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20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 SAN FRANCISCO DIVISION

23 OAKLAND BULK & OVERSIZED  
24 TERMINAL, LLC

25 Plaintiff,

26 vs.

27 CITY OF OAKLAND,

28 Defendant.

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

**PLAINTIFF OAKLAND BULK &  
OVERSIZED TERMINAL, LLC'S  
OBJECTIONS TO EVIDENCE  
PRESENTED AND RELIED ON AT  
TRIAL BY DEFENDANT CITY OF  
OAKLAND AND INTERVENORS  
SIERRA CLUB AND SAN FRANCISCO  
BAYKEEPERS**

Hearing Date: March 28, 2018

Time: 10:00 a.m.

Honorable Vince Chhabria

Trial Date: January 16, 2018

1 Pursuant to the Court’s Order Setting Post-Trial Briefing Schedule (D.E. 232), Plaintiff  
2 Oakland Bulk & Oversized Terminal, LLC (“OBOT”) objects to evidence presented and/or relied  
3 on at trial by Defendant City of Oakland (“City”) and Defendant-Intervenors Sierra Club and San  
4 Francisco Baykeepers (the “Intervenors”) as follows:

5 **Objection 1: Evidence Regarding City / ESA Discussions.** OBOT objects to evidence  
6 introduced at trial related to communications between the City and ESA regarding the preparation  
7 of the ESA Report. *See* TX00596.0001 (ESA Report).<sup>1</sup> The City asserted attorney-client  
8 privilege and/or work product protection over communications between itself and ESA “related to  
9 the ESA Report.” *See e.g.* D.E. 102, 204; Tr. 153:12-155:3. On that basis, the City withheld more  
10 than 1,000 ESA documents from production to OBOT, D.E. 204, and refused to permit testimony  
11 on certain allegedly privileged communications. Despite maintaining its objection, the City  
12 introduced and relied on communications between itself and ESA at trial, eliciting testimony from  
13 ESA regarding its discussions with the City about the preparation of the ESA Report including, for  
14 example, regarding “instruction[s]” ESA was “given” by the City for “specific parts of [the  
15 materials the City provided to ESA] to focus on or not focus on” in ESA’s review. Tr. 152:21-  
16 153:8 (Evans [ESA]); *see also id.* 155:8-156:11; 168:1-10; 169:2-5. Despite offering this  
17 testimony, the City continues to withhold documents and communications on this very topic under  
18 the guise of the attorney-client privilege, improperly using its claim of privilege as both a sword  
19 and a shield. *See, e.g., Century Aluminum Co. v. AGCS Marine Ins. Co.*, 285 F.R.D. 468, 472  
20 (N.D. Cal. 2012); FRE 502 advisory comm. n. to subdivision (a) (“[T]he party using an attorney-  
21 client communication to its advantage in the litigation has, in so doing, intentionally waived the  
22 privilege as to other communications concerning the same subject matter.”). The City should not  
23 be permitted to do so, and OBOT respectfully requests that the Court strike from the record and  
24 give no consideration to the following testimony offered by ESA representative Victoria Evans:  
25 Tr. 152:21-153:8, 155:25-156:1, 168:1-10, 169:2-5.

26 \_\_\_\_\_  
27 <sup>1</sup> “Tr.” refers to the trial transcript for this action. “TX” refers to Trial Exhibits. “PFF” refers  
28 to OBOT’s Proposed Findings of Fact, filed contemporaneously herewith. “Dep.” refers to  
transcripts of video deposition designations played during trial, appended to OBOT’s Submission  
of Transcripts for Videos Played During Trial, filed contemporaneously herewith.

1            **Objection 2: Evidence Regarding Documents Submitted to the City by Third-Parties**

2            **Who Did Not Testify.** OBOT objects on hearsay (FRE 802) and relevance (FRE 402) grounds to  
 3 documents third-parties allegedly submitted to the City for which: (1) the third-party authors did  
 4 not testify at trial, and/or (2) the City presented no evidence that the documents were reviewed or  
 5 relied on by the City in passing the Ordinance. This includes: (1) documents submitted by the  
 6 City in “Trial Exhibit 640,”<sup>2</sup> and (2) Trial Exhibits 657 (collection of emails from 2015 that third-  
 7 parties sent to the City), 660 (Sept. 21, 2015 Letter from Alameda County Health Officer Muntu  
 8 Davis to the City), 661 (June 2, 2016 Letter from Lora Jo Foo of “No Coal in Oakland” to the  
 9 City), and 960 (June 14, 2016 Letter and Report from the Public Health Advisory Panel).

10            Other than ESA and Dr. Zoe Chafe, no third-party fact witness testified regarding the truth  
 11 or accuracy of the contents of these documents – including the report by the Public Health  
 12 Advisory Panel – and the City offered no expert testimony regarding the truth or accuracy of those  
 13 third-party documents either (despite the Court’s guidance during the pre-trial conference that any  
 14 “important testimony” be elicited at trial (D.E. 221 (1/10/18 Hr’g Tr) 132:8-133:5)). Nor was any  
 15 witness subject to cross-examination on these documents, and there was certainly no opportunity  
 16 to do so as (1) none of these third-parties were listed in Defendants’ Rule 26 disclosures, and  
 17 (2) reasonable time limits would not have permitted such examinations. Further, Trial Exhibit 640  
 18 contains a number of newsletters, articles, and press releases which are hearsay regardless of  
 19 whether this case proceeded as a bench or a jury trial. These documents, which are out-of-court  
 20 statements, cannot be offered as evidence for the truth or accuracy of their contents. FRE 802.

21            Additionally, no evidence was presented by the City showing that these documents are  
 22 relevant to the breach of contract claim at issue. Under the parties’ Development Agreement (the  
 23 “DA”), the City had a contractual obligation to determine whether, *based on* substantial evidence,  
 24 the absence of the Ordinance posed a substantial danger to health and safety. TX0584.0023 (DA)  
 25 § 3.4.2. Therefore, the relevant question is not “what information was potentially available to the

26            <sup>2</sup> Trial Exhibit 640 is a flash drive that contains 228 different documents comprising  
 27 approximately 40,000 pages and consisting of various documents including, amongst other things,  
 28 public comment letters and emails submitted by third-parties, and agendas, minutes, or transcripts  
 of various meetings.

1 City Council and its staff;” the question is “what evidence did the City Council and its staff *base*  
2 their determination on.” *See id.* No evidence was presented at trial that the City Council and its  
3 staff considered, much less made a determination based on, any of the challenged documents.

4       Specifically, the City submitted two declarations by Heather Klein, a planner at the City’s  
5 Bureau of Planning, and one declaration from John Monetta, a project manager with the City  
6 Administrator’s Office, that discuss the documents in Trial Exhibit 640. D.E. 222 at Ex. A (Klein  
7 Decl.), Ex. B (Monetta Decl.); D.E. 226 (Supp. Klein Decl.). However, none of those declarations  
8 provided testimony or evidence that any documents in Trial Exhibit 640 were considered or relied  
9 on by the City in passing the Ordinance; rather, those declarations merely discuss how these  
10 documents were received and then, at times, purportedly uploaded to an Army Base Gateway  
11 Redevelopment Project Website (“Project Website”). D.E. 222, Ex. A ¶¶ 4-11, *id.* Ex. B, ¶¶ 4-11;  
12 D.E. 226, ¶¶ 3-8. Declarations were also submitted by employees of Burke, Williams & Sorensen,  
13 LLP, trial counsel for the City, but again those described only a document collection and  
14 production process. D.E. 222, Ex. C & D. There was no testimony or evidence, either in these  
15 declarations or otherwise presented at trial, indicating that any City Councilmember or their staff  
16 reviewed the challenged documents. There is no testimony or evidence, either in these  
17 declarations or otherwise presented at trial, indicating that any City Councilmember or their staff  
18 based any determination on the challenged documents.

19       The City also did not offer evidence proving which of (and when) the challenged  
20 documents were available for review on the Project Website, which is another reason there was no  
21 evidence that the City’s determination to pass the Ordinance was “based on” the contents of the  
22 Project Website. The “Legislative File” for the Ordinance (as compared to the Project Website)  
23 was available on the Office of the City Clerk’s website, but it was limited to five documents.  
24 TX1272.0001. Additional documents were on the Project Website, but there is no detailed  
25 account regarding which documents were actually uploaded and when. Proving the importance of  
26 this point, after receiving the City’s purported “index” of documents in Trial Exhibit 640 (*i.e.*,

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1 Trial Exhibit 639, D.E. 222 at Ex. D (Long Decl.)), minimal investigation by OBOT during trial<sup>3</sup>  
2 revealed that many documents – including a number of health and safety-related documents  
3 submitted by or on behalf of OBOT – had *not* been posted to the Project Website prior to the  
4 passage of the Ordinance, a fact the City has admitted. D.E. 222 at Ex. A, n. 1. This includes  
5 nearly 3,000 pages of documents submitted by OBOT in May, 2016 including health- and safety-  
6 related documents, OGRE Operating Manuals, Federal Railroad Administration mandated safety  
7 protocols, rail operating agreements, and documents describing federal, state and local  
8 requirements for storing certain substances, along with an April 16, 2016 letter from OBOT's  
9 attorneys at Stice Block.

10 Finally, there is no evidence that the link to the Project Website was sent to the City  
11 Council until June 24, 2016 – three days before the June 27, 2106 hearing, Tr. 475:2-8,  
12 TX0042.0001, and there is no evidence any City Councilmember or their staff reviewed any  
13 (much less all) of the 40,000 pages in Exhibit 640 before the June 27, 2016 determination to pass  
14 the Ordinance. Further, as assistant City administrator Claudia Cappio testified, “substantial  
15 evidence required expert analysis that is based on evidence and data so that the mechanisms are  
16 appropriately documented and peer reviewed” (Tr. 474:7-19) – no evidence was offered that any  
17 of the challenged documents fall within this definition.

18 Put simply, there is no evidence that any determination was “based on” any of the  
19 challenged documents. They are therefore irrelevant to OBOT’s breach of contract claim, and  
20 should not be considered evidence in this case.

21 **Objection 3: Hearsay Testimony from Victoria Evans Regarding the Preparation of**  
22 **ESA Emissions Calculations.** OBOT objects and moves to strike all testimony from ESA

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24 <sup>3</sup> The Wayback Machine – or archive.org – revealed that the Project Website was archived on  
25 June 8, 2016 and June 30, 2016. OBOT’s counsel compared the June 30, 2016 archived version of  
26 the Project Website to the list of documents provided on Trial Exhibit 639 and determined that 26  
27 files were not available on the Project Website as of June 30, 2016 (and therefore, not available at  
28 the time of the June 27, 2016 City Council meeting). D.E. 222, Ex. F. These files include,  
amongst others, the set of documents relied on by Dr. Chafe in her report and various public  
comment letters. The City agreed to not include these documents as part of the record because  
they were uploaded after June 27 or otherwise not identified.

1 representative Ms. Evans regarding what she learned, post-deposition and through an out-of-court  
 2 conversation that is hearsay, regarding the spreadsheets that are Trial Exhibits 432 and 433. Tr.  
 3 265:4-269:12 (Evans [ESA]). Trial Exhibit 432 is a June 6, 2016 spreadsheet containing  
 4 calculations in which ESA used “1.12” for the Threshold Friction Velocity, the value for  
 5 “uncrusted coal pile” in Section 13.2.5 of EPA’s AP-42. PFF 257-58. This resulted in an  
 6 emissions estimate for Staging 3.12 tons of PM2.5 emissions per year, which when corrected for a  
 7 calculation error, was reduced to 0.68 tons of PM2.5 emissions per year. PFF 258-59. Trial  
 8 Exhibit 433 was created on June 21, 2016 according to its metadata. PFF 262. Trial Exhibit 433  
 9 appears to be the most recent spreadsheet produced by ESA in this litigation. PFF 263. It assigns  
 10 a Threshold Friction Velocity of “0.54” – the value assigned to “fine coal dust on a concrete pad”  
 11 in the table in Section 13.2.5 – as contrasted with the Threshold Friction Velocity of the June 6,  
 12 2016 spreadsheet (Trial Exhibit 432) of “1.12” – the value assigned to “uncrusted coal powder” in  
 13 the table in Section 13.2.5. PFF 264.

14 Ms. Evans, ESA’s representative, was asked in her deposition about the Threshold Friction  
 15 Velocity used in Table 5-7 of Trial Exhibits 432 and 433. Ms. Evans could *not* explain why the  
 16 Threshold Friction Velocity for fine coal dust on a crusted pile was used for Table 5-7 as opposed  
 17 to using the Threshold Friction Velocity for an uncrusted coal pile:

18 8 Q. You can’t explain how the use of 1.12 for  
 19 9 the friction velocity would result in a PM2.5, for  
 20 10 example, of 3.12 and yet the same number on Table  
 21 11 5-7 is 67?  
 22 12 A. Right. I’d --  
 23 13 Q. You can’t do that; right?  
 24 14 A. Well, I didn’t -- they did this.  
 25 15 MR. BRADLEY: It’s a yes-or-no question.  
 26 16 BY MR. FELDMAN:  
 27 17 Q. You can’t?  
 28 18 A. I can’t.

24 Evans Dep. 271:8-18.

25 At trial (as well as in the City’s summary judgment briefing), Ms. Evans tried to explain  
 26 that she learned *after* her deposition why the uncrusted coal pile was not used. Tr. 265:4-269:12  
 27 (Evans [ESA]); *see also* D.E. 155 (Evans Declaration). This testimony was purportedly based on  
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1 Ms. Evans' conversation with Daniel Sloat, another ESA employee who did not testify at trial. Tr.  
2 268:19-269:1 (Ms. Evans: "We found that [the spreadsheet] was labeled in error. I spoke to Dan  
3 Sloat, who still works at ESA, about two or three weeks ago, and he clarified [the issue] for me").  
4 This testimony by Ms. Evans regarding what Mr. Sloat purportedly said is hearsay, and OBOT  
5 respectfully requests that the Court strike from the record and give no consideration to the  
6 following testimony: Tr. 268:19-269:1.

7 **Objection 4: City Expert Dr. Sahu's Testimony Regarding Threshold Friction**

8 **Velocity.** OBOT objects and moves to strike all testimony from City expert Dr. Ranajit Sahu  
9 about Threshold Friction Velocity. Dr. Sahu conceded that he did not address Threshold Friction  
10 Velocity in any of his expert reports. Tr. 561:10-14 (Sahu [City expert]). At trial, he tried to  
11 explain that he only addressed in his report assumptions where he "had disagreed with ESA," *id.*,  
12 but that is false. For example, Dr. Sahu agreed with ESA regarding its assumptions for  
13 meteorological data, wind speed calculation, and rail trip lengths, and he still specifically  
14 addressed each of these items in his reports, Tr. 562:6-563:4, unlike Threshold Friction Velocity.  
15 Because Dr. Sahu did not disclose any opinions regarding Threshold Friction Velocity in his  
16 expert reports (and his explanation for that omission at trial does not approach an explanation for  
17 its omission), OBOT respectfully requests that the Court strike from the record and give no  
18 consideration to the following testimony offered by Dr. Sahu: Tr. 535:9-545:16.

19 **Objection 5: City Expert Dr. Sahu's Testimony Regarding Rail Covers and**

20 **Surfactants.** OBOT objects to and moves to strike all testimony from City expert Dr. Sahu  
21 regarding rail car covers. The Court ordered that Dr. Sahu could provide no testimony on rail car  
22 covers because Dr. Sahu did not provide an opinion on them in his expert reports. Tr. 545:18-  
23 549:21; 553:19-20. Nevertheless, certain testimony provided by Dr. Sahu addressed the issue, and  
24 OBOT respectfully requests that the Court strike from the record and give no consideration to the  
25 following testimony offered by Dr. Sahu regarding rail car covers: Tr. 552:10-553:20.

26 Dr. Sahu also offered certain expert opinion testimony regarding surfactants, but there was  
27 no foundation for him to do so. Dr. Sahu contended that he relied on literature to support his  
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1 opinion, Tr. 554:8-12, but no literature was cited or referred to in his expert reports in this case, or  
2 was otherwise identified at trial. No other foundation for Dr. Sahu's opinion testimony on  
3 surfactants was provided, and thus OBOT respectfully requests that the Court strike from the  
4 record and give no consideration to the following testimony offered by Dr. Sahu: Tr. 553:23-  
5 555:6.

6 **Objection 6: City Expert Dr. Moore's Testimony Regarding Issues Outside the Scope**  
7 **of the City's Review.** City expert Dr. Nadia Moore provided 29 pages of testimony at trial.  
8 However, in only three of those pages of testimony did Dr. Moore discuss materials (the ESA  
9 Report) that were actually before the City in 2016 when the Ordinance was passed. *See* Tr.  
10 590:23-591:10, 599:6-22 (Moore [City expert]). At no other point did Dr. Moore link the  
11 testimony she provided to any documents or information before the City at the relevant time, and  
12 therefore her post-hoc opinions are irrelevant to this case. OBOT respectfully requests that the  
13 Court strike from the record and give no consideration to all testimony offered by Dr. Moore other  
14 than Tr. 590:23-591:10 and Tr. 599:6-22.

15 **Objection 7: Testimony by Dr. Chafe's Including Inadmissible Hearsay.** OBOT  
16 objects and moves to strike testimony from Dr. Zoe Chafe that describes out-of-court  
17 conversations she had with Professor Daniel Jaffe. Dr. Chafe purportedly relied on a study by  
18 Professor Jaffe to prepare a report she submitted to the City in 2016. TX0961.0073 (Chafe  
19 Report); *see* TX0970.0001 (2015 Jaffe Report). At trial, Dr. Chafe testified about the contents of  
20 conversations she purportedly had with Professor Jaffe. Tr. 618:3-619:19 (Chafe). Those  
21 conversations are out-of-court statements that cannot be offered for the truth of the matters  
22 asserted therein. FRE 802.<sup>4</sup> This testimony should be stricken for the additional reason that it is  
23 irrelevant, since the contents of the conversations were not in Dr. Chafe's report, and were not  
24 before the City at the time the Ordinance was adopted. FRE 402. Accordingly, OBOT  
25 respectfully requests that the Court strike from the record and give no consideration to the  
26 following testimony offered by Dr. Chafe: Tr. 618:3-619:19.

27 \_\_\_\_\_  
28 <sup>4</sup> Dr. Chafe was not tendered as an expert witness, and therefore her testimony does not fall  
into a hearsay exception. *See* FRE 703.



1           **Objection 8: City Expert Dr. Fernandez-Pello’s Testimony Related to the Risk of**  
2 **Fires or Explosion.** OBOT objects and moves to strike all testimony from Dr. Carlos Fernandez-  
3 Pello related to the risk of a fire or explosion happening at the proposed OBOT terminal. During  
4 direct examination, Dr. Fernandez-Pello testified about the purported risks of fire or explosion: “I  
5 think that they are high.” Tr. 645:22-24 (Pello [City expert]). He continued to testify about the  
6 purported basis for this conclusion. Tr. 646:1-16. During cross examination, however, he  
7 conceded that he had no expertise or foundation to offer this testimony. Specifically, Dr.  
8 Fernandez-Pello admitted that he does *not* have the expertise to identify the risk of fire or  
9 explosion at the proposed OBOT terminal, Tr. 651:3-18, and admitted that he had not quantified  
10 the actual risk of fire at the proposed OBOT terminal. Tr. 647:19-21. OBOT thus respectfully  
11 requests that the Court strike from the record and give no consideration to the following testimony  
12 offered by Dr. Fernandez-Pello: Tr. 645:22-646:16.

13           **Objection 9: City Expert Mr. Sullivan’s Testimony Related to Coal Dust Loss.**  
14 OBOT objects and moves to strike all testimony from Stephen Sullivan related to coal dust loss.  
15 Mr. Sullivan testified on direct examination that “using the bottom dump hopper car as a template,  
16 and there are various kinds that can hold anywhere from 115 to 130 tons per car, I did the  
17 calculation of how much dust would be lost through the bottom of the car in the trip from the  
18 origin point at Price, Utah to West Oakland and to the OBOT facility. That calculation ranges  
19 again because of the varying tonnages of the cars, anywhere from 50,000 pounds to 57,000 pounds  
20 per train per trip.” Tr. 661:24-662:6 (Sullivan [City expert]). However, during cross examination,  
21 Mr. Sullivan admitted that he is “not an expert on dust release,” Tr. 664:7-15, and he therefore  
22 lacked the expertise and foundation to testify on the topic. Accordingly, OBOT respectfully  
23 requests that the Court strike from the record and give no consideration to the following testimony  
24 offered by Mr. Sullivan: Tr. 658:6-661:19.

25           **Additional Specific Objections:** In addition to and without waiving the above objections,  
26 and all objections asserted at trial, OBOT offers the following objections to certain evidence  
27 introduced by the City and Intervenors as set forth in the chart below:  
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Material Objected To	Objections	Ruling
1. TX0456 [Dr. Moore Expert Report]	<ul style="list-style-type: none"> <li>Expert reports are inadmissible hearsay FRE 802. The exhibit is an expert report from a City expert who testified at trial. The out-of-court statements in the report cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
2. TX0485 [Mr. Sullivan Expert Report]	<ul style="list-style-type: none"> <li>Expert reports are inadmissible hearsay FRE 802. The exhibit is an expert report from a City expert who testified at trial. The out-of-court statements in the report cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
3. TX0499 [Dr. Sahu Expert Report]	<ul style="list-style-type: none"> <li>Expert reports are inadmissible hearsay FRE 802. The exhibit is an expert report from a City expert who testified at trial. The out-of-court statements in the report cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
4. TX0571 [Dr. Maier Expert Report]	<ul style="list-style-type: none"> <li>Expert reports are inadmissible hearsay FRE 802. The exhibit is an expert report from an OBOT expert who testified at</li> </ul>	Sustained: _____ Overruled: _____

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Material Objected To	Objections	Ruling
	trial. The out-of-court statements in the report cannot be offered for the truth of the matters asserted therein.	
5. TX0640 [flash drive with City documents]	<ul style="list-style-type: none"> <li>Inadmissible hearsay FRE 802; relevance FRE 402. This exhibit should be excluded for the reasons and in accordance with Objection 2 outlined above.</li> </ul>	Sustained: _____ Overruled: _____
6. TX0657 [collection of emails from 2015 that third-parties sent to the City]	<ul style="list-style-type: none"> <li>Inadmissible hearsay FRE 802. The exhibit consists of communications from residents and non-residents. The out-of-court statements in the communications cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
7. TX0660 [Sept. 21, 2015 Letter from Alameda County Health Officer Muntu Davis to the City]	<ul style="list-style-type: none"> <li>Inadmissible hearsay FRE 802. The exhibit consists of a letter from an Alameda County Health Officer. The out-of-court statements in the letter cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
8. TX0661 [June 2, 2016 Letter from Lora Jo Foo of "No Coal in Oakland" to the City]	<ul style="list-style-type: none"> <li>Inadmissible hearsay FRE 802. The exhibit consists of a memorandum from Lora Jo Foo with No Coal in Oakland. The</li> </ul>	Sustained: _____ Overruled: _____

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Material Objected To	Objections	Ruling
	out-of-court statements in the memorandum cannot be offered for the truth of the matters asserted therein.	
9. TX0728 [Dr. Sahu Expert Declaration]	<ul style="list-style-type: none"> <li>Expert declarations are inadmissible hearsay FRE 802. The exhibit is a declaration from a City expert who testified at trial. The out-of-court statements in the report cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
10. TX0960 [June 14, 2016 Letter and Report from the Public Health Advisory Panel]	<ul style="list-style-type: none"> <li>Inadmissible hearsay FRE 802. The exhibit consists of a letter and report from a Public Health Advisory Panel. The out-of-court statements in the letter and report cannot be offered for the truth of the matters asserted therein.</li> </ul>	Sustained: _____ Overruled: _____
11. Tr. 599:23-601:1 (Moore [City expert])  23 Q. Has the U.S. EPA tried to sort of qualitatively 24 characterize the health effects from PM2.5 above the NAAQS 25 level, above 12? Is there anything in the final rule that 26 1 discusses the degree of adverse effects? Is it minor or 27 2 significant or -- how did the U.S. EPA characterize it? 28 3 MR. MYRE: Objection. There was no opinion offered 4 on minor or significant.	<ul style="list-style-type: none"> <li>Foundation; Best Evidence Rule FRE 1002. The best evidence for EPA's "characteriz[ations]" is statements offered in documents authored by EPA, not Dr. Moore's description of those documents (Dr. Moore offered to look up the relevant language in the subject EPA</li> </ul>	Sustained: _____ Overruled: _____

Material Objected To	Objections	Ruling
<p>5 A. Well, the --  6 THE COURT: Hold on a second.  7 Overruled. Why don't you ask the  question again.  8 MR. AKER: Sure.  9 BY MR. AKER  10 Q. Did the -- in passing this final rule,  did the U.S. EPA  11 characterize the sort of magnitude of  adverse health effects  12 from increases above 12? Did they say  it was trivial or  13 what --  14 MR. MYRE: Objection.  15 THE COURT: Overruled.  16 BY MR. AKER  17 Q. Go ahead.  18 A. Can I answer it?  19 THE COURT: Yes.  20 A. So they did characterize the  particulate air pollution was  21 a substantial human health risk.  22 BY MR. AKER  23 Q. Was that their exact words?  24 A. Something close to that.  25 Q. Okay  1 A. I can look it up in the final rule.  2 MR. AKER: Thank you, your Honor.</p>	<p>documents, but the  City declined to  present that evidence).</p>	
<p>12. OBOT maintains all objections  asserted at trial.</p>		

Dated: February 9, 2018

Respectfully submitted,

/s/ Robert P. Feldman  
Robert P. Feldman

Attorneys for Plaintiff  
OAKLAND BULK & OVERSIZED TERMINAL, LLC