

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

	)	
	)	Case Number: 3:16-CV-7014-VC
Oakland Bulk & Oversized Terminal, LLC	)	
Plaintiff,	)	<b>JOINT PRETRIAL CONFERENCE</b>
	)	<b>STATEMENT</b>
	)	
vs.	)	
	)	
City of Oakland	)	
	)	
Defendant.	)	
<hr/>		
Sierra Club and San Francisco Baykeeper,	)	Date: January 10, 2018
	)	Time: 10:00 a.m.
	)	Ctrm.: No. 2, 17 <sup>th</sup> Floor
Defendants-Intervenors.)	)	Judge: Honorable Vince Chhabria

Pursuant to Rule 16 of the Federal Rules of Civil Procedure, Civil Local Rule 16-10, and Paragraph 2 of the Standing Order for Civil Trials Before Judge Chhabria, Plaintiff Oakland Bulk & Oversized Terminal, LLC (“OBOT”), Defendant City of Oakland (the “City”), and Defendant-Intervenors Sierra Club and San Francisco Baykeeper (“Defendant-Intervenors”) submit this Joint Pretrial Conference Statement for the Pretrial Conference set for January 10, 2018, at 10:00 A.M.

**A. Description of the Claims and Defenses:** OBOT alleges three claims for relief against the City, which all present issues for the Court (rather than a jury) to decide:

1. Unconstitutionality under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3): OBOT alleges that Oakland Ordinance No. 13385 (the “Ordinance”) and Resolution No. 86234 (the “Resolution”) violate the Dormant Commerce Clause of the United States Constitution.
2. Preemption under:
  - a. The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”)—OBOT alleges that the ICCTA preempts the Ordinance and Resolution. *See* 49 U.S.C. § 10501(a), (b).
  - b. The Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*

1 (“HMTA”)—OBOT alleges that the HMTA preempts the Ordinance and  
2 Resolution.

3 c. The Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (“the Shipping  
4 Act”)—OBOT alleges that the Shipping Act preempts the Ordinance and  
5 Resolution.

6 3. Breach of the Development Agreement dated July 16, 2013 (the “DA”): OBOT  
7 alleges that the City’s application of the Ordinance to OBOT through the  
8 Resolution is a breach of the DA.

9 The City and Defendant-Intervenors (“Defendants”) respond to OBOT’s claims as

10 follows:

11 Affirmative Defenses:

- 12 1. OBOT lacks standing with respect to its Commerce Clause and three  
13 preemption claims (“Federal Claims”). OBOT lacks standing to present  
14 either a facial challenge to the Ordinance or an as-applied challenge to  
15 the application of the Ordinance to OBOT.
- 16 2. OBOT has not presented an actual case or controversy with respect to any  
17 facial challenge to the Ordinance.
- 18 3. OBOT failed to meet the applicable statute of limitations for its  
19 supplemental claim for breach of contract (“Breach Claim”).
- 20 4. OBOT has unclean hands and is therefore barred from asserting either the  
21 Federal Claims or the Breach Claims against the City.

22 In addition, OBOT cannot and will not prove any of its claims for relief.

23 **B. Statement of All Relief Sought:** OBOT respectfully requests the following relief:

- 24 1. A declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and/or  
25 Rule 57 of the Federal Rules of Civil Procedure, that:
  - 26 a. the Ordinance and Resolution are unconstitutional under the Commerce  
27 Clause of the United States Constitution;
  - 28 b. the ICCTA preempts the Ordinance and Resolution;
  - a. the HMTA preempts the Ordinance and Resolution;
  - d. the Shipping Act preempts the Ordinance and Resolution; and
  - e. the application of the Ordinance to OBOT through the Resolution is a  
breach of the DA;
2. A permanent injunction, pursuant to 28 U.S.C. § 1651, 42 U.S.C. § 1983, and/or  
Rule 65 of the Federal Rules of Civil Procedure, enjoining Oakland from applying  
or enforcing the Ordinance and Resolution as to OBOT or the Terminal (and any  
activities related thereto);
3. An award of reasonable attorneys’ fees and costs; and

4. An award of such other legal or equitable relief available under the law that may be considered appropriate under the circumstances in light of the City of Oakland's alleged misconduct, including relief prohibiting the City from asserting that OBOT has breached the DA, the LDDA, and the Ground Lease for West Gateway, dated February 16, 2016, by any failure to perform resulting from the City's misconduct.

Defendants respectfully seek the following relief from the Court:

1. Deny with prejudice each of OBOT's claims for relief and enter judgment for Defendants.
2. Deny OBOT's claims for attorney's fees.
3. In the alternative, if the Court were to interpret the Ordinance to apply to rail activities or rail carriers in a manner that would be preempted under ICCTA, by prohibiting a rail carrier from unloading coal or coke into the Terminal dump pits, the City requests this Court to sever the word "unload" from section 8.60.030(12) and "unloading" from section 8.60.040(B)(4) of the Ordinance.
4. Award Defendants cost of suit and any and all other relief to which they are justly entitled.

**C. Statement of Relevant Undisputed Facts:** The parties have stipulated to the following, undisputed facts:

1. This action concerns a portion of the former Oakland Army Base known as the "West Gateway," which, after conveyance by the United States government in 2003, is owned by defendant the City.
2. OBOT is a California limited liability company wholly owned by its sole member, California Capital and Investment Group, Inc. ("CCIG").
3. OBOT (by way of its predecessor-in-interest, Prologis CCIG Oakland Global, LLC) and the City are parties to a Lease, Development and Disposition Agreement (the "LDDA") effective December 4, 2012.
4. OBOT (by way of its predecessor-in-interest, Prologis CCIG Oakland Global, LLC) and the City are parties to the DA. The City approved the DA pursuant to California Government Code sections 65864, *et seq.*
5. Pursuant to the DA and LDDA, OBOT is pursuing the development of a "ship-to-rail terminal designed for the export of non-containerized bulk goods and the import of oversized or overweight cargo" at the West Gateway site of the former Oakland Army Base (the "Terminal").
6. OBOT and the City are parties to a Ground Lease for the West Gateway dated as of February 16, 2016.
7. OBOT and Terminal Logistics Solutions ("TLS") are parties to an Exclusive Negotiating Agreement, as amended on multiple occasions since first entered into

1 on April 17, 2014.

- 2 8. Oakland Global Rail Enterprises, Inc. (“OGRE”) is a joint venture between CCIG  
3 and West Oakland Pacific Railroad.
- 4 9. On June 17, 2014, the Oakland City Council adopted Resolution No. 85054  
5 C.M.S., titled “RESOLUTION TO OPPOSE TRANSPORTATION OF  
6 HAZARDOUS FOSSIL FUEL MATERIALS INCLUDING CRUDE OIL,  
7 COAL AND PETROLEUM COKE; ALONG CALIFORNIA WATERWAYS  
8 THROUGH DENSELY POPULATED AREAS THROUGH THE CITY OF  
9 OAKLAND.”
- 10 10. On June 27, 2016, the Oakland City Council voted to pass Ordinance No. 13385  
11 C.M.S., titled “AN ORDINANCE (1) AMENDING THE OAKLAND  
12 MUNICIPAL CODE TO PROHIBIT THE STORAGE AND HANDLING OF  
13 COAL AND COKE AT BULK MATERIAL FACILITIES OR TERMINALS  
14 THROUGHOUT THE CITY OF OAKLAND AND (2) ADOPTING  
15 CALIFORNIA ENVIRONMENTAL QUALITY ACT EXEMPTION  
16 FINDINGS” (the “Ordinance”).
- 17 11. On June 27, 2016, the Oakland City Council adopted Resolution No. 86234  
18 C.M.S., titled “A RESOLUTION (A) APPLYING [THE ORDINANCE] TO THE  
19 PROPOSED OAKLAND BULK AND OVERSIZED TERMINAL LOCATED  
20 IN THE WEST GATEWAY DEVELOPMENT AREA OF THE FORMER  
21 OAKLAND ARMY BASE; AND (B) ADOPTING CEQA EXEMPTION  
22 FINDINGS AND RELYING ON THE PREVIOUSLY CERTIFIED 2002 ARMY  
23 BASE REDEVELOPMENT PLAN EIR AND 2012 ADDENDUM” (the  
24 “Resolution”).
- 25 12. On July 19, 2016 the Oakland City Council, in a second vote, adopted the  
26 Ordinance.

27 **D. Description of the Parties’ Efforts to Settle:** On April 17, 2017, OBOT and the  
28 City engaged in mediation with the Hon. Steven A. Brick (Ret.) of JAMS, who has since  
passed away. That mediation did not result in settlement.

The City and OBOT met for bilateral settlement discussions on August 3, 2017.  
In September and October 2017, Mr. Tagami and Ms. Cappio exchanged further  
correspondence regarding settlement issues.

On December 11, 2017, OBOT and the City participated in a settlement  
conference before the Honorable Jacqueline Scott Corley. A further telephonic  
settlement conference was scheduled for December 15, and a further in-person settlement  
conference was scheduled for December 18. Thereafter, those further conferences were

1 vacated. No settlement was reached and no further settlement discussions are presently  
2 scheduled.

3 **E. List of Witnesses Likely to Be Called:** The parties identify the following witnesses  
4 likely to be called at trial live or by video deposition (other than for impeachment or  
5 rebuttal):

Witness	Topics of Expected Testimony	Estimated Time for Direct & Cross
<p>7 <b>Phillip Tagami</b> 8 President and CEO, 9 California Capital 10 &amp; Investment 11 Group, Inc.</p>	<p>12 <i>OBOT Topics:</i> The history of the Terminal 13 Project; the business and market conditions 14 relevant to the Terminal Project; the design, 15 construction and anticipated operations of/at 16 the Terminal; regulations relating to the 17 Terminal; agreements between OBOT, its 18 affiliates and the City; the Ordinance and 19 Resolution and their impacts with respect to 20 the Terminal Project.</p> <p>21 <i>Defendants Topics:</i> Cross-examination 22 concerning Mr. Tagami's testimony offered 23 on direct examination. OBOT's disclosures 24 to the City and the public of its intentions; 25 third party funding for the Terminal Project; 26 entity status and distinctions among OBOT, 27 OGRE, TLS, etc; HDR and Cardno work and 28 reports; information submitted to the City in connection with the proposed Ordinance; OBOT's agreements with TLS; rail shipments of coal through Oakland; use of coal by exempted entities; coal exports through other ports.</p>	<p>29 <i>OBOT Direct:</i> 2.5 30 hours</p> <p>31 <i>Cross/Defendant 32 Examination:</i> 3 33 hours</p>
<p>34 <b>Mark McClure</b> 35 Vice President, 36 California Capital 37 &amp; Investment 38 Group, Inc.</p>	<p>39 <i>OBOT Topics:</i> The history of the Terminal 40 Project; the business and market conditions 41 relevant to the Terminal Project; the design, 42 construction and anticipated operations of/at 43 the Terminal; regulations relating to the 44 Terminal; agreements between OBOT, its 45 affiliates and the City; the Ordinance and 46 Resolution and their impacts with respect to 47 the Terminal Project; the history and 48 operations of OGRE.</p> <p>49 <i>Defendants Topics:</i> Cross-examination</p>	<p>50 <i>OBOT Direct:</i> 2.5 51 hours</p> <p>52 <i>Cross/Defendant</i></p>

1		concerning Mr. McClure's testimony offered on direct examination. OGRE STB/common carrier status.	<i>Examination: 1.5</i>
2	<b>Megan Morodomi</b> Project Manager, California Capital & Investment Group, Inc.	<i>OBOT Topics:</i> Document identification/authentication.	<i>OBOT Direct: 0.2 hours</i>
3		<i>Defendants Topics:</i> Cross-examination concerning Ms. Morodomi's testimony offered on direct examination.	<i>Cross/Defendant Examination: 0.1 hours</i>
4	<b>Claudia Cappio</b> Assistant City Administrator, City of Oakland (retired Dec. 2017)	<i>OBOT Topics:</i> The agreements between OBOT, its affiliates and the City; the Ordinance and Resolution; the City's activities relating to the Ordinance and Resolution; the City's activities relating to coal, petcoke and other fossil fuels; regulations relating to the Terminal.	<i>Cross/OBOT Examination: 2 hours</i>
5		<i>Defendants Topics:</i> Same as OBOT's topics, and Army Base redevelopment background; public hearing/Development Agreement section 3.4.2 process, including scope of evidence collected and made available for Council review; public financing for Army Base project.	<i>Direct/Defendant Examination: 2 hours</i>
6	<b>Patrick Cashman</b> Former Project Manager for the Oakland Army Base Project, City of Oakland	<i>OBOT Topics:</i> The history of the Terminal Project; the LDDA; the City's activities relating to the Ordinance and Resolution; the City's activities relating to coal, petcoke and other fossil fuels; the design, construction and operations of/at the Terminal; regulations relating to the Terminal.	<i>Cross/OBOT Examination: 2 hours</i>
7		<i>Defendants Topics:</i> Same as OBOT's topics, and Army Base redevelopment background; public financing for Army Base project; OBOT plans to store and handle coal and coke at Terminal, OBOT disclosures/nondisclosures thereof; Army Base infrastructure orientation.	<i>Direct/Defendant Examination: 2 hours</i>
8	<b>Doug Cole</b> Project Manager, City of Oakland	<i>OBOT Topics:</i> The history of the Terminal Project; the agreements between OBOT, its affiliates and the City; the design, construction, and operations of/at the Terminal.	<i>Cross/OBOT Examination: 0.5 hours</i>
9		<i>Defendants Topics:</i> Same as OBOT topics,	<i>Direct/Defendant</i>

1		and public financing for Army Base project; scope of evidence collected and made available for Council review.	<i>Examination: 1 hour</i>
2	<b>Sabrina Landreth,</b> City Administrator, City of Oakland	<i>OBOT Topics:</i> The agreements between OBOT, its affiliates and the City; the design, construction and anticipated operations of/at the Terminal; the Ordinance and Resolution; the City's activities relating to the Ordinance and Resolution; the City's activities relating to coal, petcoke and other fossil fuels.	<i>Cross/OBOT Examination: 1 hour</i>
3		<i>Defendants Topics:</i> Same as OBOT topics, and Army Base redevelopment background; public hearing/Development Agreement section 3.4.2 process, including scope of evidence collected and made available for Council review; public financing for Army Base project.	<i>Direct/Defendant Examination: 1 hour</i>
4	<b>Darin Ranelletti</b> Deputy Director of Planning, City of Oakland	<i>OBOT Topics:</i> The agreements between OBOT, its affiliates and the City; the design, construction and anticipated operations of/at the Terminal; the Ordinance and Resolution; the City's activities relating to the Ordinance and Resolution; the City's activities relating to coal, petcoke and other fossil fuels.	<i>Cross/OBOT Examination: 0.5 hours</i>
5		<i>Defendants Topics:</i> Same as OBOT topics, and negotiations regarding Development Agreement; lack of CEQA review for impacts of storing and handling coal and coke at Terminal.	<i>Direct/Defendant Examination: 0.5 hour</i>
6	<b>Jerry Bridges,</b> President and CEO, Terminal Logistics Solutions	<i>OBOT Topics:</i> The design, construction, and anticipated operations at the Terminal; qualities, characteristics, and anticipated quantity of coal to be shipped through the Terminal.	<i>OBOT Direct: 1 hour</i>
7		<i>Defendants Topics:</i> Same as OBOT topics and cross examination regarding same, and TLS ownership, management and control; Exclusive Negotiating Agreement and amendments; Development Management Agreement, amendments and suspension/termination; expected contractual arrangements and employees for Terminal; HDR and Cardno work and reports;	<i>Cross/Defendant Examination: 2 hours</i>

1		information submitted to City and meetings with City representatives.	
2	<b>Crescentia Brown</b>	<i>OBOT Topics:</i> The Report prepared by ESA in connection with the Ordinance and Resolution.	<i>Cross/OBOT Examination:</i> 1 hour
3	Employee of ESA (consultant to the City of Oakland)	<i>Defendants Topics:</i> Same as OBOT topic, and City contract with ESA for ESA Report.	<i>Direct/Defendant Examination:</i> 1 hour
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5			
6	<b>Victoria Evans</b>	<i>OBOT Topics:</i> The Report prepared by ESA in connection with the Ordinance and Resolution.	<i>Cross/OBOT Examination:</i> 1 hour
7	Employee of ESA (consultant to the City of Oakland)	<i>Defendants Topics:</i> Same as OBOT topic.	<i>Direct/Defendant Examination:</i> 1 hour
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9			
10	<b>James Wolff</b>	<i>OBOT Topics:</i> The shipment and export of coal; the qualities, characteristics, and anticipated quantity of coal to be shipped through the Terminal.	<i>OBOT Direct:</i> 1 hour
11	Chief Financial Officer, Bowie Resource Partners	<i>Defendants Topics:</i> Same as OBOT topics and cross examination regarding same, and Bowie issues; Utah coal issues; Bowie relationship with TLS, OBOT, rail carriers; Bowie's current California and West Coast exports; expected contractual arrangements for coal transport; coal transportation issues, coal shipments, port capacities.	<i>Cross/Defendant Examination:</i> 1.5 hours
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18	<b>Lyle Chinkin</b>	<i>OBOT Topics:</i> An emissions quantification and scientific assessment of potential air quality impacts of particulate matter emissions associated with anticipated operations at the Terminal; a critique of the emissions estimates and other analyses performed by ESA; a rebuttal to the opinions offered by City witnesses Dr. Sahu, Dr. Gray, and Dr. Moore.	<i>OBOT Direct:</i> 1 hour
19	OBOT Expert Witness	<i>Defendants Topics:</i> Cross-examination concerning Mr. Chinkin's testimony offered on direct examination.	<i>Cross/Defendant Examination:</i> 1.5 hours
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<p>1 <b>Dr. Andrew Maier</b> OBOT Expert Witness</p>	<p><i>OBOT Topics:</i> A scientific assessment of the potential health impacts from anticipated operations at the Terminal; a critique of the information relied on by the City in passing the Ordinance and Resolution regarding the potential health impacts of permitting coal or petcoke to be shipped through the Terminal; a rebuttal to the opinions offered by City witness Dr. Moore.</p> <p><i>Defendants Topics:</i> Cross-examination concerning Dr. Maier's testimony offered on direct examination.</p>	<p><i>OBOT Direct:</i> 1 hour</p> <p><i>Cross/Defendant Examination:</i> 1.5 hours</p>
<p>9 <b>Dr. Ali Rangwala</b> OBOT Expert Witness</p>	<p><i>OBOT Topics:</i> A scientific assessment of potential fire and explosion risks associated with anticipated operations at the Terminal; a critique of the information relied on by the City in passing the Ordinance and Resolution regarding potential fire and explosion risks associated with anticipated operations at the Terminal; a rebuttal to the opinions offered by City witness Dr. Fernandez-Pello.</p> <p><i>Defendants Topics:</i> Cross-examination concerning Dr. Rangwala's testimony offered on direct examination.</p>	<p><i>OBOT Direct:</i> 1.25 hours</p> <p><i>Cross/Defendant Examination:</i> 2 hours</p>
<p>17 <b>James Dillman</b> OBOT Expert Witness</p>	<p><i>OBOT Topics:</i> A rebuttal to the opinions offered by City witness Mr. Sullivan and Defendant-Intervenor witness Dr. Auffhammer, including an assessment of the capacity to export coal through certain terminals.</p> <p><i>Defendants Topics:</i> Cross-examination concerning Mr. Dillman's testimony offered on direct examination.</p>	<p><i>OBOT Direct:</i> 1 hours</p> <p><i>Cross/Defendant Examination:</i> 1.5 hours</p>
<p>23 <b>David Buccolo</b> OBOT Expert Witness</p>	<p><i>OBOT Topics:</i> An assessment of coal-related rail operations, including at the Terminal, and including a rebuttal to the opinions offered by City witness Mr. Sullivan.</p> <p><i>Defendants Topics:</i> Cross-examination concerning Mr. Buccolo's testimony offered on direct examination.</p>	<p><i>OBOT Direct:</i> 1.5 hours</p> <p><i>Cross/Defendant Examination:</i> 1.5 hours</p>
<p>28 <b>Stephen Sullivan</b></p>	<p><i>OBOT Topics:</i> Testimony regarding railroad</p>	<p><i>Cross/OBOT</i></p>

<p>1 City Expert Witness</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p>	<p>operations and business in the United States. Cross-examination concerning Mr. Sullivan's testimony offered on direct examination.</p> <p><i>Defendants Topics:</i> Same as OBOT's topics, and rail operations leading into and through the OBOT bulk commodities terminal, including rail car arrival, break-up, staging, storage, unloading, and return; other Pacific Coast coal export terminals actually or potentially available for shipment of coal; fugitive coal dust emissions from rail cars, including proposed mitigation measures; response to testimony offered by OBOT experts and other witnesses, including David Buccolo and James Dillman.</p>	<p><i>Examination:</i> 2 hours</p> <p><i>Direct/Defendant Examination:</i> 2 hours</p>
<p>12 <b>Dr. Maximillian</b></p> <p>13 <b>Auffhammer</b></p> <p>14 City Expert Witness</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p>	<p><i>Defendants Topics:</i> An assessment of terminal capacity for coal and coke on the West Coast; current and future coal export volumes; OBOT's lack of competition with entities exempt from Ordinance; and domestic and global coal markets.</p> <p><i>OBOT Topics:</i> Cross-examination concerning Dr. Auffhammer's testimony offered on direct examination.</p>	<p><i>Direct/Defendant Examination:</i> 2 hours</p> <p><i>Cross/OBOT Examination:</i> 0.75 hours</p>
<p>19 <b>Dr. Zoe Chafe</b></p> <p>20 Consultant to the</p> <p>21 City of Oakland</p> <p>22</p>	<p><i>Defendants Topics:</i> Chafe Report</p> <p><i>OBOT Topics:</i> Cross-examination concerning Dr. Chafe's testimony offered on direct examination.</p>	<p><i>Direct/Defendant Examination:</i> 0.7 hours</p> <p><i>Cross/OBOT Examination:</i> 0.5 hours</p>
<p>23 <b>Dr. Carlos</b></p> <p>24 <b>Fernandez-Pello</b></p> <p>25 City Expert Witness</p> <p>26</p> <p>27</p> <p>28</p>	<p><i>Defendants Topics:</i> A scientific assessment of fire and explosion risks associated with coal, coke, and anticipated operations at the Terminal; response to testimony offered by OBOT experts and other witnesses, including OBOT witness Dr. Ali Rangwala.</p> <p><i>OBOT Topics:</i> Cross-examination concerning Dr. Fernandez Pello's testimony</p>	<p><i>Direct/Defendant Examination:</i> 2 hours</p> <p><i>Cross/OBOT Examination:</i> 1.25</p>

	offered on direct examination.	hours
1 2 3 4 5 6 7 8 9 10	<p><b>Dr. Andrew Gray</b> City Expert Witness</p> <p><i>Defendants Topics:</i> Air dispersion modeling of particulate matter emissions arising from OBOT coal-handling operations; air dispersion modeling of particulate matter and other pollutants from accidental fires within OBOT bulk commodities facility; adverse impacts of particulate matter and other pollutants on sensitive receptor sites within West Oakland and other areas near the OBOT facility; response to opinions offered by OBOT experts and other witnesses, including Lyle Chinkin.</p> <p><i>OBOT Topics:</i> Cross-examination concerning Dr. Gray's testimony offered on direct examination.</p>	<p><i>Direct/Defendant Examination:</i> 1.5 hour</p> <p><i>Cross/OBOT Examination:</i> 0.5 hours</p>
11 12 13 14 15 16 17 18 19 20	<p><b>Dr. Ranajit Sahu</b> City Expert Witness</p> <p><i>Defendants Topics:</i> Calculation of fugitive coal dust emissions from the proposed OBOT bulk commodities facility and surrounding rail operations; assumptions and factors in support of emissions calculations; evaluation of emissions computations performed by ESA; effectiveness of mitigation measures proposed by OBOT; uncertainties in design and engineering of OBOT's proposed bulk commodities facility; response to testimony offered by OBOT experts and other witnesses, including Lyle Chinkin.</p> <p><i>OBOT Topics:</i> Cross-examination concerning Dr. Sahu's testimony offered on direct examination.</p>	<p><i>Direct/Defendant Examination:</i> 2.5 hours</p> <p><i>Cross/OBOT Examination:</i> 1 hour</p>
21 22 23 24 25 26 27 28	<p><b>Dr. Nadia Moore</b> City Expert Witness</p> <p><i>Defendants Topics:</i> Evaluation of adverse health impacts due to increased particulate matter and other pollutants arising from the OBOT bulk commodities facility, including respiratory and cardiovascular disease, hospital admissions and ER visits, and premature death; federal, state and local regulatory standards for particulate matter emissions, including NAAQS; adverse health impacts arising from accidental coal fires within the OBOT facility; historical and existing air pollution levels within West</p>	<p><i>Direct/Defendant Examination:</i> 4 hours</p>

	<p>Oakland and other areas near the OBOT facility; scientific and medical research supporting the aforementioned adverse health impacts; response to testimony offered by OBOT experts and other witnesses, including Dr. Maier.</p> <p><i>OBOT Topics:</i> Cross-examination concerning Dr. Moore’s testimony offered on direct examination.</p>	<p><i>Cross/OBOT Examination:</i> 1 hours</p>
<p><b>John Monetta</b> City of Oakland Project Manager</p>	<p><i>Defendants Topics:</i> Scope of evidence collected and made available for Council review; Army Base infrastructure orientation.</p> <p><i>OBOT Topics:</i> As discussed below, OBOT objects to Defendants calling Mr. Monetta, who was never disclosed in Defendants’ Rule 26 disclosures, at trial.</p>	<p><i>Direct/Defendant Examination:</i> 1 hour</p>
<p><b>Heather Klein</b> City of Oakland Planner</p>	<p><i>Defendants Topics:</i> Scope of evidence collected and made available for Council review.</p> <p><i>OBOT Topics:</i> As discussed below, OBOT objects to Defendants calling Mr. Monetta, who was never disclosed in Defendants’ Rule 26 disclosures, at trial.</p>	<p><i>Direct/Defendant Examination:</i> 0.5 hour</p>
<p><b>Edward Liebsch</b> HDR</p>	<p><i>Defendants Topics:</i> HDR White Paper issues</p> <p><i>OBOT Topics:</i> HDR White Paper</p>	<p><i>Defendant Examination:</i> 1 hour</p> <p><i>OBOT Examination:</i> 0.5 hours</p>
<p><b>Marcel Veilleux</b> Cardno</p>	<p><i>Defendants Topics:</i> Cardno reports and related issues</p> <p><i>OBOT Topics:</i> Cardno analyses</p>	<p><i>Defendant Examination:</i> 1 hour</p> <p><i>OBOT Examination:</i> 0.5 hours</p>

*Separate Statement by OBOT:* OBOT objects to Defendants’ calling John Monetta or Heather Klein to testify at trial. Neither was included on either of the Defendants’ Rule 26 disclosures. *See* Fed. R. Civ. P. 26(a)(1)(A). Accordingly, neither

1 may testify at trial. *See, e.g., Percelle v. Pearson*, No. 12-cv-05343, 2016 WL 6427883,  
2 at \*3 (N.D. Cal. Oct. 31, 2016). The fact that summary judgment declarations were  
3 submitted by Ms. Klein (Dkt. 150) and Mr. Monetta (Dkt. 151) “does not constitute a  
4 substitute for proper disclosure.” *Id.* (excluding witnesses from testifying who were not  
5 timely disclosed despite their submission of summary judgment declarations). Further,  
6 Defendants’ own descriptions of each witness’s expected testimony confirms that they  
7 intend to offer substantive testimony from both. Defendants should be precluded from  
8 calling either at trial, given their failure to timely disclose them under Federal Rule 26.

9 *Separate Statement by Defendants:* The City intends to have Mr. Monetta and  
10 Ms. Klein testify as custodians to authenticate the record before the City Council in  
11 connection with the subject Ordinance and Resolution. In that regard, the City posted on  
12 its website all the materials presented by the City and its consultants, OBOT and its  
13 consultants and supporters, and members of the public related to this matter, as the  
14 Agenda Report for the June 27, 2016 public hearing discussed. *See* Declarations of John  
15 Monetta and Heather Klein filed in support of the City’s initial summary judgment brief  
16 (Dkt. 150 and 151). The City produced all these record documents to OBOT during the  
17 litigation, along with certified transcripts of the relevant portion of the City Council  
18 meetings. Declaration of Christopher Long, ¶¶ 3-6 (Dkt. 159).

19  
20 Because Mr. Monetta and Ms. Klein are offered to authenticate the record before  
21 the City Council, they should be allowed to testify regardless of initial disclosures. *See,*  
22 *e.g., Lam v. City and County of San Francisco*, 565 Fed.Appx. 641, 643 (9th Cir. 2014)  
23 *cert. denied, Lam v. City & Cty. of San Francisco, Cal.*, 135 S. Ct. 2860, 192 L.Ed. 2d  
24 896 (2015) (nondisclosure of witnesses used to authenticate documents was harmless);  
25 *Riddick v. AT&T*, 2017 WL 2214933, at \*6 (E.D. Cal. May 19, 2017) (same, noting that,  
26 like OBOT here, plaintiff provided “no authority for the proposition that a party must  
27 disclose the identity of a records custodian”); *Beauperthuy v. 24 Hour Fitness USA, Inc.*,  
28 772 F. Supp. 2d 1111, 1120 (N.D. Cal. 2011) (same).

1 Mr. Monetta, who is well known to OBOT as the City’s property manager, also  
2 would testify to a brief noncontroversial orientation of the Army Base infrastructure,  
3 which the City submits should fall into lack of surprise/harmless exception found in Fed.  
4 R. Civ. P. 37(c)(1) (exclusion not warranted if nondisclosure “was substantially justified  
5 or is harmless”).

6 **F. Estimate of Trial Length:** The parties anticipate this proceeding taking  
7 approximately 12 trial days.

9 Dated: January 3, 2018

*/s/ Robert P. Feldman*

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10 Robert P. Feldman (Bar No. 69602)  
11 bobfeldman@quinnemanuel.com  
12 Meredith M. Shaw (Bar No. 284089)  
13 meredithshaw@quinnemanuel.com  
14 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
15 555 Twin Dolphin Drive, 5<sup>th</sup> Floor  
16 Redwood Shores, California 94065-2139  
17 Telephone: (650) 801-5000  
18 Facsimile: (650) 801-5100

*Attorneys for Plaintiff  
Oakland Bulk & Oversized Terminal, LLC*

19 Dated: January 3, 2018

*/s/ Timothy A. Colvig*

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20 Kevin D. Siegel (SBN 194787)  
21 E-mail: ksiegel@bwsllaw.com  
22 Gregory R. Aker (SBN 104171)  
23 E-mail: gaker@bwsllaw.com  
24 Timothy A. Colvig (SBN 114723)  
25 E-mail: tcolvig@bwsllaw.com  
26 BURKE, WILLIAMS & SORESENSEN, LLP  
27 1901 Harrison Street, Suite 900  
28 Oakland, CA 94612-3501  
Tel: 510.273.8780 Fax: 510.839.9104

*Attorneys for Defendant  
CITY OF OAKLAND*

Dated: January 3, 2018

*/s/ Colin O’Brien*

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COLIN O’BRIEN, SB No. 309413  
cobrien@earthjustice.org  
ADRIENNE BLOCH, SB No. 215471  
abloch@earthjustice.org  
HEATHER M. LEWIS, SB No. 291933

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hlewis@earthjustice.org  
EARTHJUSTICE  
50 California Street, Suite 500  
San Francisco, CA 94111  
Tel: (415) 217-2000  
Fax: (415) 217-2040

*Attorneys for Defendant-Intervenors Sierra Club and San Francisco Baykeeper*

JESSICA YARNALL LOARIE, SB No. 252282  
jessica.yarnall@sierraclub.org  
JOANNE SPALDING, SB No. 169560  
joanne.spalding@sierraclub.org  
SIERRA CLUB  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
Tel. (415) 977-5636 / Fax. (510) 208-3140

DANIEL P. SELMI, SB No. 67481  
DSelmi@aol.com  
919 Albany Street  
Los Angeles, CA 90015  
Tel. (949) 922-7926 / Fax: (510) 208-3140

*Attorneys for Defendant-Intervenor Sierra Club*

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**ATTESTATION**

I, Robert P. Feldman, am the ECF User whose ID and password are being used to file the parties' JOINT PRETRIAL CONFERENCE STATEMENT. In compliance with Civil Local Rule 5-1(i), I hereby attest that Timothy A. Colvig, counsel for Defendant City of Oakland, and Colin C. O'Brien, counsel for Defendant-Intervenors Sierra Club and San Francisco Baykeeper, have concurred in this filing

DATED: January 3, 2018

/s/ Robert P. Feldman  
Robert Feldman

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