Oakland, the Ordinance recognizes that it has been designated it as a community "with high concentrations of air pollution and populations most vulnerable to health impacts from air pollutants (particularly toxic air contaminants (TACs) and fine particulate matter ($PM_{2.5}$)." *Id.* § 8.60.020(B).

OBOT's discrimination claim is based on Section 8.60.040(C), which exempts two types of facilities from the definition of "Coal or Coke Bulk Material Handling Facility":

> (i) Non-commercial facilities (e.g. educational facilities or residential property on which persons may Store or Handle small amounts of Coal or Coke for personal, scientific, recreational, or incidental use) and (ii) on-site manufacturing facilities where all of the Coal or Coke is consumed on-site at that facility's location and used on-site as an integral component in a production process[.]

OBOT claims that this exemption is a "blatant form of economic protectionism." OBOT Br. at 16. Oddly, OBOT's argument appears to be that the Ordinance benefits these local entities at the expense of OBOT—*another local entity*. Long Decl., Ex. 34 [Tagami Tr.], p. 283:7–13; *id.* Ex. 62 [OBOT's California LLC articles of organization].

But the Ordinance does not favor these entities at OBOT's expense (or anyone else's) because the undisputed evidence shows that these entities all *consume* coal or petcoke, and thus do not *compete* with marine terminal landlord OBOT or any out-of-state coal producers.[3]

"Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. As the Court explained:

> [W]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed.

Id. at 299. *Tracy* held that natural gas "bundled with [] services and protections" and sold by local utilities to local consumers was a different product from—and therefore did not compete with—"unbundled" natural gas sold by marketers to industrial buyers. *Id.* at 297–303.

Just such a claim involving exemptions to local interests was asserted in *Pharmaceutical Research*, where the court held that an ordinance exempting local pharmacies from requirements imposed on out-of-state drug manufacturers to provide for the collection and disposal of unwanted drugs was not discriminatory: "The fact that the Ordinance exempts local pharmacies does not change the outcome, because no 'actual or prospective competition' exists between the pharmacies and the manufacturers." 768 F.3d at 1042 n.1.

Unlike the local interests in *every* other case that found discrimination, the exempted entities in Oakland (1) gained nothing from the challenged law and (2) would be utterly indifferent should it be struck down, because "different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Tracy*, 519 U.S. at 299.

OBOT does not even try to explain how the Ordinance benefits the exempt entities like a law guaranteeing a market for in-state interests, and the Supreme Court cases it relies on show precisely why the Ordinance is *not* discriminatory. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), an

[3] "East Bay Municipality District uses probably somewhere between 180,000 to 200,000 metric tons annually for water filtration. That is a combination blended of western bituminous coal as well as anthracite." Long Decl., Ex. 34 [Tagami Tr.], p. 96:13–17. AB&I Foundry receives some petcoke to use in manufacturing cast iron pipes and fittings. Myre Decl., Ex. 45 [ESA Report], at OAK 0230333–34. OBOT does not consider EBMUD or AB&I Foundry to be competitors since OBOT is in the business of leasing land for a multi-commodity terminal, not manufacturing a product. Long Decl., Ex. 34 [Tagami Tr.], pp. 213:4–17, 280:13–14, 282:22–283:6.

Oklahoma law requiring the state's power plants burn at least 10 percent Oklahoma-mined coal was an illegal preference that could not "be characterized as anything other than protectionist and discriminatory." *Id.* at 440, 455. And in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Court held that a law was discriminatory because it banned disposal of out-of-state waste in New Jersey landfills in order to conserve capacity for in-state waste.

Finally, OBOT resorts to *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y 1981), where, after six years without a single ship docking at its Port, Rochester rezoned the area in order to create a "recreational marine area." *Id.* at 655–66, OBOT Br. at 16. Without further analysis, the court found that rezoning that would "halt forevermore commercial shipping at the Port of Rochester," and thus was "outright economic isolationism and patent economic protectionism." *Id.* at 660. The court neither explained who benefitted from this "protectionism", nor acknowledged that the injured party—the Port leaseholder—was a local firm. If *Pittston* has any relevance,[4] the fact that Rochester completely banned every form of commerce and shipping, as opposed to preventing handling and storage of two out of thousands of bulk commodities, shows why the Ordinance is not "economic isolationism."

Because the Ordinance does not "discriminate" in any manner recognized under the dormant Commerce Clause, the Court should grant Defendant-Intervenors' motion for summary judgment on this claim and deny OBOT's motion for summary judgment.

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

The Ordinance has nothing to do with regulating railroads, and thus does not burden uniformity in national railroad operations. Because the Ordinance does not burden interstate commerce, and any theoretical burden is outweighed by the Ordinance's putative public health benefits, the Court should grant Defendants' motion for summary judgment on this claim.

[4] *Pittston* has been cited exactly three times in the 36 years since it was decided, and has never been followed. It was cited as "see also" at the end of a footnote in *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1241 n.29; distinguished in *Wood Marine Service, Inc. v. Board of Commissioners*, 653 F. Supp. 434, 446–47 (E.D. La 1986), and distinguished in a one-sentence analysis in *Creekside Parking, Inc. v. City of Chelsea*, 2 LCR 104, 108 (Mass. Land Court 1994).

The Ordinance does not regulate railroads; it provides only that an "*Owner of a Coal or Coke Bulk Material Facility*" may not "(4) Load, unload, transload or transfer any Coal or Coke . . . or (5) Otherwise Store or Handle any Coal or Coke." Myre Decl., Ex. 1 [Ordinance] § 8.60.040(B) (emphasis added). If that were not clear enough, the Ordinance could not be clearer in exempting railroads from its ambit:

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

Id. § 8.60.010 (emphasis in original).

The undisputed evidence is that 18 months after the Ordinance was enacted, the coal trains that ran through Oakland before then have continued to do so. OBOT's 30(b)(6) witness, who controls the company, repeatedly confirmed that: "In fact, the Class I railroads are still permitted to come through Oakland with unit trains of coal, among other products." Long Decl., Ex. 34 [Tagami Tr.], pp. 553:20–554:15 (objection omitted); *see also id.* p. 554:17–19 ("Q: So Union Pacific trains haul coal through Oakland right now?" A. "They do.") (objection omitted); *id.* p. 556:8–17; ("Q: So the City coal and petcoke ordinance has not stopped Union Pacific from moving coal through Oakland; right? A. It has not stopped the from moving coal through Oakland to the Port of Richmond, but it has stopped them from moving coal through the City of Oakland to the Oakland Bulk & Oversized Terminal as proposed.").

Bowie Resource Partners, who owns TLS and wants to export coal via the Terminal, continues to ship coal by rail to other California ports today.[5] And, if the Terminal is never built, it would just continue to do so. After Bowie acknowledged this in response to questions from the City, Mr. Tagami said that this fact was "not helpful to a Commerce Clause argument. We need to show a 'burden' on commerce; by saying 'the product will continue to be shipped as it is today' we are suggesting there is no burden on commerce (as opposed to a burden on us, which actually doesn't 'count' for the purposes of this argument.)" Long Decl., Ex. 61, at OB169764–65.

[5] "Q. So, Bowie currently ships coal from Skyline, Dugout and Sufco mines in Utah to the ports of Stockton, Richmond and Long Beach? A. Yes." Long Decl., Ex. 38 [Wolff Tr.], p 59:20–23.

Nevertheless, OBOT claims that the Ordinance undermines required national uniformity in the rail system by forcing coal trains going through Oakland to "conform" to the Ordinance or avoid Oakland altogether, and that the City has "conceded" that "coal and petcoke cannot be unloaded, transferred from one rail car to another, or even stored in a rail car" in Oakland. OBOT Br. at 19–20. This is completely specious. OBOT relies on a witness who only says that (1) "temporary" could mean "30 minutes"; (2) the Ordinance prohibits storing or handling of coal or petcoke specifically at "the break-bulk terminal proposed for the West Gateway" (the Terminal); and (3) the Ordinance could apply to another hypothetical future terminal that handled coal. OBOT Br. at 20. None of these, individually or collectively, can be made to mean what OBOT claims, *i.e.*, that the Ordinance applies to railcars carrying coal that pass through or even stop—whether for 30 minutes or 30 days—in Oakland.[6]

Moreover, the same witness repeatedly testified that the Ordinance did *not* apply to railcars transporting coal through Oakland:

> Q. Okay. And the same thing with respect to rail, the City recognizes that rail transportation of coal cannot happen if you cannot put coal onto or take it off of a railcar; fair?
>
> A. No, I disagree. There is a difference between transporting coal in rail cars and having them pass through a certain area, and having them stop, unload, store, handle and manage coal.
>
> ***
>
> Q: Okay. And similarly, if you cannot take the coal off of the railcar, you can't transport coal by rail?
>
> A: Unless the coal is already in the railcar as it proceeds through Oakland.

Long Decl., Ex. 43 [Cappio Tr.], pp. 61:16–23, 62:9–13.

Nor, once again, do the cases OBOT cites support its argument. OBOT relies on *Union Pacific Railroad Co. v. California Public Utilities Commission*, 346 F.3d 851 (9th Cir. 2003), a challenge to a CPUC requirement that rail carriers cooperate in developing and implementing standards for train length and weight distribution. The Ninth Circuit agreed that the prospect of each state setting its own such standards would create an unworkable system that would undermine

[6] *See* Def.'s Objections to Evidence Submitted in Opposition to Plaintiff's Motion for Summary Judgment.

national uniformity in rail regulation, just as the Supreme Court had held in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 774–75 (1945):

> [T]he enforcement of the Arizona statute results in freight trains being broken up and reformed at the California border and in New Mexico, some distance from the Arizona line. Frequently it is not feasible to operate a newly assembled train from the New Mexico yard nearest to Arizona, with the result that the Arizona limitation governs the flow of traffic as far east as El Paso, Texas. For similar reasons the Arizona law often controls the length of passenger trains all the way from Los Angeles to El Paso.

Even if there were *any* evidence of any disruption of railroad operations as a result of the Ordinance (which there isn't), OBOT does not explain how it rises to the level of the logistical nightmare of states making their own train configuration rules.[7]

More apt is *Burlington Northern v. Department of Public Service Regulation*, 763 F.2d 1106 (9th Cir. 1985), where the plaintiff challenged a Montana law requiring it to maintain freight offices in every town with a population of 1,000 or more, compelling it to staff at least eight such offices which it did not need. The court held that "the location and staffing of local rail stations" did not implicate national railway uniformity; instead, it was "an intensely local matter, with, at worst, a minimal effect upon interstate commerce." *Id.* at 1114.

Given that there is no burden, substantial or not, on railroad operations, there is no need to perform the *Pike* balancing test to determine if "the burden [the statute] imposes on interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Ass'n des Eleveurs*, 729 F.3d at 951(quoting *Pike*, 397 U.S. at 142). A challenger "must first show ... the statute imposes a substantial burden" before the court proceeds to weigh those burdens against the benefits. *Id.* at 951–52. Any such inquiry here favors the Defendants, since OBOT has also failed to put forth *any* evidence as to how even its hypothetical burden outweighs the Ordinance's putative benefits.[8] But

[7] The only other railroad cases OBOT cites are *Griffioen v. Cedar Rapids & Iowa City Railway Co.*, 785 F.3d 1182 (8th Cir. 2015), which deals only with ICCTA preemption, *Riffin v. Surface Transportation Board.*, 733 F.3d 340 (D.C. Cir. 2013), which deals with the Interstate Commerce Act, and *Michigan Southern Railroad Co. v. City of Kendallville*, 251 F.3d 1152 (7th Cir. 2001), which OBOT quotes for its discussion of the Federal Railroad Safety Act, a statute not at issue here.

[8] OBOT's only statement as to balancing burdens and benefits is a footnote saying that "[t]he burdens the Ordinance imposes on interstate and foreign commerce outweigh the local benefits in many other ways, which OBOT will present to the Court if this case proceeds to trial." OBOT Br. at 20 n.31. Since OBOT did not make *any* such argument in its brief, it is not clear what OBOT is referring to.

even if OBOT had, any such hypothetical burden is more than outweighed by the Ordinance's public health benefits.

Courts look to the "putative"—not the "actual"—benefits of the challenged action. *Nat'l Ass'n of Optometrists v. Harris*, 682 F.3d 1144, 1155 (9th Cir. 2012) (quoting *Pike*, 397 U.S. at 142). Thus the Court must assess benefits based on the information before the City Council when it adopted the Ordinance, not as assessed after the fact with new material prepared for trial. *See* City's Br. sec. III.B. But even if the Court were to consider extra-record evidence:

> In order for a regulation to be deemed "illusory," the state must fail to make even a colorable showing that the regulations contribute to health and safety, resulting in overwhelmingly one-sided evidence that there are no real benefits to the challenged law. . . . But, if the state produces some evidence showing the purported benefits exist, the challenged statute will not be considered illusory *even if there is strong countervailing evidence.*

Nat'l Ass'n of Optometrists, 682 F.3d at 1156 n.17 (emphasis added). This standard reflects the "strong presumption of validity" for local health and safety regulations, and the admonition that the judiciary "will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Pharm. Research*, 768 F.3d at 1045 (quoting *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981)). Indeed, "the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary" to second-guess state or local legislators under the *Pike* test. *Davis*, 553 U.S. at 353.

In sum, because the Ordinance does not burden interstate commerce, and any purely hypothetical burden is outweighed by its public health benefits, the Court should grant Defendant-Intervenors' motion for summary judgment on this claim.

B. Federal law does not preempt the Ordinance, nor did the City breach the Development Agreement.

Defendant-Intervenors hereby incorporate Defendant City of Oakland's arguments with respect to OBOT's claims that the City breached the Development Agreement dated July 16, 2013, and that the Ordinance is preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 *et seq*., the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq*., and the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* Defendant-Intervenors reserve the right to address these claims on reply.

III. CONCLUSION

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

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Respectfully submitted,

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