

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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)	Case Number: 3:16-CV-7014-VC
Oakland Bulk & Oversized Terminal, LLC)	
)	JOINT PRETRIAL CONFERENCE
Plaintiff,	)	STATEMENT
)	
)	
vs.)	
)	
City of Oakland)	
)	
Defendant.)	
)	
Sierra Club and San Francisco Baykeeper,	)	Date: January 10, 2018
	)	Time: 10:00 a.m.
	)	Ctrm.: No. 2, 17 th 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.*

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

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

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

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

Affirmative Defenses:

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

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

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

1. A declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and/or Rule 57 of the Federal Rules of Civil Procedure, that:
 - a. the Ordinance and Resolution are unconstitutional under the Commerce Clause of the United States Constitution;
 - b. the ICCTA preempts the Ordinance and Resolution;
 - c. 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

on April 17, 2014.

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

D. Description of the Parties' Efforts to Settle: On April 17, 2017, OBOT and the 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

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

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

Witness	Topics of Expected Testimony	Estimated Time for Direct & Cross
Phillip Tagami President and CEO, California Capital & Investment Group, Inc.	<i>OBOT Topics:</i> The history of the Terminal Project; the business and market conditions relevant to the Terminal Project; the design, construction and anticipated operations of/at the Terminal; regulations relating to the Terminal; agreements between OBOT, its affiliates and the City; the Ordinance and Resolution and their impacts with respect to the Terminal Project. <i>Defendants Topics:</i> Cross-examination concerning Mr. Tagami's testimony offered on direct examination. OBOT's disclosures to the City and the public of its intentions; third party funding for the Terminal Project; entity status and distinctions among OBOT, OGRE, TLS, etc; HDR and Cardno work and 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.	<i>OBOT Direct:</i> 2.5 hours <i>Cross/Defendant Examination:</i> 3 hours
Mark McClure Vice President, California Capital & Investment Group, Inc.	<i>OBOT Topics:</i> The history of the Terminal Project; the business and market conditions relevant to the Terminal Project; the design, construction and anticipated operations of/at the Terminal; regulations relating to the Terminal; agreements between OBOT, its affiliates and the City; the Ordinance and Resolution and their impacts with respect to the Terminal Project; the history and operations of OGRE. <i>Defendants Topics:</i> Cross-examination	<i>OBOT Direct:</i> 2.5 hours <i>Cross/Defendant</i>

	concerning Mr. McClure's testimony offered on direct examination. OGRE STB/common carrier status.	<i>Examination: 1.5</i>
Megan Morodomi Project Manager, California Capital & Investment Group, Inc.	<i>OBOT Topics:</i> Document identification/authentication. <i>Defendants Topics:</i> Cross-examination concerning Ms. Morodomi's testimony offered on direct examination.	<i>OBOT Direct: 0.2 hours</i> <i>Cross/Defendant Examination: 0.1 hours</i>
Claudia Cappio 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>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>Cross/OBOT Examination: 2 hours</i> <i>Direct/Defendant Examination: 2 hours</i>
Patrick Cashman 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>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>Cross/OBOT Examination: 2 hours</i> <i>Direct/Defendant Examination: 2 hours</i>
Doug Cole 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>Defendants Topics:</i> Same as OBOT topics,	<i>Cross/OBOT Examination: 0.5 hours</i> <i>Direct/Defendant</i>

	and public financing for Army Base project; scope of evidence collected and made available for Council review.	<i>Examination: 1 hour</i>
Sabrina Landreth, City Administrator, City of Oakland	<p><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.</p> <p><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.</p>	<p><i>Cross/OBOT Examination: 1 hour</i></p> <p><i>Direct/Defendant Examination: 1 hour</i></p>
Darin Ranelletti Deputy Director of Planning, City of Oakland	<p><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.</p> <p><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.</p>	<p><i>Cross/OBOT Examination: 0.5 hours</i></p> <p><i>Direct/Defendant Examination: 0.5 hour</i></p>
Jerry Bridges, President and CEO, Terminal Logistics Solutions	<p><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.</p> <p><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;</p>	<p><i>OBOT Direct: 1 hour</i></p> <p><i>Cross/Defendant Examination: 2 hours</i></p>

	information submitted to City and meetings with City representatives.	
Crescentia Brown Employee of ESA (consultant to the City of Oakland)	<p><i>OBOT Topics:</i> The Report prepared by ESA in connection with the Ordinance and Resolution.</p> <p><i>Defendants Topics:</i> Same as OBOT topic, and City contract with ESA for ESA Report.</p>	<p><i>Cross/OBOT Examination:</i> 1 hour</p> <p><i>Direct/Defendant Examination:</i> 1 hour</p>
Victoria Evans Employee of ESA (consultant to the City of Oakland)	<p><i>OBOT Topics:</i> The Report prepared by ESA in connection with the Ordinance and Resolution.</p> <p><i>Defendants Topics:</i> Same as OBOT topic.</p>	<p><i>Cross/OBOT Examination:</i> 1 hour</p> <p><i>Direct/Defendant Examination:</i> 1 hour</p>
James Wolff Chief Financial Officer, Bowie Resource Partners	<p><i>OBOT Topics:</i> The shipment and export of coal; the qualities, characteristics, and anticipated quantity of coal to be shipped through the Terminal.</p> <p><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.</p>	<p><i>OBOT Direct:</i> 1 hour</p> <p><i>Cross/Defendant Examination:</i> 1.5 hours</p>
Lyle Chinkin OBOT Expert Witness	<p><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.</p> <p><i>Defendants Topics:</i> Cross-examination concerning Mr. Chinkin'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>

1 2 3 4 5 6 7 8	Dr. Andrew Maier OBOT Expert Witness	<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. <i>Defendants Topics:</i> Cross-examination concerning Dr. Maier's testimony offered on direct examination.	<i>OBOT Direct:</i> 1 hour <i>Cross/Defendant Examination:</i> 1.5 hours
9 10 11 12 13 14 15 16	Dr. Ali Rangwala OBOT Expert Witness	<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. <i>Defendants Topics:</i> Cross-examination concerning Dr. Rangwala's testimony offered on direct examination.	<i>OBOT Direct:</i> 1.25 hours <i>Cross/Defendant Examination:</i> 2 hours
17 18 19 20 21 22	James Dillman OBOT Expert Witness	<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. <i>Defendants Topics:</i> Cross-examination concerning Mr. Dillman's testimony offered on direct examination.	<i>OBOT Direct:</i> 1 hour <i>Cross/Defendant Examination:</i> 1.5 hours
23 24 25 26 27	David Buccolo OBOT Expert Witness	<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. <i>Defendants Topics:</i> Cross-examination concerning Mr. Buccolo's testimony offered on direct examination.	<i>OBOT Direct:</i> 1.5 hours <i>Cross/Defendant Examination:</i> 1.5 hours
28	Stephen Sullivan	<i>OBOT Topics:</i> Testimony regarding railroad	<i>Cross/OBOT</i>

1 2 3 4 5 6 7 8 9 10 11	City Expert Witness	<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>
12 13 14 15 16 17 18	Dr. Maximillian Auffhammer City Expert Witness	<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>
19 20 21 22	Dr. Zoe Chafe Consultant to the City of Oakland	<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>
23 24 25 26 27 28	Dr. Carlos Fernandez-Pello City Expert Witness	<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 hours</p>

	offered on direct examination.	hours
Dr. Andrew Gray City Expert Witness	<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>
Dr. Ranajit Sahu City Expert Witness	<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>
Dr. Nadia Moore City Expert Witness	<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	<i>Direct/Defendant Examination:</i> 4 hours

	<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>John Monetta 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>Heather Klein 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>Edward Liebsch 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>Marcel Veilleux 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

Robert P. Feldman (Bar No. 69602)
 bobfeldman@quinnemanuel.com
 Meredith M. Shaw (Bar No. 284089)
 meredithshaw@quinnemanuel.com
 QUINN EMANUEL URQUHART & SULLIVAN, LLP
 555 Twin Dolphin Drive, 5th Floor
 Redwood Shores, California 94065-2139
 Telephone: (650) 801-5000
 Facsimile: (650) 801-5100

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

16 Dated: January 3, 2018

/s/ Timothy A. Colvig

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

*Attorneys for Defendant
 CITY OF OAKLAND*

25 Dated: January 3, 2018

/s/ Colin O'Brien

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

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

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

Barbara J. Parker (SBN 69722)
City Attorney
Otis McGee, Jr. (SBN 71885)
Chief Assistant City Attorney
Colin Troy Bowen (SBN 152489)
Supervising Deputy City Attorney
OAKLAND CITY ATTORNEY
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
Tel: 510.238.3601 Fax: 510.238.6500

Kevin D. Siegel (SBN 194787)
E-mail: ksiegel@bwsllaw.com
Gregory R. Aker (SBN 104171)
E-mail: gaker@bwsllaw.com
Timothy A. Colvig (SBN 114723)
E-mail: tcolvig@bwsllaw.com
Christopher M. Long (SBN 305674)
E-mail: clong@bwsllaw.com
BURKE, WILLIAMS & SORESENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Tel: 510.273.8780 Fax: 510.839.9104

Attorneys for Defendant
CITY OF OAKLAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO
BAYKEEPER,

Defendant-Intervenors.

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

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

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

1 I, Christopher M. Long, hereby declare:

2 1. I am an attorney and an Associate with the firm Burke, Williams & Sorensen,
3 LLP, attorneys of record for Defendant City of Oakland (“City”) in the above-entitled action. I
4 am a member in good standing of the State Bar of California and the bar of this Court.

5 2. I have personal knowledge of the facts set forth in this declaration and, if called as
6 a witness, could and would testify competently to such facts under oath.

7 3. Based upon the declarations of John Monetta and Heather Klein (cited below), I
8 am informed and believe that true and correct copies of all public comments, documents, and
9 public hearing videos related to the City’s Army Base Gateway Redevelopment Project
10 (“Project”) that were submitted to or produced by the City were uploaded to the City’s dedicated
11 website for the Project located at the following link:

12 [http://www2.oaklandnet.com/government/o/CityAdministration/d/project-](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485)
13 [implementation/OAK038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485) (the “Project Website”). *See* Monetta Decl., ¶ 4, Klein Decl., ¶ 4.

14 4. On or about March 29, 2017, under my supervision, Legal Secretary Sharon Hagle
15 downloaded all public comments and documents posted to the Project Website.

16 5. Rather than download copies of the full City Council meeting videos posted to the
17 Project Website, in late March and early April 2017, our firm directed Aiken Welch Court
18 Reporters to prepare certified transcriptions of the relevant portions of the City Council meeting
19 videos posted on the website, including Item 7.16 from the July 19, 2016 City Council meeting
20 (OAK 0033235-243), Item 5 from the June 27, 2016 City Council meeting (OAK 0033633-854),
21 Item 4 from the May 9, 2016 City Council meeting (OAK 0033858-917), Item 13 from the May
22 3, 2016 City Council meeting (OAK 0033918-960), Item 11 from the February 16, 2016 City
23 Council meeting (OAK 0033984-4072), and Item 4 from the September 21, 2015 City Council
24 meeting (OAK 0033280-629).

25 6. The City produced each of these transcriptions of the relevant portions of these
26 City Council meetings, together with a full and complete copy of the documents posted to the
27 Project Website, during discovery (the “Administrative Record”). The entire Administrative
28 Record includes approximately 326 documents (e.g., the DA, LDDA (and related agreements),

1 written documents and communications submitted to or by the City for consideration by the City
 2 Council, draft ordinances and resolutions, consultant reports, record summaries, transcripts of the
 3 public hearings, video of the public hearings, proposals, agendas and agenda reports, public
 4 hearing notices, memoranda, and environmental review and other planning documents.

5 7. In reference to the exhibits attached to this declaration, I indicate whether such
 6 document was produced by a party or third party pursuant to a discovery request in this litigation,
 7 and also indicate, in many instances, its use as an exhibit in depositions, together with applicable
 8 testimony identifying the document. True and correct copies of excerpts from such deposition
 9 testimony are also attached hereto, respectively, cross-referred (for ease of reference) as the
 10 following exhibits:

- 11 a. Exhibit 34: OBOT Rule 30(b)(6) representative Philip Tagami, taken on
 12 October 6, 2017 and continued on October 20, 2017;
- 13 b. Exhibit 35: OBOT Rule 30(b)(6) representative Mark McClure, taken on
 14 October 12, 2017 ("McClure I Tr.");
- 15 c. Exhibit 36: OGRE Rule 30(B)(6) representative Mark McClure, taken on
 16 October 16, 2017 ("McClure II Tr.");
- 17 d. Exhibit 37: City of Oakland Rule 30(b)(6) representative Darin Ranelletti,
 18 taken on June 26, 2017;
- 19 e. Exhibit 38: Bowie Resources Partners, LLC Rule 45 representative James
 20 Wolff, taken on October 10, 2017;
- 21 f. Exhibit 39: Terminal Logistics Solutions, LLC Rule 45 representative Jerry
 22 Bridges, taken on October 31, 2017;
- 23 g. Exhibit 40: ESA Rule 45 representative Crescentia Brown, taken on August
 24 22, 2017;
- 25 h. Exhibit 41: Zoe Chafe, PhD, MPH, taken on September 28, 2017;
- 26 i. Exhibit 42: Cardno Rule 45 representative Marcel Veilleux, taken on October
 27 17, 2017;
- 28 j. Exhibit 43: City of Oakland Rule 30(b)(6) representative Claudia Cappio,

1 taken on June 26, 2017;

2 k. Exhibit 58: Plaintiff's expert witness Lyle R. Chinkin, taken on November 7,
3 2017; and

4 l. Exhibit 59: Plaintiff's expert witness Dr. Andrew Maier, taken on November
5 16, 2017.

6 8. Attached hereto as **Exhibit 1** are true and correct copies of the Ordinance and
7 Resolution OBOT challenges in this litigation, (a) Oakland City Council Ordinance No. 13385
8 C.M.S., and (b) Oakland City Council Resolution No. 86234 C.M.S., which were downloaded
9 from the Project Website and produced as OAK 0039568 and OAK 0039559, respectively, by the
10 City in this litigation.

11 9. Attached hereto as **Exhibit 2** is a true and correct copy of the letter from David
12 Smith to Sabrina Landreth dated September 8, 2015, Re: September 21, 2015, Oakland City
13 Council Public Hearing, which was downloaded from the Project Website and produced as OAK
14 0159661 by the City in this litigation.

15 10. Attached hereto as **Exhibit 3** is a true and correct copy of the Agenda Report for
16 the September 21, 2015 City Council public hearing, filed September 11, 2015, subject: "Coal's
17 Public Health and/or Safety Impacts," which was downloaded from the Project Website and
18 produced as OAK 0034145 by the City in this litigation.

19 11. Attached hereto as **Exhibit 4** is a true and correct copy of the Agenda Report for
20 the February 16, 2016 City Council public hearing, filed February 5, 2016, subject: "Status
21 Report on Coal," which was downloaded from the Project Website and produced as
22 OAK 0036583 by the City in this litigation.

23 12. Attached hereto as **Exhibit 5** is a true and correct copy of an email from Mark
24 McClure to David C. Smith, Larry Kramer, and Don Perata, subject: "FWD: Notice of Special
25 Meeting of the Oakland City Council on June 27, 2016 to address Coal and Coke issues," dated
26 June 17, 2016, produced as OB055570 by Plaintiff in this litigation.

27 13. Attached hereto as **Exhibit 6** is a true and correct copy of the Agenda Report for
28 the May 3, 2016 City Council public hearing, filed April 21, 2016, subject: "Status Report on

1 Coal and Authorization of a Professional Services Contract with Environmental Science
2 Associates," which was downloaded from the Project Website and produced as OAK 0036500 by
3 the City in this litigation.

4 14. Attached hereto as **Exhibit 7** is a true and correct copy of the Table of Contents,
5 Introduction, and Preliminary Engineering sections (labeled "Intro through Section 3" on the
6 Project Website)¹ of the OBOT Basis of Design, dated July 21, 2015 ("BoD"), which was
7 downloaded from the Project Website, produced as OAK 0004708 by the City in this litigation,
8 and also attached as Exhibit 13 to Mr. Tagami's deposition transcript. *See* Ex. 34 hereto [Tagami
9 Tr.], pp. 153–54.

10 15. Attached hereto as **Exhibit 8** is a true and correct copy of the "Conceptual
11 Drawings" section of the BoD (labeled sections 16 through 18 on the Project Website), which
12 was downloaded from the Project Website, produced as OAK 0004653 by the City in this
13 litigation, and also attached as Exhibit 14 to Mr. Tagami's deposition transcript. *See* Ex. 34
14 hereto [Tagami Tr.], pp. 185–87.

15 16. Attached hereto as **Exhibit 9** is a true and correct copy of the letter from Jerry
16 Bridges to Sabrina Landreth dated September 8, 2015 enclosing a copy of the BoD, which was
17 downloaded from the Project Website and produced as OAK 0006679 by the City in this
18 litigation.

19 17. Attached hereto as **Exhibit 10** is a true and correct copy of the report entitled,
20 "Analysis of Health Impacts and Safety Risks and Other Issues/Concerns Related to the
21 Transport, Handling, Transloading, and Storage of Coal and/or Petroleum Coke (Petcoke) in
22 Oakland and at the Proposed Oakland Bulk & Oversized Terminal," prepared by Zoë Chafe, PhD,
23

24 ¹ Note that the BoD, in its entirety, encompasses multiple volumes of documents, and is
25 posted in its entirety on the Project Website in multiple sections. The entire BoD was produced as
26 a series of documents by the City in this litigation as follows: Intro through Section 3: OAK
27 0004708-26; Section 4: OAK 0006552-624; Sections 5 and 6: OAK 0004023-24; Section 7a:
28 OAK 0004025-87; Section 7b: OAK 0004117-74; Section 8: OAK 0004207-83; Sections 9 and
10: OAK 0006450-86; Sections 11 through 13: OAK 0004088-116; Sections 15 and 15: OAK
0006705-26; Sections 16 through 18: OAK 0004653-707; Section 19a: OAK 0006684-704;
Section 19b: OAK 0004961-87; Section 19c: OAK 0005783-828; Appendix: OAK 0004745-916.

1 MPH, dated June 22, 2016, which was downloaded from the Project Website and produced as
2 OAK 0120921 by the City in this litigation.

3 18. Attached hereto as **Exhibit 11** is a true and correct copy of the letter from Claudia
4 Cappio to Interested Parties re: Follow-up Questions on Coal's Public Health and/or Safety
5 Impacts dated September 28, 2015, which was downloaded from the Project Website and
6 produced as OAK 0007839 by the City in this litigation.

7 19. Attached hereto as **Exhibit 12** is a true and correct copy of City of Oakland
8 Resolution 86162 C.M.S., which was downloaded from the Project Website and produced as
9 OAK 0039556 by the City in this litigation.

10 20. Attached hereto as **Exhibit 13** is a true and correct copy of the Meeting Agenda
11 for the Special Meeting of the Oakland City Council dated June 27, 2016, which was downloaded
12 from the Project Website and produced as OAK 0036463 by the City in this litigation.

13 21. Attached hereto as **Exhibit 14** is a true and correct copy of the letter from David
14 Smith to Claudia Cappio dated May 2, 2016, which was downloaded from the Project Website
15 and produced as OAK 0054732 by the City in this litigation.

16 22. Attached hereto as **Exhibit 15** is a true and correct copy of the letter from Philip
17 Tagami to Claudia Cappio re: Responses to Inquiries by ESA dated May 16, 2016, which was
18 downloaded from the Project Website, produced as OAK 0054721 by the City in this litigation,
19 and also attached as Exhibit 21 to Mr. Tagami's deposition transcript. *See* Ex. 34 hereto [Tagami
20 Tr.], pp. 201:17–202:15.

21 23. Attached hereto as **Exhibit 16** is a true and correct copy of the Agenda Memo
22 from Councilmember Dan Kalb to Members of the Oakland City Council and City Administrator
23 Sabrina Landreth dated June 23, 2016, which was downloaded from the Project Website and
24 produced as OAK 0034860 by the City in this litigation.

25 24. Attached hereto as **Exhibit 17** are a true and correct copies of a letter from the
26 Public Health Advisory Panel on Coal in Oakland ("PHAP") to the Oakland City Council, City
27 Attorney Barbara Parker, and Assistant City Administrator Claudia Cappio dated June 14, 2016,
28 and the enclosed report of the same date entitled "An Assessment of the Health and Safety

1 Implications of Coal Transport through Oakland” prepared by the PHAP, which were
 2 downloaded from the Project Website and produced as OAK 0008437 by the City in this
 3 litigation.

4 25. Attached hereto as **Exhibit 18** is a true and correct color copy of Figure 2-3 from
 5 the ESA Report, which was downloaded from the Project Website. A black and white version of
 6 Figure 2-3 was produced as OAK0242471 by the City in this litigation and also attached as
 7 Exhibit 28 to Mr. Myre’s declaration.

8 26. Attached hereto as **Exhibit 19** is a true and correct copy of the Amended and
 9 Restated Exclusive Negotiating Agreement between OBOT and TLS, produced as OB119623 by
 10 Plaintiff in this litigation and also attached to the deposition transcripts of Messrs. Tagami and
 11 McClure as Exhibits 143 and 55, respectively. *See* Exs. 34 [Tagami Tr.], pp. 440-448, and 35
 12 [McClure I Tr.], pp. 117–128. [NOTE: redacted at OBOT's insistence pursuant to the Court's
 13 Revised Stipulated Protective Order [Dkt. 85]—unredacted version filed under seal].

14 27. Attached hereto as **Exhibit 20** is a true and correct copy of the Ninth Amendment
 15 to Amended and Restated Exclusive Negotiation Agreement and Sublease Option and
 16 Amendment to Development Management Agreement a/k/a First Omnibus Amendment between
 17 OBOT and TLS, produced as OB322408 by Plaintiff in this litigation and also attached to the
 18 deposition transcripts of Messrs. Tagami and McClure as Exhibits 143 and 55, respectively. *See*
 19 Exs. 34 [Tagami Tr.], pp. 440-448; 35 [McClure I Tr.], pp. 117–128. **[NOTE: redacted at**
 20 **OBOT's insistence pursuant to the Court's Revised Stipulated Protective Order [Dkt. 85]—**
 21 **unredacted version filed under seal].**

22 28. Attached hereto as **Exhibit 21** is a true and correct copy of the Tenth Amendment
 23 to Amended and Restated Exclusive Negotiating Agreement and Sublease Option between OBOT
 24 and TLS dated September 28, 2017, produced as OB322735 by Plaintiff in this litigation and also
 25 attached to the deposition transcripts of Messrs. Tagami and McClure as Exhibits 143 and 55,
 26 respectively. *See* Exs. 34 [Tagami Tr.], pp. 440-448; 35 [McClure I Tr.], pp. 117–128. **[NOTE:**
 27 **redacted at OBOT's insistence pursuant to the Court's Revised Stipulated Protective Order**
 28 **[Dkt. 85]—unredacted version filed under seal].**

29. Attached hereto as **Exhibit 22** is a true and correct copy of the Development Management Agreement between California Capital and Investment Group and TLS, dated April 24 2015, produced as OB104534 by Plaintiff in this litigation and also attached to the deposition transcripts of Messrs. Bridges and Tagami as Exhibits 4 and 30, respectively. *See* Exs. 39 [Bridges Tr.], pp. 29–30, and 34 [Tagami Tr.], pp. 240–41. **[NOTE: redacted at OBOT's insistence pursuant to the Court's Revised Stipulated Protective Order [Dkt. 85]—unredacted version filed under seal].**

30. Attached hereto as **Exhibit 23** is a true and correct copy of the TLS Operating Plan Framework dated June 19, 2015, produced as OB082060 by Plaintiff in this litigation and also attached to the deposition transcript of Mr. Tagami as Exhibit 2. *See* Ex. 34 hereto [Tagami Tr.], pp. 55–57. [NOTE: Plaintiff initially designated this document as confidential but has since agreed to remove that designation].

31. Attached hereto as **Exhibit 24** is a true and correct copy of the Sublease Agreement between OBOT and OGRE dated December 15, 2016, produced as OBOT_B_059722 by Plaintiff in this litigation and also attached to the deposition transcript of Mr. McClure as Exhibit 70. *See* Ex. 35 hereto [McClure I Tr.], pp. 215–218.

32. Attached hereto as **Exhibit 25** is a true and correct copy of the decision from the Surface Transportation Board dated February 21, 2014, entitled "Oakland Global Rail Enterprise, LLC—Acquisition and Operating Exemption—In the Port of Oakland, Cal.," Docket No. FD 35807, produced as OB017420 by Plaintiff in this litigation and also attached to the deposition transcript of Mr. McClure as Exhibit 78. *See* Ex. 36 hereto [McClure II Tr.], pp. 123–24. A copy of this decision is also available at 2014 WL 664841.

33. Attached hereto as **Exhibit 26** is a true and correct copy of the decision from the Surface Transportation Board dated September 25, 2015, entitled "Oakland Global Rail Enterprise, LLC—Operation Exemption—Lines of Railroad Owned by the Port of Oakland, Cal., and the City of Oakland, Cal.," Docket No. FD 35953, produced as OB020127 by Plaintiff in this litigation and also attached to the deposition transcript of Mr. McClure as Exhibit 84. *See* Ex. 36 hereto [McClure II Tr.], pp. 137–38. A copy of this decision is also available at 2015 WL

1 5637093.

2 34. Attached hereto as **Exhibit 27** is a true and correct copy of a version of the
3 "Preliminary Engineering" section of the BoD, dated July 16, 2015, produced as OB068194 by
4 the Plaintiff in this litigation and also attached to the deposition transcript of Mr. Veilleux as
5 Exhibit 207. *See* Ex. 42 hereto [Veilleux Tr.], pp. 136–139. (NOTE: Plaintiff initially designated
6 this document as confidential but has since agreed to remove that designation).

7 35. Attached hereto as **Exhibit 28** is a true and correct copy of a version of Drawing
8 Number BMH-100 and its associated date-related metadata, dated July 9, 2015, produced as
9 OB082314 by Plaintiff in this litigation and also attached to the deposition transcript of Mr.
10 Tagami as Exhibit 23. *See* Ex. 34 hereto [Tagami Tr.], pp. 203–206. (NOTE: Plaintiff initially
11 designated this document as confidential but has since agreed to remove that designation).

12 36. Attached hereto as **Exhibit 29** is a true and correct copy of a version of Drawing
13 Number X-1796, dated December 1, 2015, attached to the deposition transcript of Mr. Tagami as
14 Exhibit 44. *See* Ex. 34 hereto [Tagami Tr.], pp. 294–96.

15 37. Attached hereto as **Exhibit 30** is a true and correct copy of the meeting minutes
16 from a "Kinder Morgan meeting" held on July 18, 2012, produced as OBOT_B_020341 by
17 Plaintiff in this litigation and also attached to the deposition transcript of Mr. Tagami as Exhibit
18 145. *See* Ex. 34 hereto [Tagami Tr.], pp. 453–54.

19 38. Attached hereto as **Exhibit 31** is a true and correct copy of an email from Mr.
20 Tagami to Chris Stotka and Jame Kachelmeyer, subject: "Re: City and Port comments on LSA's
21 2/16/2012 OAB project description," dated February 29, 2012, produced as OBOT_B_022084 by
22 Plaintiff in this litigation and also attached to the deposition transcript of Mr. Tagami as Exhibit
23 146. *See* Ex. 34 hereto [Tagami Tr.], pp. 459–63.

24 39. Attached hereto as **Exhibit 32** is a true and correct copy of a news article from
25 "Issue 4" of "Oakland Global News" from December 2013, produced as OAK 0072782 by the
26 City in this litigation and also attached to the deposition transcript of Mr. Tagami as Exhibit 147.
27 *See* Ex. 34 hereto [Tagami Tr.], pp. 468–69.

28 40. Attached hereto as **Exhibit 33** is a true and correct copy of an email from Mr.

1 McClure to himself, subject: "The point," dated August 27, 2016, produced as OB052804 by
 2 Plaintiff in this litigation and also attached to the declaration transcript of Mr. McClure as Exhibit
 3 48. (Note: Plaintiff initially designated this document as confidential but has since agreed to
 4 remove that designation). *See* Ex. 35 hereto [McClure I Tr.], pp. 73-74.

5 41. Attached hereto as **Exhibit 34** is a true and correct copy of excerpts from the
 6 deposition transcript of OBOT Rule 30(b)(6) representative Philip Tagami, taken on October 6,
 7 2017 and continued on October 20, 2017 by Defendants in this litigation. Attached hereto as
 8 **Exhibit 35** is a true and correct copy of excerpts from the deposition transcript of OBOT Rule
 9 30(b)(6) representative Mark McClure, taken on October 12, 2017 by Defendants in this litigation
 10 ("McClure I Tr.").

11 42. Attached hereto as **Exhibit 36** is a true and correct copy of excerpts from the
 12 deposition transcript of OGRE Rule 45 representative Mark McClure, taken on October 16, 2017
 13 by Defendants in this litigation ("McClure II Tr.").

14 43. Attached hereto as **Exhibit 37** is a true and correct copy of excerpts from the
 15 deposition transcript of City of Oakland Rule 30(b)(6) representative Darin Ranelletti, taken on
 16 June 26, 2017 and continued on October 3, 2017 by Plaintiff in this litigation.

17 44. Attached hereto as **Exhibit 38** is a true and correct copy of excerpts from the
 18 deposition transcript of Bowie Resources Partners, LLC Rule 45 representative James Wolff,
 19 taken on October 10, 2017 by Defendants in this litigation.

20 45. Attached hereto as **Exhibit 39** is a true and correct copy of excerpts from the
 21 deposition transcript of Terminal Logistics Solutions, LLC Rule 45 representative Jerry Bridges,
 22 taken on October 31, 2017 by Defendants in this litigation.

23 46. **[Exhibit #40 hereto is intentionally omitted]**

24 47. Attached hereto as **Exhibit 41** is a true and correct copy of excerpts from the
 25 deposition transcript of Zoë Chafe, PhD, MPH, taken on September 28, 2017 by Plaintiff in this
 26 litigation.

27 48. Attached hereto as **Exhibit 42** is a true and correct copy of excerpts from the
 28 deposition transcript of Cardno Rule 45 representative Marcel Veilleux, taken on October 17,

2017 by Defendants in this litigation.

49. Attached hereto as **Exhibit 43** is a true and correct copy of excerpts from the deposition transcript of City of Oakland Rule 30(b)(6) representative Claudia Cappio, taken on June 26, 2017 by Plaintiff in this litigation.

50. Attached hereto as **Exhibit 44** is a true and correct copy of Plaintiff Oakland Bulk & Oversized Terminal, LLC's Supplemental Objections & Responses to the City's First Set of Interrogatories, dated October 20, 2017.

51. Attached hereto as **Exhibit 45** is a true and correct copy of Defendant City of Oakland's Notice of 30(b)(6) Deposition to Plaintiff Oakland Bulk and Oversized Terminal, LLC, dated August 9, 2017.

52. Attached hereto as **Exhibit 46** is a true and correct copy of Defendant City of Oakland's Requests for Production to Plaintiff Oakland Bulk & Oversized Terminal, LLC, Set No. 1, dated May 22, 2017.

53. Attached hereto as **Exhibit 47** is a true and correct copy of Defendant City of Oakland's Subpoena to Produce Documents, Information, or Objects or To Permit Inspection of Premises in a Civil Action to Oakland Global Rail Enterprise, LLC, dated June 23, 2017.

54. Attached hereto as **Exhibit 48** is a true and correct copy of Defendant City of Oakland's Subpoena to Testify at a Deposition in a Civil Action to Oakland Global Rail Enterprise, LLC, dated September 18, 2017.

55. Attached hereto as **Exhibit 49** is a true and correct copy of Defendant City of Oakland's Objections to Plaintiff Oakland Bulk & Oversized Terminal, LLC's Notice and Amended Notice of 30(b)(6) Deposition, dated June 22, 2017.

56. Attached hereto as **Exhibit 50** is a true and correct copy of the Expert Report of Dr. Andrew Maier, prepared on behalf of Plaintiff, dated October 6, 2017.

57. Attached hereto as **Exhibit 51** is a true and correct copy of the Rebuttal Expert Report of Dr. Andrew Maier, prepared on behalf of Plaintiff, dated November 2, 2017.

58. Attached hereto as **Exhibit 52** is a true and correct copy of the minutes from the June 27, 2016 City Council Special Meeting, which was downloaded from the Project Website

1 and produced as OAK 0033630 by the City in this litigation.

2 59. Attached hereto as **Exhibit 53** is a true and correct copy of the minutes from the
3 July 19, 2016 City Council Special Concurrent Meeting, which was downloaded from the Project
4 Website and produced as OAK 0033244 by the City in this litigation.

5 60. Attached hereto as **Exhibit 54** is a true and correct copy of a document entitled,
6 "Response to Follow-Up Questions from Residents and Non-Residents," which was downloaded
7 from the Project Website and produced as OAK 0004285 by the City in this litigation.

8 61. Attached hereto as **Exhibit 55** is a true and correct copy of a document entitled,
9 "Peer Review Report, Preliminary Engineering – Oakland Bulk and Oversized Terminal,"
10 prepared by Cardno, produced as OB075973 by Plaintiff in this litigation, and also attached as
11 Exhibit 8 to Mr. Tagami's deposition transcript. *See* Ex. 34 hereto [Tagami Tr.], pp. 110:20–
12 111:23. (NOTE: Plaintiff initially designated this document as confidential but has since agreed
13 to remove that designation)

14 62. Attached hereto as **Exhibit 56** is a true and correct copy of a document entitled,
15 "Response to Follow-up to Questions from the Bay Area Quality Management District" [sic],
16 which was downloaded from the Project Website and produced as OAK 0004955 by the City in
17 this litigation.

18 63. Attached hereto as **Exhibit 57** is a true and correct copy of a letter (with attached
19 exhibits) from Earthjustice to the Oakland City Council, dated September 21, 2015, which was
20 downloaded from the Project Website and produced as OAK 0005208 by the City in this
21 litigation.

22 64. Attached hereto as **Exhibit 58** is a true and correct copy of excerpts from the
23 deposition transcript of Plaintiff's expert witness, Lyle R. Chinkin, taken on November 7, 2017 by
24 Defendants in this litigation.

25 65. Attached hereto as **Exhibit 59** is a true and correct copy of excerpts from the
26 deposition transcript of Plaintiff's expert witness, Dr. Andrew Maier, taken on November 16,
27 2017 by Defendants in this litigation.

28 66. Attached hereto as **Exhibit 60** is a true and correct copy of Bay Area Air Quality

1 Management District ("BAAQMD") Regulation 2, Rule 2, which I downloaded from BAAQMD's
2 website on December 3, 2017, and is publicly available at the following link:

3 [http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/reg-](http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/reg-02/rg0202.pdf?la=en)
4 [02/rg0202.pdf?la=en](http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/reg-02/rg0202.pdf?la=en).

5 67. Attached hereto as **Exhibit 61** is a true and correct copy of an email from Jim
6 Wolff to Phil Tagami, subject: "RE: Need your input," dated August 31, 2016, produced as
7 OB169763 by Plaintiff in this litigation and also attached to the declaration transcript of Mr.
8 Tagami as Exhibit 42. *See* Ex. 34 hereto [Tagami Tr.], pp. 287:17–288:24. (NOTE: Plaintiff
9 initially designated this document as confidential but has since agreed to remove that
10 designation).

11 68. Attached hereto as **Exhibit 62** is a true and correct copy of the Articles of
12 Organization for Oakland Bulk and Oversized Terminal, LLC, filed July 23, 2013 with the
13 California Secretary of State and publicly available on the Secretary of State's website,
14 <https://businesssearch.sos.ca.gov>, which was attached to the declaration transcript of Mr. Tagami
15 as Exhibit 25. *See* Ex. 34 hereto [Tagami Tr.], p. 211:6–18.

16 69. Attached hereto as **Exhibit 63** is a true and correct copy of a "Terminal Services
17 Agreement Letter of Intent" between Terminal Logistics Solutions, LLC and Searles Valley
18 Minerals, dated September 10, 2015, produced pursuant to subpoena as TLS19214 by third-party
19 Terminal Logistics Solutions, LLC in this litigation.

20 70. Attached hereto as **Exhibit 64** is a true and correct copy of an unexecuted
21 "Terminal Services Agreement" between Terminal Logistics Solutions, LLC and Bowie
22 Resources Partners, LLC, dated March 31, 2017, produced pursuant to subpoena as TLS19481 by
23 third-party Terminal Logistics Solutions, LLC in this litigation.

24 71. Attached hereto as **Exhibit 65** is a true and correct copy of a letter from the
25 Alameda County Health Care Services Agency Public Health Department to City Council
26 President Lynette Gibson McElhaney, "Re: Coal's Public Health and Safety Impacts," dated
27 September 21, 2015, which was downloaded from the Project Website and produced as OAK
28 0004020 by the City in this litigation.

72. Attached hereto as **Exhibit 66** is a true and correct copy of a memorandum from Lora Jo Foo, No Coal in Oakland, to Claudia Cappio, the Oakland City Council, and City Attorney Barbara Parker, subject: "Covers for rail transport of coal," dated June 2, 2016, which was downloaded from the Project Website and produced as OAK 0008586 by the City in this litigation.

73. Attached hereto as **Exhibit 67** is a true and correct copy of a letter from Jessica Yarnall Loarie and Irene Gutierrez to the Oakland City Council and Oakland City Administrator, "Re: Proposed Oakland Coal Export Terminal," dated October 6, 2015, which was downloaded from the Project Website and produced as OAK 0005431 by the City in this litigation.

74. Attached hereto as **Exhibit 68** is a true and correct copy of BAAQMD's "Air Quality Guidelines," dated as of May 2017, which I downloaded from BAAQMD's website on December 4, 2017, and is publicly available at the following link:
http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/ceqa_guidelines_may2017-pdf.pdf?la=en.

75. Attached hereto as **Exhibit 69** is a true and correct copy of an email from Jeff Holt to various Utah county officials, subject: "FW: Update Memo and Term Sheet," dated March 25, 2015, produced as ZAC_001866 and SC_033571 by the City and Defendant-Intervenors in this litigation, respectively, and also attached as Exhibit 51 to Mr. McClure's deposition transcript. See Ex. 35 hereto [McClure I Tr.], pp. 99:22–101:25.

76. Attached hereto as **Exhibit 70** is a true and correct copy of the decision from the Surface Transportation Board dated July 24, 2014, entitled "Oakland Global Rail Enterprise, LLC—Operation Exemption—Rail Line of Union Pacific Railroad Company and BNSF Railway Company," Docket No. FD 35822. A copy of this decision is also available at 2014 WL 367414.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 5th day of December 2017, at Oakland, California.

/s/ Christopher M. Long
Christopher M. Long, Esq.

EXHIBIT 27

TO CHRISTOPHER LONG'S DECLARATION ISO MSJ



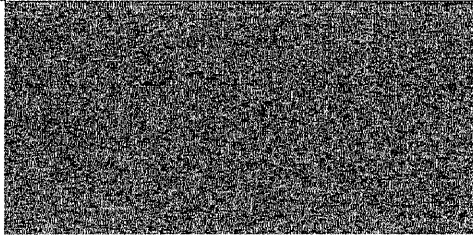
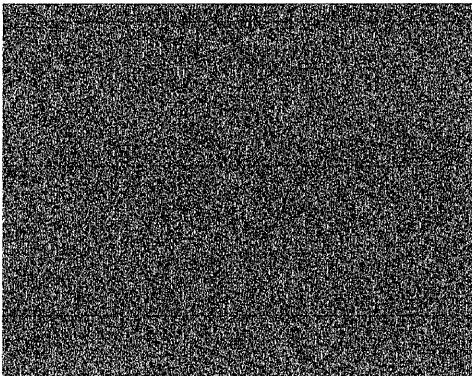
Basis of Design

Oakland Bulk and Oversized Terminal

California Capital Investment Group

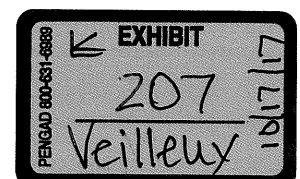
Preliminary Engineering

Port of Oakland, Oakland, CA
July 16, 2015



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Basis of Design
Oakland Bulk and Oversized Terminal



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Basis of Design
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1 Basis of Design

This establishes the definition of elements of the preliminary engineering design to achieve the production capacities desired by the owner and defines the basic infrastructure needs to operate the plant in the manner desired by the owner with respect to safety and environmental goals.

2 Project Definition

2.1 Title of Project

Oakland Bulk and Oversize Terminal (OBOT).

2.2 Background

Oakland Bulk and Oversize Terminal (OBOT) OBOT intends to re-develop the Oakland Army Base located within the Port Authority Outer Harbor in Oakland, CA. OBOT is responding to a general shortfall in trans-shipment capacity for the marine export of bulk products from the West Coast.

The Oakland Army Base Property covers approximately 135 acres. The leasable area of OBOT covers 20.31 acres, consisting of 12.45 acres of land area and 7.86 acres of wharf. The project property consists of warehouse storage and mostly paved and impervious concrete. OBOT has entered into a 60-year lease agreement with the City of Oakland to develop the site. Subsequently, OBOT has entered into a development agreement with Trans Logistics Solutions (TLS) to develop the OBOT. OBOT is the long-term lease holder and TLS will be a tenant of OBOT.

OBOT will develop the marine terminal based on a staged implementation approach. Design capacity will be 9 million tonnes per annum (Mtpa), with a stabilized throughput of 75% of design, or 6.3 Mtpa. The first stage (Stage 1) will develop the terminal overall capacity to approximately 6.3 Mtpa and include trans-shipment of Bulk Material Products.

2.3 Project Objectives

OBOT's objectives for this phase of the project are to create a terminal for the receipt by rail, storage and shipment of coal and soda ash as follows:

- Coal with a desired throughput of 5.0Mtpa.
- Soda Ash with a desired throughput of 1.5Mtpa.
- There is a requirement for segregated storage to blend coal.
- No requirement for segregated storage or blending of soda ash.
- To commission the new terminal by the 1st quarter of 2018.
- Utilize proven technologies and modern design standards.
- Utilize Best Control Technology (BCT) to control or eliminate emissions.
- No lost time injuries or environmental breaches.

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3 General

3.1 Location

The property is located on the San Francisco Bay at the East end of the Bay Bridge in Oakland, California. The site can be found at 37.82°, -122.318° (Lat., Lon.).

3.2 Soils

There have been several geotechnical studies made available to HDR for review. These studies outline basic design data for a few different pile configurations, as well as slope stability under the existing wharves in non-seismic conditions. One of the documents identifies the potential seismic-induced liquefaction and lateral spreading hazards at this site and recommends further studies to determine the types of ground improvement methods necessary to mitigate these hazards, based on the configuration of the facility and tolerance to settlement and lateral displacement.

Reviewed studies are outlined below:

- Technical Memo – Dredged Slope Stability, Oct. 17, 2014, Kleinfelder: This memo summarizes the static stability of the slope beneath wharves 6, 6½, and 7 under proposed dredging to 50 ft. depth near the berth face. The report concludes that the stability of the existing slope can accommodate the proposed dredging, but specifically excludes the stability of the modified slope under seismic loading.
- Seismic Site Specific Horizontal Accelerations, Nov. 24, 2014, Kleinfelder: This memo provides site specific lateral seismic accelerations for CLE, DE and MCE earthquake hazard levels for Wharves 6, 6½ and 7. It does not provide information about liquefaction or lateral spreading potential of the site.
- West Gateway Terminal Preliminary Pile Capacity Geotechnical Memo, Oct. 28, 2014, Kleinfelder: This memorandum provides preliminary pile capacities for three different types of pile, based on a CPT performed on the upland side of the dock. These pile capacities are intended for preliminary design of the piled foundations supporting equipment and buildings on the upland side of the terminal. The pile capacities do not include any reductions for seismic induced liquefaction or lateral spreading.
- 65% Geotechnical Report, Oakland Army Base – Horizontal Development, Jun. 20, 2013, Berlogar Stevens & Associates: Memorandum with preliminary analysis and recommendations based on geotechnical explorations performed around the site. This memo identifies the liquefaction and lateral spreading hazards for the site and recommends further analysis to determine specific impacts on the proposed design of the facility.

3.2.1 Geotechnical Recommendations

Additional Geotechnical Recommendations to come.

3.3 Units of Measurement

The Imperial system of units will be used and is assumed to be the system of units used for design, fabrication and construction.

Material capacities will be given in metric tons (tonnes).

3.4 Service Life

Design lives for the various elements of the terminal are provided in Table 3-1.

Table 3-1. Service Life

System	Design Life
Major Equipment Structures (Shiploaders, Stackers, Conveyors, Reclaimers, Railcar Dumper, etc.)	30 years
Mechanical Components (Reducers, bearings, pumps, etc.)	50,000 hours
Structural Components	50 years
Mooring Fender System	30 years

The design service life of equipment and structures relies on inspection, maintenance and repairs at regularly scheduled intervals. Major equipment such as shiploaders, stackers, reclaimers and railcar dumper will also require periodic major refurbishment for repairs to coating systems and other component upgrades that cannot otherwise be conducted during normal maintenance windows.

3.5 Safety & Access

The design, manufacture and installation of the required equipment shall be designed to comply with the regulations of the local, state and federal authorities having jurisdiction, as well as Occupational Safety and Health Administration (OSHA).

All platforms, stairs, handrails, walkways, ladders and accesses shall be specified to comply with the requirements of the local, state and federal authorities having jurisdiction as well as OSHA.

Mechanical components will be selected and designed to facilitate safe access for inspection, maintenance, disassembly and replacement.

4 Scope of Work

The specific scope of work for the OBOT Preliminary Engineering includes design of facilities and systems as follows:

- Site preparation including clearing, grading and ground improvements to strengthen existing soils and mitigate seismic-induced liquefaction and lateral spreading.
- Utility services (potable and process water, sanitary sewer, natural gas, and electricity).
- Fire protection systems.

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- Access roads and equipment maintenance and circulation routes.
- Rail departure track from mainline railway, on-site operations and storage rail for unit train unloading and storage.
- Covered bulk material storage structures and foundations.
- Surfacing and structural design of storage pads, general site access and operations areas.
- Material handling equipment and foundations for railcar unloading, stacking, storage, reclaiming and ship loading.
- Administration, maintenance and operations buildings and associated foundations.
- Stormwater management facilities (retention/detention ponds, culverts, and ditches).
- Process water collection and treatment facilities.
- Marine structures, dock, mooring and fendering systems for loading ships.

5 Products

Products to be handled by the terminal are coal and soda ash. There is a requirement to blend coal. The design for coal blending is limited to two sources. The blending process is expected to be accomplished through reclaiming operations performed during ship loading. There are no requirements for the blending of the soda ash, but each product handled will be required to have segregated storage.

The properties of materials handled at the facility are defined in Table 5-1.

Table 5-1. Material Properties

Properties	Bituminous Coal	Soda Ash
Bulk Density	48 lb/ft ³ (Volume Calculations) 55 lb/ft ³ (Mass Calculations)	59 lb/ft ³ (Volume Calculations) 78 lb/ft ³ (Mass Calculations)
Angle of Repose	35-38°	32-37°
Surcharge Angle	20-25°	20-25°
Moisture Content (Inherent)	12% (inherent) 11% (Surface) 23% (Total)	0%
Maximum Lump Size	3 in	Granules
Corrosiveness	Not Corrosive	Not Corrosive
Abrasiveness	Extremely Abrasive	Abrasive
Special Handling Constraints	Very dusty, exhibits spontaneous combustion behavior, potentially explosive	Very dusty, hygroscopic

6 Throughput

OBOT intends to develop the marine terminal based in phases per Table 6-1.

Table 6-1. Terminal Throughput

Properties	(Estimated)
Coal	5.0 MMTPA
Bulk Ash	1.5 MMTPA

A preliminary spreadsheet simulation has been developed as a separate document.

7 Hours of Operation

The terminal will operate three 8-hour shifts a day, 362 days a year.

8 Marine

8.1 General

A new mooring and berthing system will be constructed at the existing wharf (Wharf 7) capable of handling Capesize vessels. The proposed mooring and berthing system will be independent of the existing wharf, and will utilize breasting dolphins with fender panels and mooring dolphins with quick release mooring hooks. The dolphins will utilize steel pipe piles with cast-in-place concrete pile caps. There will also be two in-water arc shaped runways to support the quadrant loaders, founded on steel pipe piles. The pivot point supporting the tail end of the quadrant loaders will be supported on piles driven within the footprint of the existing wharf. The pivot support structure will have an independent pile supported foundation and be isolated from the existing timber wharf structure.

8.2 Design Vessels

Design vessel information is provided in Table 8-1.

Table 8-1. Design Vessels

Specification	Handysize/ Handymax	Panamax	Capesize
Deadweight tonnage	25,000-50,000 DWT	60,000-80,000 DWT	180,000 DWT ¹
Length Overall (LOA)	630 ft	265 ft	1020 ft
Beam	105 ft	106 ft	148 ft
Loaded Draft (Max)	35 ft	45 ft	51 ft ¹
Dredging Depth	No Dredging	No Dredging	No Dredging

¹ Capesize ships, due to the existing 51 feet of draft with no plans for dredging, will be lightly loaded to an approximate maximum of 130,000 tonnes.

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Oakland Bulk and Oversized Terminal

8.3 Mooring operations

No mooring operations studies are proposed at this stage of the project and it is assumed that Capesize vessels can be moved into position to moorage facilities that will be designed to accept the design vessel.

8.4 Dredging

No dredging is proposed to increase the design draft conditions. However, maintenance dredging will be required to maintain the design draft at the berth.

9 Mechanical

9.1 General

Mechanical equipment will be selected based on modern material handling systems utilizing automation where reasonable to increase efficiency. Conveyance systems will be designed to Conveyor Equipment Manufacturers Association (CEMA) standards.

The mechanical systems will include:

- Railcar unloading equipment.
- Stacking, reclaiming and storage equipment.
- Conveyors for feeding, stacking and reclaiming.
- Ship loading equipment.

9.2 Railcar Dumpers

Requirements for the railcar dumpers can be found in Table 9-1.

Table 9-1. Railcar Dumper Requirements

Properties	Coal	Soda Ash
Type	Bottom Dump	Bottom Dump
Railcars	North American Covered Hopper Cars	North American Closed Top Hopper Cars
Gross Weight	130 tonnes	130 tonnes
Net Capacity	110 tonnes	110 tonnes
Number of Dumpers	1	1
Railcar Positioning Method	Switching Locomotive or Indexer	Switching Locomotive or Indexer
Design Dump Cycle Time	See Simulation	See Simulation

¹ Removable, fiberglass covers

9.3 Conveyance

9.3.1 Troughed Belt Conveyors

Bituminous Coal

Coal conveyors will be 48 or 84 in. equipped with 45° CEMA class C6 or E7 idlers, troughed fabric belts, electric drive units and remote gravity take-ups and a maximum angle of 15 degrees. Where practical, drive units will be located at ground level with vehicle access. All conveyors will be housed in fully-enclosed galleries with single sided walkways and designed with ample access to tail pulleys and other critical areas for maintenance.

Soda Ash

Soda ash conveyors will be 48 in. equipped with 35° CEMA class C6 idlers, troughed fabric belts, electric drive units and remote gravity take-ups and a maximum angle of 15 degrees. Where practical, drive units will be located at ground level with vehicle access. All conveyors will be housed in fully-enclosed galleries with single sided walkways and designed with ample access to tail pulleys and other critical areas for maintenance.

9.3.2 Pipe Conveyors

Pipe conveyors will transport material from the railcar dumper to storage. The pipe conveyor will be 23 in., equipped with electric drive units and gravity take-ups. The pipe conveyor will be of a self-carrying design that includes a single-sided walkway, top cover and expanded metal guarding along each side.

9.3.3 High-Angle Conveyors

High angle conveyors will be used to move material from the unloading pit to the pipe conveyors. The high-angle conveyors will be approximately 72 in. wide with 16 in. tall side walls equipped with electric drive units, automatic take-up and will be fully enclosed.

9.4 Contaminated Material

Contaminated product diverters will be included to remove material from the reclaim belts, between the storage buildings and shiploaders.

9.5 Storage

9.5.1 Bituminous Coal

Material will be stored in a series of covered longitudinal stockpiles. Stacking to the longitudinal stockpiles will be accomplished by the use of an overhead conveyor and tripper.

The coal storage capacities are:

- | | |
|-----------|-----------------------------------|
| 1. Pile 1 | 105,000 ¹ tonnes total |
| | 105,000 ¹ tonnes live |

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2. Pile 2 75,000¹ tonnes total
 75,000¹ tonnes live

Material will be manually reclaimed from the longitudinal stockpiles by dozers into a series of dozer traps.

¹ In the case of segregated storage piles within the storage building, storage building 1 will have an estimated capacity of 84,000 tonnes, building 2 will have an estimated capacity of 55,000 tonnes.

9.5.2 Soda Ash

Material will be stored in a concrete storage dome(s). The storage dome(s) will be filled from the top and include a dust collection system.

The soda ash storage capacities are:

1. Dome 1 60,000 tonnes total
 50,000 tonnes live

Material will be reclaimed from the storage dome(s) by gravity onto a series of reclaim conveyors in above ground tunnels underneath the dome(s).

9.6 Sampling

9.6.1 Bituminous Coal

Three-stage automatic sampling will take place on the outgoing product flows at the East shiploader.

9.6.2 Soda Ash

Automatic sampling is not required for the soda ash system.

9.7 Shiploading

9.7.1 Bituminous Coal

Shiploading will be accomplished with the use of dual telescoping quadrant shiploaders. Each shiploader will be equipped with loading spoons for hatch trimming. The shiploaders will be design to accommodate wash down of system between shipments.

9.7.2 Soda Ash

Shiploading will be accomplished with the use of a fixed, shuttling, slewing shiploader, utilizing a cascade type loading chute.

9.7.3 Shiploader control

Shiploaders will be controlled by remote control boxes from the decks of the ships, with backup control stations located on the shiploaders.

9.7.4 Shiploader Chute/Spout Maintenance

Over the dock access will be provided for cleaning and maintaining loading chutes and spouts.

9.8 Dust Control

9.8.1 Bituminous Coal

Dust will be controlled by:

- Dry fog and/or water sprays at the covered railcar dumper building.
- Covered bulk material storage buildings.
- Enclosed transfers.
- Enclosed/Covered conveyors.
- Dry fog and/or water sprays at transfer points and stockpiles.

9.8.2 Soda Ash

Dust will be controlled by cartridge style, pulse-jet, dust collectors or bin vents:

- Unloading boots, enclosed hopper and dust collection at the covered railcar dumper building.
- Enclosed storage domes with dust collection.
- Enclosed conveyor transfers.
- Covered conveyors.
- Dust Collection at transfer points and shiploader, as required.
- Dust collectors will be provided with rotary air locks.

10 Structural

10.1 General

Structural design and development of loads will be based on the California Building Code and ASCE 7. It is anticipated that soil conditions will require ground improvements and pile supported foundations for all major equipment and storage buildings to mitigate settlement and seismic hazards associated with liquefaction.

Design of the marine structures will be in accordance with ASCE/COPRI 61-14 and utilize non-linear seismic analysis methods in the detailed design phase. It is assumed that any construction activities utilizing or affecting the existing wharf will be further investigated, and may include the need for a structural condition assessment and analysis of the existing elements for the temporary loads associated with mobile crane outriggers and any other construction loads. It is also anticipated that some lighter structures may be supported directly by the existing wharves which could potentially require wharf repairs depending on the outcome of the condition assessment.

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Basis of Design
Oakland Bulk and Oversized Terminal

10.2 Live Loads

The vehicular/access lanes of the dock and trestle will be designed to an HS20-44 highway load, or a 20T mobile crane (whichever controls based on span length). Conveyor galleries and access platforms will be designed for a 60psf live load.

10.3 Wind Loads

Design wind speed: $V_{ult}=110$ mph (Exp. C, Risk Category II) per Figure 1609A of the California Building Code.

10.4 Vessel Loads

Mooring and berthing loads for the dock and fender system will be based on Capesize vessels (Approximately 180,000 DWT) Mooring and spring line loads for detailed design will be based on specialized mooring analysis software (OPTIMOOR or similar).

Berthing loads for the fender system and breasting dolphins will assume a vessel approach speed of 0.50 fps (normal to the berth face) and 10 degree approach angle.

10.5 Seismic Loads

Seismic design of the upland structures and foundations will be based on the International Building Code (IBC) and ASCE 7. The following site-specific design parameters were included in the 65% geotechnical report by Berlogar Stevens & Associates listed in Section 3.2:

- S_g : 1.5
- S_1 : 0.6
- S_{MS} : 1.35
- S_{M1} : 1.44
- S_{DS} : 0.9
- S_{D1} : 0.96

**Above seismic parameters based on Site Class 'E'*

Seismic design of the marine structures will be based on the performance-based analysis methods of ASCE/COPRI 61-14. The three seismic performance levels will be as follows:

- Operating Level Earthquake (OLE):
 - 1 in 72 year event (50% probability of exceedance in 50 years)
- Contingency Level Earthquake (CLE):
 - 1 in 475 year event (10% probability of exceedance in 50 years)
- Design Earthquake (DE):
 - 2/3 of Full Maximum Considered Earthquake (MCE); MCE defined as (2% probability of exceedance in 50 years) per ASCE 7

11 Electrical and Controls

11.1 Electrical

Utility electrical power will be delivered to the site by two independent 12.47kV three-phase systems owned by the Port of Oakland or PG&E. At the Point-of-Delivery on the site, utility power will be received at main service electrical room with metering and isolation/protection. Electrical power will be distributed on site at 12.47kV three-phase in an open-loop system (site electrical distribution loop) to area electrical rooms located throughout the site.

Each area electrical room will distribute electrical power to equipment, motors, lighting etc. through unit substation transformers that will step down the voltage to service voltages required.

Electrical Shore Power and Communications will be provided at a vault mounted on the wharf to interface with docked ships, allowing them to connect to the electrical grid (cold ironing).

Power and control cable will be jacketed armored cable suitable for heavy industrial environments. Non-armored cable may be used where installed in cable duct or other enclosed raceway. Cables will be distributed in cable tray where possible.

Uninterruptible Power Supplies (UPSs) will be used to power the Site Control System, select lighting and other services required to be in service after the loss of electrical power.

Drives for conveyors and selected other equipment will include AC motors controlled by Variable Frequency Drives (VFDs).

Generators will be used as the back-up or emergency power source for services that are required to be in service under loss of electrical power, which are too large for a UPS system.

LED lighting will be the primary technology used for lighting throughout the site.

11.2 Controls

The Site Control System will be based on a PLC/SCADA system. A dual-redundant hot backup processor system will be used for the PLC. The SCADA system will provide a graphical and data analysis interface for operation.

The PLC system will utilize remote input/output racks closed to the field instruments, devices and final control elements. The control system will communicate via Ethernet over fiber optic cables to remote racks.

Input/output (I/O) devices will be 4-20mA for analog signals, 24VDC or 120VAC for discrete (on/off) signals. Specialty devices such as RTDs to measure temperature will use RTD signal directly to the PLC I/O.

The SCADA system main Graphical User Interfaces (GUIs) will be located in a Central Control Room located at the Administration Building. Operator Interface Terminals (OITs) will be provided at site area locations where required.

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Control will be either Remote or Local. Remote control is operational control through the PLC/SCADA system via the GIUs or OITs. Local control is manual control through Local Control Panels (LCPs) that may include pushbuttons, selector switches, pilot lights, drive interface terminals, etc.

Major equipment, for example shiploaders, may have on-board, stand-alone control systems. These control systems will be specified to be compatible with the Site Control System. Communications to stand-alone equipment will be Ethernet over fiber optic cable. The Site Control System will monitor and/or provide supervisory control through the communications link. Exceptions would be any emergency signals that would require hard-wiring.

The rail unloading facilities will have an independent control system. This system will be compatible with and linked to the downstream control system. Only when the downstream control system is configured for material transfers, and verified, will the rail unloading system be allowed to initiate transfers.

12 Infrastructure

12.1 Rail Systems

A rail system, designed to meet with BNSF and UP Industrial Track Standards will be used for receipt and processing of unit trains. There will be an arrival and departure spur from the mainline to the facility. Unit trains will be processed in approximately 26-car segments through discharging into a below grade dumping pit and conveyance system. The 26-car segments will be pulled or pushed through the dumping stations either by a switching locomotive or an indexer, which will be evaluated during preliminary engineering.

12.1.1 Train and Railcar Data

The design calls for incoming trains of 104 railcars to be split in and handled on 26 railcars "ladder type" storage tracks. Coal railcars are expected to be bottom dump aluminum construction, closed top hopper cars, with gross weight of 130 tonnes, cargo capacity of approximately 110 tonnes. Soda Ash railcars are expected to be steel construction, closed top, bottom dump hopper cars, each with approximately 90 tonnes of cargo capacity.

Coal cars will be bottom hopper, rapid discharge style cars, with removable, fiberglass covers.

Soda ash cars will be 60 ft. long, closed top hopper cars. Variable configurations and numbers of hoppers are anticipated. The soda ash cars will be unloaded in a stationary position. Pneumatic gate opening/closing devices will be used.

12.2 Site Preparation

12.2.1 Clearing and Grubbing

Clearing, grubbing and top soil stripping is to be done only where required leaving as much of the existing vegetation as practicable. The design will:

- Establish vegetation clearing, grubbing, and over-stripping requirements.
- Determine the applicable regulations and restrictions for disposal of materials through discussions with appropriate authorities.

12.2.2 Temporary Spill Containment and Erosion Control

The design will:

- Establish the regulations surrounding the disposal of site runoff into off-site water courses through discussions with the appropriate authorities.
- Provide the necessary containment facilities for products of erosion and oil spills originating from construction activities and equipment operation, etc.
- Provide appropriate best management practices to treat site runoff and prevent siltation of natural water courses.

12.2.3 Ground Improvement

Ground improvements will be based on Geotechnical Engineers recommendations, it is assumed that some type of ground improvement will be required for the coal storage building for support of the coal stockpile. An appropriate recommendation for the type and extent of ground improvement will be determined, after additional geotechnical studies, during detail engineering.

12.2.4 Demolition

Demolition is being done by the Owner and is assumed to be completed prior to the start of site work

12.2.5 Earthworks

Re-grading of the site to create appropriate base grades for the new facilities. It is assumed that grading will be driven by the requirements of operations of the new facilities and other design constraints rather than trying to achieve an earthwork balance.

The design will establish the approximate extent of excavation, import and export required in accordance with the recommendations of the Owner's Geotechnical Engineer. Surplus material will be disposed of as directed by the Owner's representative. Disposal of contaminated soil is not anticipated.

12.2.6 Hazardous Materials

The site may contain toxic or hazardous materials. If present, these materials and subsequent mitigation strategies will be established by others, with a specific focus on

Basis of Design
Oakland Bulk and Oversized Terminal

determining areas of potential soil contamination and establishing the nature and extent of remediation required.

The design will assume no hazardous materials findings.

12.3 Surfacing

The design will account for surfacing materials in and around the new facilities to allow for the movement of personnel and equipment, and to direct surface runoff water away from facilities to drains and ditches. In general, the surfacing will include:

- Pavement where vehicular or access ways warrant.
- Gravel for pedestrian paths and maintenance areas.
- Grass or vegetation for low use areas and landscaped areas.

12.4 Roads/Vehicular Access

The design will specify on-site access roads that connect buildings and maintained facilities. Roads will be designed in accordance with the following specifications:

- Maximum grade: 10%
- Minimum centerline radius: 50 ft.
- Minimum traffic (traveled way) width (2 lanes): 16.5 ft.
- Minimum vertical clearance: 16 ft.
- Cross slopes: 2%

Pavement thickness design is to be provided by Owner's Geotechnical Engineer. Additional turning radii accommodations for large delivery equipment and mobile maintenance equipment may be considered for access ways depending on operations requirements identified to the Engineer by the Owner.

12.5 Site Drainage

Site drainage for stormwater surface runoff will be facilitated through the use of stormwater management facilities that could include open channel and underground gravity conveyance systems, stormwater pump stations/force main systems, and stormwater detention/infiltration and treatment systems. The design will establish the appropriate methodologies for sizing stormwater management facilities based on local requirements for stormwater quality and flow control.

Low Impact Development (LID) techniques will be considered for accomplishing local stormwater quality and flow control standards. LID techniques may include reducing impervious surfaces where practical and utilizing infiltration where feasible as determined by the Owner's Geotechnical Engineer. Excess stormwater will discharge through an approved and permitted outlet. Opportunities for storing and reusing stormwater for process or dust suppression may be considered depending economic feasibility.

The drainage design will evaluate and select best management practices for site specific source controls where appropriate. Process water contacting bulk materials or used for facility maintenance will have drainage collection systems separate from stormwater runoff collection facilities. Bulk materials handled on site will be covered in storage buildings and enclosed/covered conveyors to provide environmental protection during material transfers.

12.6 Water Systems

The design will include water systems for Potable Water, Process Water, and Fire Water.

- Potable Water will be sourced by a metered connection from the local purveyor. All pipe and materials for the potable water system will conform to requirements of the local purveyor and health authority. Potable water supply and metering for arriving ships will be provided.
- Process Water will be sourced from potable water by an approved backflow prevention device. Process water may also include treated water from onsite recycling operations and from collected stormwater where connected internal to the process water system and protected by backflow prevention device.
- Fire Water will be sourced from potable water following an approved backflow prevention device.
- The design of all water mains, including those not designed to provide fire protection, will be subject to hydraulic analysis and sized based on flow demands and pressure requirements.

12.6.1 Materials

Pipe, fitting, valve and fire hydrant materials will conform to the latest industry standards and local requirements. Plastic pipe may not be used in locations with potential exposure to petroleum products.

Packing and jointing materials will meet applicable standards. Pipes having mechanical joints or slip-on joints with rubber gaskets are preferred. Normally:

- Cement mortar-lined, push-on joint, ductile iron will be used for areas subject to mostly truck traffic and heavier, off-road wheel loads, or where cover is less than 3 ft.
- C900 polyvinyl chloride pipe will be used elsewhere, to a maximum 12 in. diameter.
- Galvanized Steel Pipe Schedule 40 will be used for process water.

12.6.2 Valves

- The design will provide shut-off valves on water mains to provide appropriate shut down for maintenance and operations activities.
- The design will provide means of removing air, such as hydrants or air relief valves, where air can accumulate at high points within water mains.
- A combination air/vacuum relief valve will be provided at the crest (highest) point of the water main.

Basis of Design
Oakland Bulk and Oversized Terminal

12.6.3 Cross-Connections and Inter-Connections

The design will not connect the water distribution system to any pipes, pumps, hydrants or tanks that may contain unsafe water or other contaminating materials and that may be discharged or drawn into the distribution system.

12.7 Vacuum Systems

Locations in the facility that handle soda ash will be equipped with vacuum collection headers to allow for dry clean up of fugitive materials. These vacuum systems will consist of hose connections in process areas that connect to a main header leading to a vacuum-truck accessible location.

12.8 Fire Protection

12.8.1 General

The fire protection system will be designed, installed, tested and inspected to NFPA standards. Materials and equipment used in the fire protection system will meet Underwriters Laboratory and Factory Mutual requirements.

The local fire authority will approve the final design, equipment selection, and layout of the fire protection system.

12.8.2 Piping, Fire Hydrants and Hose Cabinets

Fire protection system water mains will conform to NFPA 24, with a minimum size of NPS 6, a minimum operating pressure of 55 psi, and a pressure drop as described in NFPA 24.

The design will specify approved fire hydrants where required by code. In accordance with NFPA 307, fire hydrants will be located no closer than 40 ft. from any major building, at intervals no greater than 300 ft., no less than 150 ft. from a dead head, and such that each facility is within reach of at least two hydrants. The hydrant opening size will be 2.5 in. and the most remote hydrant will have a minimum residue pressure of 20 psi with a minimum flow rate of 1000 gpm.

12.9 Wastewater Systems

The design will include water systems for Sanitary Waste Water and Process Waste Water.

- Sanitary Waste Water will be discharged to the sewer system operated by the local purveyor and will comply with the permit regulations associated with discharge. All pipe and materials for the Sanitary Waste Water system will conform to requirements of the local purveyor and health authority.
- Process Waste Water will be conveyed to an onsite treatment facility for either recirculation onsite as Process Water or for discharge as appropriate, either as stormwater or sanitary wastewater.

- The design of all wastewater mains will be subject to hydraulic analysis and sized based on flow demands and pressure requirements.
- Underground wastewater pipelines will be designed with at least 3 ft. of cover.

12.9.1 Pipe Materials

The design will use the following pipe materials, which will be selected to suit the physical and chemical properties of the liquids they convey:

- Fiberglass reinforced plastic pipe: Pipe lengths will be joined using bell-and-spigot joints or a butt-and-strap technique. Bell-and-spigot pipe joint gaskets will be made of appropriate synthetic materials to suit the liquid being carried by the pipe.
- High-density polyethylene pipe: Pipe lengths will be joined using butt fusion methods or flanges.
- Polyvinyl chloride pipe: Pipe lengths will be joined using bell-and-spigot gasketed joints or solvent welds.
- Stainless steel (SAE grade 304) or epoxy-lined and coated mild steel pipe (for exposed pipelines): Pipe lengths will be welded or joined using flanged or Victaulic couplings.
- Sewer pipelines will be designed with at least 2 ft. of cover below sub-grade where they pass under heavily traveled roads.

12.9.2 Force Mains

Force mains will be designed to maintain a minimum fluid velocity of 3 ft/s and a maximum velocity of 11.5 ft/s. Force mains will aim to rise continuously toward an outlet without local high points. An automatic air relief valve will be provided at each high point in the force main to prevent air locks.

A combined air/vacuum relief valve will be provided at the crest (highest point) of each force main. Force mains will enter the gravity system at a point not higher than 2 ft. above the flow line of the receiving manhole.

12.9.3 Water Pumping

Pumps shall be provided for locations where pumping is required.

Submersible pumps shall be used where possible and designed to handle slurry flow with a solid weight concentration of up to 1%.

Pumps shall be controlled by level instruments and preference shall be given to pumps that can run dry.

12.10 Cable Trenches

It is assumed that duct banks will convey main underground systems outside of areas where they can be conveyed by above ground structures on cable trays.

Basis of Design
Oakland Bulk and Oversized Terminal

12.11 Security and Fencing

To the west side of the facility is a public access area. There will be fencing and screening placed along this area to provide control access and provide visual separation.

12.11.1 Parking

Parking for ILWU, administrative staff and visitors will be provided outside of secure facility.

12.12 Office and Maintenance Facility

There will be an administration/maintenance building located between the entrance and the stockpile area. The administration/maintenance building will be approximately 7,500 ft².

12.13 Dock Office

An approximate 200 ft² dock office with Internet, Ethernet, HMI and phone access.

12.14 Gangway Access

Gangway access to provide safe access to all ships will be provided.

12.15 Operating and Maintenance Vehicles

Mobile equipment such as forklifts, wheel loaders, boom trucks, welders, service trucks, pickups, and light utility vehicles are assumed to be required, but will be specified and provided by the terminal.

EXHIBIT 30

TO CHRISTOPHER LONG'S DECLARATION ISO MSJ



7/18/12
2:00 PM
Phil's Office
Kinder Morgan meeting

Attendees:
Kevin Jones
Phil Tagami
Megan Morodomi

PT: We want to give priority call to KM, but until KM figures out site requirements, how do we proceed? Other people are calling, and we want to recognize our KM business relationship. Can we send KM an option agreement? Is this what you want to do and how you typically operate?

KJ: In vetting the site for what KM wants to do, it's right on par, we have people who are very interested. KM operates on a pipeline business development mentality. If commercial tenants lined up, then we can invest in a terminal design because we want to make sure that the deal will go through. In discussions with CML and UP, KM doesn't feel they have a customer yet. I spoke with BNSF and have a meeting with them on Friday. Are there any couriers that CCIG is opposed to?

PT: Nuclear waste
KJ: What about coal?
PT: Not opposed.

KJ: It could create a political storm. If there are no courier restrictions, then it opens up new opportunities for CCIG. KM not getting anywhere with iron ore, but if we put coal on the table, there are lots of customers willing to do it. KM is talking with people in the PNW about coal and one customer in Georgia particularly excited- Dixon Betts.

PT: In terms of timing, schedule and deal flow, how long does KM need to get things in order? 24 months? We will need to decide at what time is money refundable, non-refundable, and credited.

KJ: 24 months should be adequate. With an option in place we can begin discussions with customers. BNSF is major carrier of coal out of Wyoming (15-30 M tons).

PT: Being respectful of the timeline, we want to get this on the table. But because of CCIG's unique position, we still need to speak with other operators.

KJ: If we go the coal course, who has authority to stop this type of development and design? The Port?

PT: The Port received \$15M to build this facility for the export of goods and the Port is required to use the money this way.

PT: For the option agreement, what are reasonable milestones?

If it's a 24 month option, we would give you the first year to identify lines of business and focus on type of business to vet requirements, give KM flexibility and an option to extend. Does KM prefer tranches or option?

KJ: KM prefers option view. We need a 20 year deal to make this viable and KM prefers a 10 with 10 year option. KM would give reasonable notice for extension and have an opener on how to deal with escalations.

PT: I want to mention the community jobs agreement. The City wants to make sure local jobs are available. This facility is the ILWU's jurisdiction and they want in on rail. Teamsters are opposed. CCIG not getting involved, letting operators choose.

KJ: Labor shouldn't be an issue, KM controls items on ship, off ship, when on rail, it's someone else's control. The labor issues tend to work themselves out. On the LAX T facility, KM provided stevedore, on vessel and maintenance.

PT: The land issue, how much land do you need?

KJ: With coal, it's a lot more land.

PT: EBMUD agreement regulates train trips. 6 unit train (whole train) trips during hours of 6am to 6pm, and no more than 12 per day. I will send over the package of leases (KM's form of ground lease will mirror CCIG's, effectively a sublease) and the option agreement for you to review.

KJ: KM is an independent terminal operator, they invest in facilities and operate facilities, the fact that this is a private development, is a good combination.

PT: OBOT allows CCIG to be an operator, KM can be part of that

KJ: I want to get KM to the point where we sign an option agreement, or say 'we don't have the customers lined up' and explore other options.

PT: CCIG will get from Stice a summation of the documents, and hopefully signed LDDA. I will draft an option agreement and Stice will tighten up and send over to KM.

KJ: The option agreement allows KM to go to customers and shop around to find the highest and best use (today) for the site.

KJ: 107 acres in Antioch, would CCIG be interested in developing it? It was a former pulp mill, on the water, with small pier, 34' water depths. Fourstar is holding agent. KM is in option agreement, but not making option payments yet. KM needs someone to buy land, develop it and allow KM to lease what they need and put the rest to purpose. I will send the info for you to review.

In the meantime:

- CCIG is working on getting wharf repairs permitted, tug operators next to berth 6 - tug plan (for crowley, am nav to use)

- Port project has to relocate fuel line, looking to CCIG for help. Does KM have a fuel contact? (KJ will send over a contact. Rob, in Orange, CA)

EXHIBIT 31

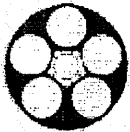
TO CHRISTOPHER LONG'S DECLARATION ISO MSJ

Lorrie L. Marchant, CSR# 10523, RMR, CRR, CCRR, CRC

EXHIBIT 146WITNESS: Phillip Tagami
CASE: OBOT v. City of Oakland
CASE NO.: 3:16-cv-07014-VC
DATE: Friday, October 20, 2017**Phil Tagami**

From: Phil Tagami
Sent: Wednesday, February 29, 2012 11:28 AM
To: Chris Stotka; James Kachelmeyer
Subject: RE: City and Port comments on LSA's 2/16/2012 OAB project description

60 ships annually ! cool



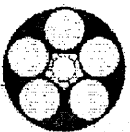
Phil Tagami
 Managing General Partner
 CALIFORNIA CAPITAL & INVESTMENT GROUP
 Office 510 483 6364
tagami@californiagroup.com

From: Chris Stotka [mailto:cstotka@indrailco.com]
Sent: Wednesday, February 29, 2012 11:22 AM
To: James Kachelmeyer; Phil Tagami
Subject: RE: City and Port comments on LSA's 2/16/2012 OAB project description

5-6 unit trains per ship is my guess so that would make 60 ships

From: James Kachelmeyer [mailto:jkachelmeyer@californiagroup.com]
Sent: Wednesday, February 29, 2012 10:42 AM
To: Phil Tagami
Cc: Chris Stotka
Subject: RE: City and Port comments on LSA's 2/16/2012 OAB project description

I suggest we stick with "bulk goods", unless they ask. Do we have an idea of the projected number of vessel calls at Wharf 7 associated with these volumes?



James Kachelmeyer
 Development Partner
 CALIFORNIA CAPITAL & INVESTMENT GROUP
 Office 510 483 6364
jkachelmeyer@californiagroup.com

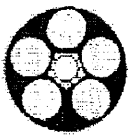
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From: Phil Tagami
Sent: Wednesday, February 29, 2012 10:40 AM
To: James Kachelmeyer
Cc: Chris Stotka
Subject: RE: City and Port comments on LSA's 2/16/2012 OAB project description

The last thought I have on this is the commodity type's we have discussed handling and how precise we want to be at this time

Iron ore, grains, DDGS, LUMBER, FROZEN AND REFRIDGERATED FOODS, (coal?)



Phil Tagami
Managing General Partner
CALIFORNIA CAPITAL & INVESTMENT GROUP
Office 510 403 6364
tagami@californiagroup.com

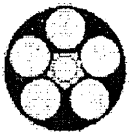
From: James Kachelmeyer
Sent: Wednesday, February 29, 2012 10:05 AM
To: Phil Tagami; Hansen, Mark; Letter, Dan; marc@sticelaw.com; James Heilbronner
Subject: FW: City and Port comments on LSA's 2/16/2012 OAB project description

Do you think we'll have any modifications to the redlined version of the CEQA project description that I sent out last night? If so, I'll hold off a little longer on sending it over to them. If not, I'll go ahead and send that version over.

Please let me know.

Thanks,

James



James Kachelmeyer
Development Entrepreneur
CALIFORNIA CAPITAL & INVESTMENT GROUP
Office 510.768.8500
jkachelmeyer@californiagroup.com

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From: Shannon Allen [<mailto:Shannon.Allen@lsa-assoc.com>]
Sent: Tuesday, February 28, 2012 10:30 AM
To: James Kachelmeyer; JamesH@archdim.com
Cc: Donnell Choy; Mark Erickson; Loretta.Meyer@CH2M.com; Imee Osantowski; Barry MacDonnell; Angstadt, Eric; Cashman, Pat; Shen, Alisa; Anne Whittington; Wald, Mark
Subject: RE: City and Port comments on LSA's 2/16/2012 OAB project description

James and Jim -

The City and the Port have both provided their consolidated comments and inputs on the project description. I will spend this afternoon reviewing the comments, implementing the edits, etc. When do you anticipate providing your comments? If you would prefer to provide them verbally, I will be at my desk from 1:00 to 5:00. Please let me know what time works for you and I will be sure to be at my desk.

- Shannon

From: Shen, Alisa [<mailto:AShen@oaklandnet.com>]
Sent: Monday, February 27, 2012 8:33 PM

To: Anne Whittington; Wald, Mark; Shannon Allen

Cc: Donnell Choy; Mark Erickson; Loretta.Meyer@CH2M.com; Imee Osantowski; Barry MacDonnell; jkachelmeyer@californiagroup.com; JamesH@archdim.com; Angstadt, Eric; Cashman, Pat

Subject: RE: City and Port comments on LSA's 2/16/2012 OAB project description

I'm attaching the City comments and Port comments on the Project Description - in addition to any comments (not addressed) LSA included in the draft document and I summarized in a chart handed out last Wed (and distributed via email).

Points of contact for LSA (Shannon), City (Alisa), Port (Anne) and the Developer (James K & Jim H.) should touch base tomorrow to agree on a process by which we ensure that all of these comments addressed and incorporated.

Alisa

-----Original Message-----

From: Anne Whittington [<mailto:awhittington@portoakland.com>]

Sent: Mon 2/27/2012 4:59 PM

To: Wald, Mark; Shen, Alisa; shannon.allen@lsa-assoc.com

Cc: Donnell Choy; Mark Erickson; Loretta.Meyer@CH2M.com; Imee Osantowski; Barry MacDonnell

Subject: Port comments on LSA's 2/16/2012 OAB project description

Mark et al.,

Port of Oakland staff comments on the OAB CEQA project description are in the attached document. Please share with appropriate City and developer staff.

A few comments pertain to figures, so are noted with the figure names. The table of acreages may need some fine tuning. I'll send suggestions separately, with Port projects added to the City project matrix. I did not yet write a transition piece for the infrastructure project section, in large part because it makes more sense to include that section in "development". Let me know if you still need a paragraph on the Port infrastructure.

Anne

EXHIBIT 32

TO CHRISTOPHER LONG'S DECLARATION ISO MSJ

Brought to you by the Oakland Global Trade & Logistics Center and California Capital & Investment Group

OAKLAND GLOBAL NEWS

Issue 4

Monthly Updates on the Oakland Global Trade & Logistics Center Project

IN THIS ISSUE

Project Updates

OBOT

Employment

Photos!



QUICK LINKS

[Oakland Global Website](#)

Oakland Global News, December 2013

Dear Reader,

Happy Holidays! Oakland Global News is a monthly newsletter for readers with an interest in staying current as the Oakland Global Trade & Logistics Center (former Oakland Army Base) project evolves. This week OG News includes stories about the Oakland Bulk and Oversized Terminal and several other topics. Enjoy and Happy New Year!

Project Updates

Lorrie L. Marchant, CSR# 10523, RMR, CRR, CCRR, CRC

EXHIBIT 147

WITNESS: Phillip Tagami
CASE: OBOT v. City of Oakland
CASE NO.: 3:16-cv-07014-VC
DATE: Friday, October 20, 2017



Following the Oakland Global groundbreaking event on November 1, actual construction work has started at the former Oakland Army Base. The project also has made significant contributions to its surroundings on the former base.

- **Demolition:** Lead and asbestos abatement is on-going at several warehouses scheduled for imminent demolition. Nine large buildings will ultimately be demolished as part of the early construction work, but a preliminary step is disconnecting utilities, and segregating and disposing lead and asbestos-laden debris. Following the abatement process, valuable wood will be preserved for reuse and resale.
- **Construction operations center:** Ten trailers housing approximately 25 offices and several conference rooms have been installed on the Oakland Global project site to serve as construction headquarters for the next 54 months. Office occupants number approximately 25 and include representatives from CCIG, the City of Oakland and the project construction joint venture team, which includes the Tuner, Top Grade and Flatiron companies. The construction operations center trailers are located near the intersection of 11th Street and Maritime Street and occupy a five-acre parcel. The offices are open 7 a.m. to 3:30 p.m. Monday through Friday.
- **Bike Path Port-a-potties:** Two port-a-potties have been added to the Bay Bridge pedestrian / bike path parking lot created in a joint effort between Caltrans, the City of Oakland and Oakland Global developer CCIG. Caltrans built the new path as part of the new Bay Bridge, but did not provide additional parking. The lot, which is at the intersection of Burma Road and

Maritime Street, opened in November. Given the length of the trip to the end of the path and back, the port-a-potties are a welcome improvement for visitors.

Oakland Bulk and Oversized Terminal

A new service for the Oakland waterfront



Bulk commodity ship

Transforming the former Oakland Army Base into a modern trade and logistics center is central to the Oakland Global plan. That work will include replacing 1940s infrastructure with modern utilities, roads and buildings designed to move goods efficiently to and from Oakland. But, a lesser-known aspect of the project is a new marine break-bulk commodity terminal on the westernmost section of the base.

The Oakland Bulk and Oversized Terminal (OBOT) is expected to capture some of the business that Oakland loses to other West Coast ports, which feature bulk terminals. OBOT will take advantage of the city's direct ocean path to China and railroad tracks that stretch to agricultural products in California's Central Valley.

When running to full capacity, OBOT is expected to move approximately 2 million metric tons of bulk products that would otherwise be shipped through other West Coast ports. The commodities typically are transported on land to and from ports in boxcars or rail cars designed to carry a specific product. Ocean-going

vessels commonly carry bulk goods in their hulls rather than in containers.

"The Port of Oakland relies heavily on cargo that moves primarily by truck. That limits Oakland's potential as a national gateway," said Phil Tagami, CEO of California Capital & Investment Group, which is the majority partner in OBOT. Creating a marine terminal opens a new pathway for the Oakland waterfront - one serviced by rail."

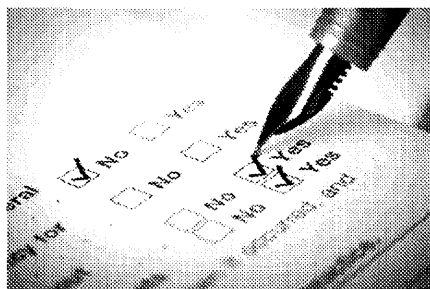
Given California's wealth of natural resources, it's not surprising that CCIG would contemplate moving agricultural products through OBOT, such as corn, soybeans, flour and dehydrated garlic. But the list of potential products is much longer, including iron ore, pot ash, soda ash, building materials and steel products.

One bulk material OBOT does not plan to export or import is coal. CCIG and Port of Oakland officials have been asked about potential coal shipments as part of Oakland Global and OBOT. Coal is not in the plans, according to Tagami.

"It has come to my attention that there are community concerns about a purported plan to develop a coal plant or coal distribution facility as part of the Oakland Global project," Tagami said. "This is simply untrue. The individuals spreading this notion are misinformed. CCIG is publicly on record as having no interest or involvement in the pursuit of coal-related operations at the former Oakland Army Base."

Ex-Offender Employment Support Survey

To ensure that the Oakland Global project is doing everything possible to hire Oakland resident ex-offenders reentering the workforce, CCIG is currently sponsoring a survey of East Bay non-profit organizations that work with the reentry population.



The 15-question survey is intended to gather information about services currently available to East Bay employers seeking to hire reentry job applicants. The goal is to use the information to create partnerships between the project and groups with similar hiring goals.

CCIG mailed and emailed the survey on December 2 to 27 organizations, many of which are located in Alameda County. The organizations include the Oakland Private Industry Council, the Unity

Council, Allen Temple Housing and Economic Development Corp. and Youth Uprising. So far, only six organizations have responded to the survey. They are as follows:

- Oakland Private Industry Council
- Law Family Community Development Inc.
- Society of St. Vincent de Paul of Alameda County
- Michael Chavez Center
- Tri-Valley Regional Occupational Program
- C.U.R.A. Inc.

In January, CCIG will be following up with calls to the organizations that have not responded to the survey.

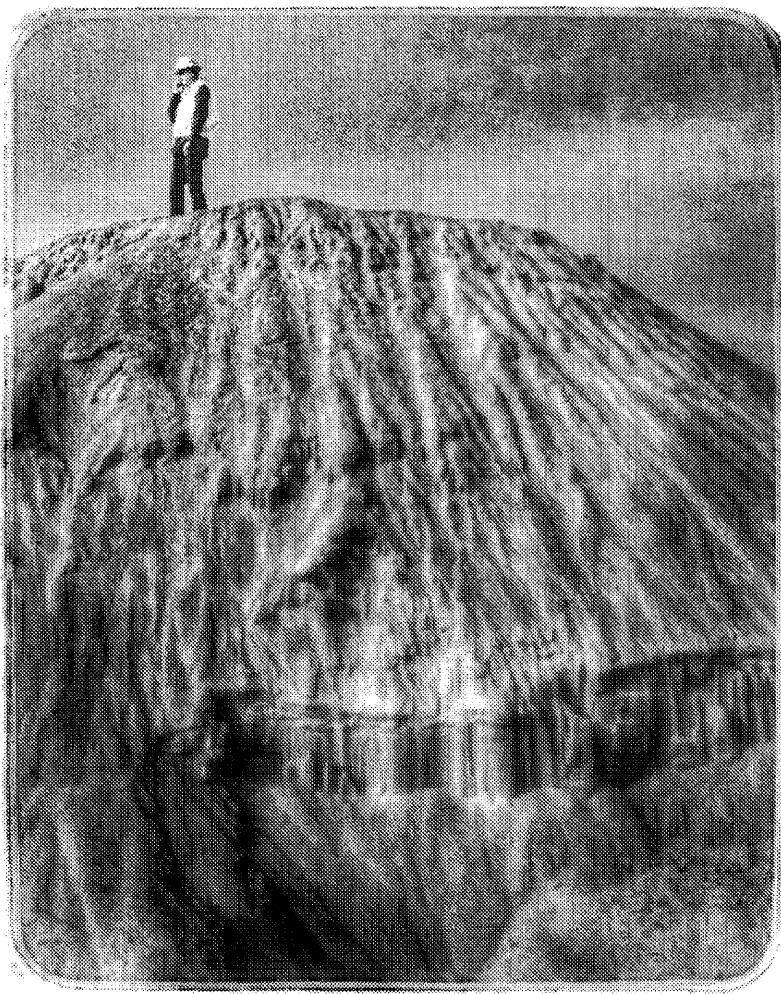
Oakland Global's job policies were created as part of a lengthy dialogue with community and labor groups. The policies strongly emphasize hiring union laborers and local residents. Specifically, the policies dictate that each contractor involved in Oakland Global construction meet the following requirements: At least 50 percent of project work hours be performed by Oakland residents; a minimum of 25 percent of apprentice work hours be performed by disadvantaged workers; and 20 percent of project work be performed by apprentices.

Disadvantaged workers include ex-offenders, and with limited exceptions, the jobs policies prohibit contractors from inquiring about applicants' history of involvement with the criminal justice system.

CCIG welcomes any information regarding services available to employers seeking to hire reentry workers. Contact: Chrissy Becker at 510-355-0128 x 113 or at Chrissy@rojeconsulting.com.

Army Base Photography

As a recurring feature, the Oakland Global News presents photography from the Army Base. The photos and captions below are by Dan Nourse.



Worker atop recycled aggregate in the North Gateway.



Recycled asphalt closeup

Dan Nourse is a project manager for the Oakland Army Base focusing on environmental remediation, site elevation increase and site surcharging. Dan was instrumental in the redevelopment of Emeryville and West Oakland. He is a self taught photographer and uses photography to capture the progress of redevelopment projects as well as producing artful images along the way.


In addition to his project manager duties, Dan is the head coach of Cal Men's Lacrosse Team.

Stay informed

Thank you for taking the time to learn more about the Oakland Global Trade & Logistics Center development. I believe that the Oakland Global Newsletter will prove to be a useful tool for staying informed and current on this important project going forward.

Sincerely,
Phil Tagami

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Roje Consulting | 300 Frank H. Ogawa Plaza | Suite 385 | Oakland | CA | 94612

EXHIBIT 34

TO CHRISTOPHER LONG'S DECLARATION ISO MSJ

Confidential

Page 307

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 OAKLAND DIVISION
4

5 OAKLAND BULK & OVERSIZED

6 TERMINAL, LLC,

7 Plaintiff,

8 vs.

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

9 CITY OF OAKLAND,

10 Defendant.
11 -----/

12
13 ** CONFIDENTIAL **

14 VIDEOTAPED DEPOSITION OF PHILLIP HISASHI TAGAMI

15 30(b)(6): OBOT & Individual

16 Volume II

17 Oakland, California

18 Friday, October 20, 2017
19
20
21

22 Reported by:

LORRIE L. MARCHANT, CSR No. 10523

23 RMR, CRR, CCRR, CRC
24

25 Job No. 132027

Confidential

Page 405

1 at the top of the page, in the time line bar graph,
2 and then with the advent of each of these plans, we
3 would go out and make the rounds with the Lake
4 Merritt Breakfast Club, the chamber of commerce, a
5 number of different organizations, WOCA, and make a
6 presentation and give an update at their regular
7 meetings as to what was going on. And we would also
8 update these on our website.

9 So we would have, at the time when the
10 project was further along as of this date, be giving
11 them an update showing them kind of where we were at
12 that point in time, a snapshot, if you will, of
13 where we were based on what was taking place.

14 Q. When was that it OBOT first considered that
15 coal might be a product that would be shipped
16 through the terminal?

17 MS. SHAW: Object to form.

18 THE WITNESS: If I recall, the first coal
19 conversations took place in 2011, with Kinder
20 Morgan. And then subsequently in -- a few times in
21 2012 and 2013, to the best of my recollection.

22 BY MR. SIEGEL:

23 Q. And do you recall when OBOT entered the --
24 well, OBOT is party to an exclusive negotiating
25 agreement with TLS; correct?

EXHIBIT 39

TO CHRISTOPHER LONG'S DECLARATION ISO MSJ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

---oOo---

OAKLAND BULK & OVERSIZED
TERMINAL, LLC

Plaintiff,

vs.

NO. 3:16-cv-07014-VC

CITY OF OAKLAND,

Defendant.

_____/

VIDEOTAPED DEPOSITION OF JERRY A. BRIDGES
OAKLAND, CALIFORNIA
TUESDAY, OCTOBER 31, 2017

BY: ANDREA M. IGNACIO, CSR, RPR, CRR, CCRR, CLR ~
CSR LICENSE NO. 9830
JOB NO. 132675
Pages: 1 - 222

1 I think our discussions in responses to the
2 subpoenas are off limits, and you shouldn't testify as
3 to those.

4 If you have other information in response to
5 the question, please do so.

6 THE WITNESS: I have no other information to
7 provide.

8 MR. COLVIG: Q. Do you know whether any
9 storage media that you controlled was searched for the
10 purpose of producing documents in this lit --
11 litigation?

12 A Yes.

13 Q Okay. What storage media was searched that
14 was in your control?

15 A The -- we have a server in our office, and it
16 was searched for various e-mail and whatever other
17 content was searched for. Technically, that server is
18 not under my control. It's controlled by my parent
19 corporation.

20 Q What is the parent corporation?

21 A Bowie Research Partners, a wholly-owned
22 subsidiary.

23 Q When you say "wholly-owned subsidiary," are
24 you saying that Terminal Logistics Solution LLC is a
25 wholly-owned subsidiary of Bowie Research Partners?

1 A Yes.

2 MR. COLVIG: I'm going to mark, as the next
3 exhibit in order, an Oakland Terminal Lender
4 Presentation dated February 2015.

5 (Document marked Exhibit 2
6 for identification.)

7 MR. BASSAK: Thank you.

8 MR. GORDON: Bowie is B-O-W-I-E.

9 MR. BASSAK: All right.

10 Counsel, are we proceeding with the
11 understanding that everything marked as an exhibit in
12 this deposition is provisionally designated
13 confidential under the protective order, subject to
14 review down the road?

15 MR. COLVIG: My understanding is, and
16 probably Kevin Siegel can help me better how that
17 procedure works, but there's a period of time when
18 parties, and perhaps third parties can, after receipt
19 of the transcript, designate portions of it as
20 confidential, but you have different --

21 MR. SIEGEL: If you look at the protective
22 order, it outlines what the rules are, and I think
23 it's really before the close of the deposition that
24 you have the opportunity to invoke your right to
25 review the transcript for designation portions of it

1 Q Did coal move through that terminal?

2 A Coal moved through the Port of Virginia, yes.

3 Q Was the coal stored at the port for any
4 purpose?

5 MR. BASSAK: Objection as to form.

6 THE WITNESS: Coal was stored at -- at
7 private terminals at the port, yes.

8 MR. COLVIG: Okay.

9 Q Were they enclosed for storage?

10 A No.

11 Q Does TLS have revenue?

12 MR. BASSAK: Objection as to form.

13 THE WITNESS: TLS does not have revenue.

14 MR. COLVIG: Q. Where does TLS obtain its
15 funding to pay its obligations?

16 A The funding for TLS is made up through our
17 investor.

18 Q Which is who?

19 A Bowie Resources Partners.

20 Q Does the money come directly from Bowie
21 Resources Partners, or through some other entity?

22 MR. BASSAK: Objection as to form.

23 Answer, if you know.

24 MR. GORDON: Objection as to form; compound.

25 THE WITNESS: As far as I know, the money --

EXHIBIT 44

TO CHRISTOPHER LONG'S DECLARATION ISO MSJ

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Robert P. Feldman (Bar No. 69602)

2 bobfeldman@quinnemanuel.com

David Myre (Bar No. 304600)

3 davidmyre@quinnemanuel.com

Eliyahu Ness (Bar No. 311054)

4 eliness@quinnemanuel.com

555 Twin Dolphin Drive, 5th Floor

5 Redwood Shores, California 94065-2139

Telephone: (650) 801-5000

6 Facsimile: (650) 801-5100

7 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Meredith M. Shaw (Bar No. 284089)

8 meredithshaw@quinnemanuel.com

50 California Street, 22nd Floor

9 San Francisco, CA 94111

Telephone: (415) 875-6600

10 *Attorneys for Plaintiff*

11 *Oakland Bulk & Oversized Terminal, LLC*

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 SAN FRANCISCO DIVISION

15 OAKLAND BULK & OVERSIZED
16 TERMINAL, LLC

17 Plaintiff,

18 vs.

19 CITY OF OAKLAND,

20 Defendant.

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

**PLAINTIFF OAKLAND BULK &
OVERSIZED TERMINAL, LLC'S
SUPPLEMENTAL OBJECTIONS &
RESPONSES TO CITY OF OAKLAND'S
FIRST SET OF INTERROGATORIES**

RESPONSE TO INTERROGATORY NO. 1:

OBOT objects to this interrogatory as compound and seeking to circumvent the limit on the number of interrogatories that may be propounded under the Federal Rules of Civil Procedure. OBOT further objects to this interrogatory as overbroad and unduly burdensome, particularly as it seeks a description of “all” facts and identification of “all” documents related to its subject matter. OBOT further objects to this interrogatory to the extent that it calls for legal conclusions and/or characterizations of facts. OBOT further objects to this interrogatory to the extent it seeks information that is subject to the attorney-client privilege, the work-product privilege, the mediation privilege, and/or any other applicable privilege or protection. By providing factual information in response to this Interrogatory, OBOT in no way admits that the information provided is relevant to or required for OBOT to prove any of its claims in this litigation, nor does it undertake or assume any burden of proof or persuasion not otherwise imposed on it by applicable law.

Subject to, as limited by, and without waiving the foregoing objections, OBOT responds as follows: California Capital and Investment Group (“CCIG”) is the sole member of OBOT. Oakland Global Rail Enterprise, LLC (“OGRE”), in turn, is a joint venture between CCIG and West Oakland Pacific Railway (“WOPR”).

OBOT-affiliated OGRE operates as a short line rail carrier for Union Pacific Railroad Company (“UP”) and BNSF Railway Company (“BNSF”). (*See, e.g.*, 10/16/2017 Rough Deposition Transcript of Mark McClure; *e.g.* McClure Rough Tr. at 88:8-15; *see also* 10/6/2017 Deposition Transcript of Phil Tagami; 10/12/2017 Rough Deposition Transcript of Mark McClure). OGRE’s services include operations that service UP and BNSF’s customers at warehouses, work terminals, and other facilities. (*See id.*; *e.g.* McClure Rough Tr. at 88:16-89:3).

The nature and scope of the rail carrier services that OGRE has offered or will offer have been described in or during, among other places, the following which are incorporated by reference herein: (1) the deposition of OGRE representative Mark McClure (10/16/2017 Rough Deposition Transcript of Mark McClure); (2) the depositions of OBOT representatives Phil Tagami and Mark McClure (10/6/2017 Deposition Transcript of Phil Tagami; 10/12/2017 Rough

Barbara J. Parker (SBN 69722)
City Attorney
Otis McGee, Jr. (SBN 71885)
Chief Assistant City Attorney
Colin Troy Bowen (SBN 152489)
Supervising Deputy City Attorney
OAKLAND CITY ATTORNEY
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
Tel: 510.238.3601 Fax: 510.238.6500

Kevin D. Siegel (SBN 194787)
E-mail: ksiegel@bwsllaw.com
Gregory R. Aker (SBN 104171)
E-mail: gaker@bwsllaw.com
Timothy A. Colvig (SBN 114723)
E-mail: tcolvig@bwsllaw.com
Christopher M. Long (SBN 305674)
E-mail: clong@bwsllaw.com
BURKE, WILLIAMS & SORESENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Tel: 510.273.8780 Fax: 510.839.9104

Attorneys for Defendant
CITY OF OAKLAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO
BAYKEEPER,

Defendants-Intervenors.

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

**DECLARATION OF PATRICK
CASHMAN IN SUPPORT OF
DEFENDANT CITY OF OAKLAND'S
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT, AND
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

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

1 I, Patrick Cashman, hereby declare:

2 1. I have personal knowledge of the facts set forth in this declaration and, if called as
3 a witness, could and would testify competently to such facts under oath.

4 2. Since March 2014 to the present, I have worked as a part-time consultant for the
5 City of Oakland ("City"), regarding real estate development issues. Between November 2010 to
6 January 2013, I was employed by the City as the Oakland Army Base Project Manager. In my
7 work for the City as a consultant and employee, I worked extensively on development issues
8 related to redevelopment of the former Oakland Army Base, including the terminal that Plaintiff
9 Oakland Bulk & Oversized Terminal, LLC ("OBOT") proposes to develop at the West Gateway
10 Area of the former Oakland Army Base ("Terminal"), immediately adjacent to Bay Bridge Toll
11 Plaza.

12 3. I was not involved in the drafting, negotiation or approval of the 2013
13 Development Agreement ("DA") between the City and OBOT's predecessor-in-interest
14 Prologis/CCIG, though have since become familiar with the DA. I am also familiar with the 2012
15 Lease Disposition and Development Agreement ("LDDA") between the City and OBOT's
16 predecessor-in-interest Prologis/CCIG. In fact, I prepared the May 30, 2012 Agenda Report to
17 the City Council regarding the LDDA, a true and correct copy of which (without exhibits) is
18 attached hereto as **Exhibit 1**.

19 4. During my term of employment with the City from November 2010 to January
20 2013, I communicated extensively with OBOT representatives—including OBOT principals Phil
21 Tagami and Mark McClure, and their counsel Marc Stice of the Stice & Block law firm—about
22 their plans bring iron ore and other products to the Terminal. Indeed, on several occasions they
23 provided me lists of potential commodities, none of which included coal or petroleum coke
24 (petcoke). Up until my departure in 2013, iron ore was the prime commodity they had identified.
25 I do not recall having any discussion with anyone (orally or in writing), including with OBOT
26 representatives, about their having any interest in coal or petcoke as a potential commodity to be
27 brought to the Terminal.

28 5. Rather, I recall expressing to Mr. Tagami in or around 2011 and 2012 that it would

1 not be prudent to pursue bringing a potentially controversial product like coal to the Terminal,
2 and it was my impression that he concurred.

3 6. On or about November 26, 2017, Kevin Siegel, counsel to the City, sent me an
4 email by Joanne Park, addressed to me and others, dated October 23, 2012, that attached a draft
5 CPUC application for a railroad crossing at the former Oakland Army Base, which draft
6 application references coal. I am informed and believe that OBOT has submitted this email and
7 attachment to the Court in connection with this motion. I do not recall reading either the October
8 23, 2012 email or the attachment. Had I read the reference to coal, I surely would have responded
9 to the email by asking the Terminal developers' representatives why coal was cited as a possible
10 commodity.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Executed on the 4th day of December, 2017, at Oakland, California.

14
15 /s/ Patrick Cashman
Patrick Cashman

16 **ATTESTATION**

17 I, Kevin D. Siegel, am the ECF user whose ID and password are being used to file this
18 "Declaration of Patrick Cashman in Support of Defendant City of Oakland's Motion for Summary
19 Judgment, Or In The Alternative, Partial Summary Judgment, and Opposition to Plaintiff's
20 Motion for Summary Judgment." Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that
21 Patrick Cashman has concurred in the filing of this document.

22 DATED: December 5, 2017

23 /s/ Kevin D. Siegel
Kevin D. Siegel

EXHIBIT 1



FILED
OFFICE OF THE CITY CLERK
OAKLAND

2012 MAY 31 PM 4:34

ATTACHMENT A

AGENDA REPORT

TO: DEANNA J. SANTANA
CITY ADMINISTRATOR

FROM: Fred Blackwell

SUBJECT: Oakland Army Base Development

DATE: May 30, 2012

City Administrator
Approval

Date

5/31/12

COUNCIL DISTRICT: #3

RECOMMENDATION

Staff recommends that the City Council conduct a Public Hearing and upon conclusion adopt the following legislation:

- 1) A Resolution Approving Amendments to the (Former) Oakland Army Base Final Reuse Plan Relating to a Revised Conceptual Land Use Strategy Emphasizing Warehousing/Logistics, and Authorizing City Staff To Make Any and All Necessary Conforming Changes Without Returning to the City Council
- 2) A Resolution Authorizing the City Administrator to Negotiate and Execute a Memorandum of Agreement with the East Bay Municipal Utility District and CCIG Oakland Global, LLC, a California Limited Liability Company and/or Oakland Bulk Oversized Terminal, LLC, a California Limited Liability Company (or Their Related or Affiliated Entities) Relating to Mutual Cooperation in the Development of the Former Oakland Army Base in a Form and Content Substantially in Conformance with the Attached Documents, Without Returning to the City Council
- 3) A Resolution Authorizing the City Administrator to Negotiate and Execute an Amended and Restated Cost Sharing Agreement with the Port of Oakland Pertaining to Infrastructure Improvements at the Former Oakland Army Base; to Reflect the Transfer of the Property from the Oakland Redevelopment Agency to the City of Oakland; to Acknowledge an Amendment to the Trade Corridor Improvement Fund (TCIF) Baseline Agreement; to Establish Respective Roles and Responsibilities Between the Port and City as to Grant Funding; to Identify the Funding Sources to Match the TCIF Grant; and to Commit an Additional \$22.5 Million, Resulting in a Total Commitment of \$54.5 Million, in City Funds to Match the TCIF Grant, in a Form and Content Substantially in Conformance with the Attached Documents, Without Returning to the City Council

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- 4) An Ordinance: (1) Authorizing the City Administrator to Negotiate and Execute a Lease Disposition and Development Agreement and Billboard Franchise and Lease Agreement, Ground Leases, Site Management Pass-Through Lease, and Related Documents (Collectively "LDDA") Between the City of Oakland, and Prologis CCIG Oakland Global, LLC, a Delaware Limited Liability Company (or Their Related Entities or Affiliates), for the Development of a Mixed-Use Industrial (Warehousing and Logistics), Commercial, Including Billboard, Maritime, and Open Space Project on Approximately 130 Acres in the Central, East and West Gateway Areas of the Former Oakland Army Base ("Project"); (2) Amending in Part the City's Employment and Contracting Programs for the Army Base Project; and (3) Waiving the Advertising and Request for Proposal Process for a Design-Build Contract for the Construction of Public Improvements As Described in the LDDA ("Public Improvements") and Authorizing the City Administrator to Enter into a Contract for the Design-Build of the Public Improvements with CCIG, Inc., in an Amount to be Determined Pursuant to the Terms of the LDDA; All of the Forgoing Documents to be in a Form and Content Substantially in Conformance with the Attached Documents, Without Returning to the City Council
- 5) A Resolution Authorizing the City Administrator to Negotiate and Execute a Cooperation Agreement Between the City of Oakland and a Coalition of Community Groups Relating to the Application of Specified Job, Contracting and Environmental Community Benefits Regarding the Development of the Former Oakland Army Base, in a Form and Content Substantially in Conformance with the Attached Documents, Without Returning to the City Council
- 6) A Resolution Authorizing the City Administrator to Negotiate and Execute an Environmental Review Funding and Indemnity Agreement with Prologis Property, LP, a Delaware Limited Partnership And CCIG Oakland Global, LLC, a California Limited Liability Company (or Their Related Or Affiliated Entities) (Collectively "Developer") Regarding the Proposed Mixed-Use Project on the Former Oakland Army Base ("Project") with Respect to: (1) Allocating Responsibility for Environmental Review Costs Between the City and the Developer and (2) Defining the Procedure for Defending and Indemnifying the City of Oakland for the Initial Project Approvals in a Form and Content Substantially in Conformance with the Attached Documents, Without Returning To City Council

EXECUTIVE SUMMARY

After several years of negotiations among the City, the Developer ("Prologis/CCIG"), the Port, and the major community stakeholders, the Oakland Army Base ("OARB") redevelopment is in

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a position to proceed. A master plan for the development of site-wide infrastructure and a mixed use, commercial, including billboards, maritime, rail, and open space project ("OARB Project" or "Project") has been prepared; the necessary California Environmental Quality Act ("CEQA") review has been completed; terms for a Lease Disposition and Development Agreement ("LDDA") and its associated agreements, including the Billboard Franchise and Lease Agreement, Site Management Pass-Through Lease, Design-Build Contract, and Ground Leases have been negotiated; a package of Community Benefits, primarily jobs oriented, has been mostly defined; and the necessary public funds needed to rebuild the infrastructure has been identified.

Staff believes that the parties have reached agreement on most major financial terms and issues, subject to approval by Prologis' attorneys and Investment Committee as described later in this report.

Staff, the City Attorney's Office and outside counsel have been negotiating and drafting the major agreements which are attached to the LDDA ordinance (the "Transactional Documents") with the Developer team around-the-clock in an attempt to finalize the documentation. While the parties have made substantial progress, the Transactional Documents are current as of the Agenda Report but remain a work in progress.

In the interest of providing the Committee with the most up-to-date information, the parties continued to draft up to the deadline for filing the Agenda Report. Accordingly, staff, the City Attorney's Office and outside counsel have not yet had an opportunity to review the latest versions of the Transactional Documents in a comprehensive/global fashion but intend to do so before the CED Committee meeting.

The parties intend to diligently continue discussions and staff will present an oral report at the CED Committee regarding progress reached in finalizing the documents. Staff also will be prepared to respond to Committee members' requests for additional information in a supplemental report on the then-current status of the parties' discussions and documentation.

With respect to the necessary public funds, the California Transportation Commission ("CTC") has put the OARB on a watch list for its public improvements grant funding because of prior delays. The CTC wants assurance by June 19, 2012 that the OARB Project proposed by the City and the Port of Oakland is far enough along to warrant its retention of a \$242.1 million Trade Corridor Improvement Fund ("TCIF") allocation. For CTC, the agency administering the TCIF program, the primary indicator of progress is the project's environmental clearance. City staff worked with Port staff to prepare an Initial Study/Addendum which evaluated all of the proposed project's potentially significant environmental effects and concluded that the project would not result in new significant environmental impacts or a substantial increase in the severity of significant impacts already identified in the 2002 Oakland Army Base Redevelopment Plan Environmental Impact Report (EIR) and thus no further CEQA review is required. The City

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Council's approval of the amended *Final Reuse Plan for Oakland Army Base* ("Final Reuse Plan") and the LLDA would provide CTC with the necessary evidence of the project's environmental clearance and demonstrate the City's capability to bring private investment to match the TCIF funds and to meet the TCIF December 2013 start of construction deadline.

As additional proof of the project's progress, CTC also wants to see the Amended and Restated Cost Sharing Agreement ("CSA") between the City and the Port. The amendment, which must be approved by both the City Council and the Port Board by June 19th, clarifies for CTC the agencies' roles and responsibilities regarding their use of TCIF funding, and concretely identifies the funding sources that will match TCIF. The City Council approved the Term Sheet for the Amended and Restated CSA on May 15th, and the final document presented in this report is in substantial conformance with that Term Sheet. The Port Board approved that Term Sheet on May 11th.

In addition to the Amended and Restated CSA, certain other agreements separate from the LLDA are necessary to support implementation of the LLDA. The Memorandum of Agreement with East Bay Municipal Utility District ("EBMUD") and CCIG Oakland Global, LLC and/or Oakland Bulk Oversized Terminal, LLC, specifies the terms for mutual cooperation for developing the former OARB and secures EBMUD's acceptance of the land uses and configurations proposed for the former OARB. The Cooperation Agreement between the City and specified community/labor groups ("Coalition") would memorialize the City's commitment include a Construction Jobs Policy as a material term of any contract that the City awards for work to be performed on the Project Site and a Operations Jobs Policy as a material term of certain leases or service contracts that the City enters into with any entity that may employ workers on the Project Site as well as obtain the Coalition's release of claims regarding the Project. The Indemnity Agreement ensures that Prologis/CCIG and the City have in place an agreement providing for the joint defense or indemnification of the City in the event of any suits arising from the proposed project, either through the City's approval of the project or in the course of its implementation.

OUTCOME

After fifteen years of start and stop planning, the OARB has found its appropriate use, as a revitalized "Working Waterfront." Positioned between rail and the marine terminals, it is the right use and will be a major generator of jobs and increased maritime trade and logistics activity. This is the City and Port's last chance to preserve the \$242.1 million TCIF allocation for the OARB. Although there is no guarantee that CTC will hold the TCIF funding for the OARB Project if the City Council adopts the proposed legislation, CTC will certainly reprogram the funds to other projects in California without evidence of substantial progress on the OARB Project. In any event, the OARB approvals will put in place a master plan and agreements with the Developer, the Port, and the Community Groups, that will finally set the OARB on the

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course to its revitalization as a trade and logistics industrial Working Waterfront, with all the jobs and other economic benefits that its construction and operations will entail.

BACKGROUND

Oakland Army Base Final Reuse Plan

The *Final Reuse Plan for Oakland Army Base* is a planning document, which represents the preferred reuse vision for the OARB. It is based on an extensive community planning process, regulatory requirements of the San Francisco Bay Conservation and Development Commission ("BCDC"), State Lands Commission and other government entities having legislative or regulatory authority over future use of OARB property, and the development needs of the City of Oakland and the Port of Oakland.

On July 31, 2002, the Oakland Base Reuse Authority ("OBRA"), the designated Local Reuse Authority charged under the federal Base Reuse and Closure Laws ("BRAC") law with planning and implementing the conversion of the closed military bases in Oakland, California, adopted the *Final Reuse Plan* for the Oakland Army Base. The *Final Reuse Plan* put forth a "Conceptual Reuse Strategy" that identified a menu of intended land uses for future reuse of the former OARB or "Gateway Development Area" under the concept of what was called the "Flexible Alternative." The preferred menu of land uses envisioned a mixed-use waterfront commercial development containing a variety of land uses ranging from light industrial, research and development, flex-office, retail, and possibly a high-end hotel complex; and marine terminal uses in the area to be developed by the Port, including wharves, container yards, and railroad facilities. The Conceptual Reuse Strategy and Flexible Alternative were predicated on the notion that actual development with the Gateway Development Area could change over time to reflect the prevalent market conditions and demands, in order to achieve the broader goals and objectives of the *Final Reuse Plan* and *OARB Area Redevelopment Plan* (the Plan that was prepared for the larger 1,800-acre Redevelopment Area that included the former OARB). An illustration of the land use strategy of the *Final Reuse Plan* adopted in 2002 is included in this report as *Exhibit A to the Resolution Adopting Amendments to the Final Reuse Plan for the OARB*.

In 2006 the Redevelopment Agency of the City of Oakland ("Agency"), which assumed responsibility for redeveloping the OARB, amended the *Final Reuse Plan* to add as a conceptual strategy: (a) locating an auto mall within the North Gateway Area; and (b) relocating Ancillary Maritime Support ("AMS") uses to the East and/or Central Gateway Areas. In authorizing the amendment, the City certified a Supplemental Environmental Impact Report ("SEIR"), which identified the environmental impacts associated with the auto mall development and AMS relocation actions. In 2007 the Agency amended the *Final Reuse Plan* again to include a revised layout of the auto mall. An Addendum to the 2006 SEIR ("2007 Addendum") analyzed the

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impact of the proposed change in layout and concluded that there would be no new significant impact or substantial increase in the severity of a previously identified impact as a result of changes to the project.

In 2009, per Court order following a suit brought by EBMUD, the City rescinded the 2007 Amendment to the *Final Reuse Plan*, and certification of the SEIR and the 2007 Addendum only to the extent that they applied to the auto mall project and/or provided environmental clearance for discharges from OARB development to an existing 15-inch sewer line or the relocation of Wake Avenue.

In 2010, the Agency entered into an Exclusive Negotiating Agreement ("ENA") with AMB/CCG (reorganized as Prologis/CCIG) for the development of a portion of the OARB. To have a basis for CEQA analysis and LDDA negotiations, Prologis/CCIG, working with the City and the Port pursuant to a Second Amendment to the ENA, developed a master plan for the entire OARB, which determined, among other things, land uses, densities, prototypical building placements and massings, necessary infrastructure and other site improvements. The master plan covers the area addressed in the *Final Reuse Plan* plus an approximately 14-acre area along 7th and Maritime Streets.

The master plan is characterized as rebuilding Oakland's "Working Waterfront" and includes restored and expanded rail services and a deep water commodities export-oriented maritime terminal on the West Gateway portion of the development. The master plan proposes more warehousing and logistics uses than was specifically noted in the *Final Reuse Plan* or its amendments. However, proposed uses in the master plan would be consistent with the intent of the Conceptual Reuse Strategy and Flexible Alternative set forth in the *Final Reuse Plan*. As noted above, the intent of the Flexible Alternative was to establish a broad envelope of probable land uses/market activities that could change over time in order to reflect market and economic conditions. An illustration of the proposed 2012 OARB Conceptual Land Use Strategy and a comparison of its land uses and those that were studied as part of the 2002 OARB EIR based on the 2002 *Final Reuse Plan* is included in this report as *Exhibit B to the Resolution Adopting Amendments to the Final Reuse Plan for the OARB*.

Staff is requesting the City Council to adopt a resolution approving the proposed amendments to the *Final Reuse Plan* to reflect the currently proposed master plan Conceptual Land Use Strategy emphasizing warehousing/logistics and to make all necessary conforming changes, including but not limited to, updating information to reflect actions undertaken since 2002 to implement the *Final Reuse Plan* and correcting out-of-date information, without returning to City Council.

EBMUD MOA

EBMUD's main wastewater treatment plant ("MWWTP") is located immediately north of the North Gateway Area of the OARB. Wake Avenue, a public street that crosses the North

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Gateway, is the only way to access the main gate of the MWWTP, although there is other access to the MWWTP. EBMUD has consistently maintained that any development of the North Gateway must allow EBMUD to have safe and reliable access to the MWWTP. EBMUD previously challenged the City's plans for the North Gateway Area over this access issue.

To avoid future disputes, in 2009 City and EBMUD staff agreed to meet regularly to coordinate development plans. The discussions were largely conceptual in nature until the City initiated the master planning process for the OARB. Then in 2011 EBMUD began meeting with Prologis/CCIG as well as the City to discuss the elements of the master plan and related impacts to EBMUD. Prologis/CCIG proposes to intensify the usage of the rail lines located between the North Gateway and the MWWTP. The City has also entered into an exclusive negotiating agreement to sell two parcels within the North Gateway to two recyclers, California Waste Solutions and Custom Alloy Scrap Sales, both of whom are currently located in West Oakland. Wake Avenue must be realigned to accommodate both recyclers on the site effectively.

The City's preferred land use option calls for the relocation and realignment of Wake Avenue, which currently provides access to the main gate of the MWWTP. Thus, the City must work with EBMUD to maintain access to the MWWTP. The EBMUD MOA ensures that the OARB project is properly integrated with its neighbor EBMUD and that EBMUD's concerns have been addressed. Without the assurances and rights granted in the MOA, EBMUD may once again challenge the project.

EBMUD expressed the following concerns:

- Increased rail activity could block access to the MWWTP several times a day
- A shortened and realigned Wake Avenue would increase the distance to the primary entrance to the MWWTP, and the existing Engineers Road is not designed to handle the resulting traffic flow
- Locating recycling facilities east of the new Wake Avenue alignment and truck parking facilities west of the new Wake Avenue alignment would increase traffic

To address these concerns, City, CCIG Oakland Global, LLC and/or Oakland Bulk Oversized Terminal and EBMUD staff negotiated a Memorandum of Agreement, which includes, among other items:

- The City will widen the relocated Wake Avenue from two to four lanes;
- The City will facilitate relocating the new and existing rail lines 20 feet south; thereby enabling the widening of EBMUD-owned Engineers Road to accommodate traffic flows by providing, at no cost, some of its property (about .7 acres) to EBMUD;
- The City will install a rail crossing that meets applicable California Public Utilities Commission code and safety requirements at the proposed Wake Avenue and Engineers Road intersection;

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- The City will facilitate connecting Engineers Road to Burma Road to provide an additional access point (to alleviate traffic-related blockages along Wake Avenue and potential blockages to the proposed new crossing at Engineers Road) either by subleasing at no cost a Caltrans lease (about .3 acres) or working with Caltrans to identify an alternate access route;
- The City will reimburse EBMUD its cost to construct necessary safety improvements at the intersection of the newly aligned Wake Avenue and Engineers Road and pay to extend Engineers Road east to their main entrance, while EBMUD will pay all costs associated with extending Engineers Road west to connect with Burma Road;
- CCIG Oakland Global, LLC and/or Oakland Bulk Oversized Terminal, LLC and rail operator agree to time and frequency restrictions of the rail line crossing directly in front of the MWWTP on the Developer and rail operator so as not to inconvenience EBMUD operations and also to pay liquidated damages for violation of such.

If the City cannot accomplish the successful relocation of Wake Avenue, then Wake Avenue will remain in its current location, but the rail restrictions would still apply. In any event, the Memorandum of Agreement states that EBMUD agrees not to challenge the OARB Project. The negotiated MOA is attached as *Exhibit A to the Resolution Authorizing the Memorandum of Agreement with the East Bay Municipal Utility District and CCIG Oakland Global, LLC, etc.*

Amended and Restated Cost Sharing Agreement

In 2008, the Port was given two allocations totaling \$285 million in Proposition IB Trade Corridor Improvement Funds ("TCIF")—\$110 million to fund the Oakland Outer Harbor Inter-Modal Terminal ("OHIT") and \$175 million to fund the 7th Street Grade Separation Project. The TCIF funds require 1:1 matching funds from either private or other public sources. In 2009, the TCIF total funding allocation was amended to \$242.2 million, \$131.9 million for the OHIT and \$110.3 million for the 7th Street Grade Separation Project. Since that time the Port has been trying to secure the necessary matching funds.

In May of 2011, the Port and City entered into the CSA that committed the City to \$32 million in City funds as match to TCIF, in exchange for the Port requesting amendments to the TCIF allocations that would permit as much as \$62 million of the TCIF to be used to improve the City's OARB land. The Port was supposed to have accomplished the TCIF Baseline Agreement Amendment no later than December 2011, but did not due to ongoing negotiations with CTC regarding the sources of additional required matching funds.

As a result of meetings in early 2012 with CTC, the Port and the City agreed that the best strategy for preserving the TCIF funding would be to shift the emphasis of the project from the Port's OARB land to the City's OARB land, because only the City has the potential private partners and investments that could leverage TCIF funds. It is assumed that the City's entire

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portion of the OARB would be eligible for TCIF funding because it will be all trade and logistics oriented, including the restoration of the West Gateway Marine Terminal as a commodities/break bulk facility. TCIF funding was initially limited to public improvements within the East and Central Gateway Areas of the City's OARB land. On March 30th, the Port submitted a proposed amendment to its TCIF Baseline Agreement to CTC to reallocate all of its TCIF allocation from the 7th Street project to the OHIT project; to amend the TCIF project scope to include all necessary infrastructure improvements on the City's portion of the OARB and Phase 1 of the Port's rail terminal; and to add the City as an additional Project Sponsor/Lead Agency. CTC told the Port and City that it will consider the Port's application in late June 2012.

On May 15th, the City Council approved the proposed TCIF Baseline Amendment, consistent with the Port's March 30th submittal to CTC. The City Council also approved the Term Sheet for the Amended and Restated CSA on May 15th, the Port approved that Term Sheet on May 11th, and the final document presented in this report is in substantial conformance with that Term Sheet and is included in this report as *Exhibit A to the Resolution Authorizing the Amended and Restated CSA*. The Amended and Restated CSA reflects the funding plan, schedule, and sources of matching funds required to implement the TCIF Baseline Amendment, and provides for the continued cooperation between the Port and City. It commits the City to \$54.5 million in City funds to match TCIF funds. \$36.5 million of the \$54.5 million City commitment is funding currently in hand and already required, per the Economic Development Conveyance Agreement with the Army, to be expended towards the economic development of the OARB. The additional \$18 million required to fully meet the City commitment is the amount to be received by the City from the land sales to the recyclers and Caltrans, projects that are under negotiation to be sold, subject to Council approval.

The Amended and Restated CSA also has provisions regarding which entity, the City or the Port, will be responsible for designing and constructing the various infrastructure improvements. The City, working through the Developer, will design and construct the entire backbone infrastructure, roads, and site preparation/soils improvements, and the Port will design and construct the Port rail terminal.

Because the City's OARB project is a maritime-oriented, rail-oriented logistics center, the Port's construction of the new rail terminal is crucial to the City's development. The Amended and Restated CSA provides necessary assurances that the City's developments, in particular the West Gateway Marine Terminal, will have adequate rail access. It provides the City with at least 50% exclusive use of the Port Rail Terminal for 20 years and rights of access and use for an additional 46 years. This ensures that the City's tenants, most of whom will be relying on rail service, the access they will require.

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LDDA/Ground Leases/Billboard Franchise and Lease/Site Management Pass-Through Lease/Design-Build Contract for the Public Improvements

In 2008, the City issued a Request for Qualifications to identify potential development teams for redevelopment of a portion of the City-owned Gateway Development Area (the "Project Site"). The City selected the Developer consisting of (Prologis Property, L.P. ("Prologis") (successor-in-interest to AMB Property, L.P., a Delaware limited partnership), and CCIG Oakland Global, LLC ("CCIG"), a California limited liability company (successor-in-interest to California Capital Group, a California general partnership)) to negotiate with regarding development of the Project Site. The Project Site consists of approximately 130 acres of the City's 170 acre portion of the OARB, including the entire East, Central, and West Gateways, and the rail right of ways necessary to connect them to the Port Rail Terminal, as illustrated in this report as *Attachment A*. The City and Developer entered into an ENA on January 22, 2010, a first amendment on August 10, 2010 and a second amendment on April 11, 2011. A third amendment is pending execution, which is expected prior to June 12, 2012.

Pursuant to the Second Amendment to the ENA, the City entered into a Professional Services Agreement with CCG (predecessor to CCIG), to design the Public Improvements. Also during the ENA period, the City and the Developer evaluated the design and financial feasibility of the proposed project, which includes a mixed-use industrial (warehousing and logistics), commercial, including billboards, maritime, rail, and open space project on the Project Site. Having assessed the project's feasibility, the Developer proposes to lease the Project Site for development of approved uses ("Private Improvements") through a Billboard Franchise and Lease Agreement and for mixed use development in three phases: the West Gateway, Central Gateway, and East Gateway.

Staff and the Developer have negotiated the terms of an LDDA, including Ground Leases for the lease of the Project Site for development of the Private Improvements, a Billboard Franchise and Lease Agreement, a Site Management Pass-Through Lease to allow for management of the Project Site during the Public Improvement work, a Design-Build Contract for construction of the Public Improvements, and related documents which set forth the terms and conditions of the development of the Project and the use of the Property by the Developer and any successors to the Property. The LDDA and its attachments are included in this report as *Exhibit C to the Ordinance Authorizing the Lease Disposition and Development Agreement/Billboard Franchise Agreement/Ground Leases/Pass-Through Lease and Related Documents*. While the Billboard Franchise and Lease Agreement can be implemented independently of the other LDDA components, execution of the LDDA and associated contracts is necessary to begin takedown and improvement of the Project Site within the timeframe set by CTC for TCIF funding.

The LDDA spells out the financial terms of the Ground Leases and the Billboard Franchise and Lease Agreement. These terms are still subject to the Prologis Investment Committee's review

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and approval. It is anticipated that the initial approval will be secured before June 12th and the final approval before the July 3rd second reading of the Prologis/CCIG LDDA.

- For the Central and East Gateways, the term of the Ground Lease is 66 years. The Initial Rent is \$0.0267 per month per square foot of land, subject to annual increases based on the CPI but limited to no more than 3% nor less than 2% per year. Rent is held steady for the first 10 years and in year 11 it is increased by the accumulated and compounded CPI increases of the first 10 years. The rent is similarly held steady and then increased every 5 years. On years 20 and 40 there will be a Fair Market Valuation (FMV) adjustment based on the then currently permitted uses and set at 95% of the appraised value in lieu of trying to appraise the value of the various community benefits. Under no circumstances can the FMV Rent go down. Increases in Rent in Years 20 and 40 are subject to cap of the initial rent increased at 5% compounded years 1-19 and 4% compounded years 20-39. The total area of the East Gateway is approximately 31 acres and the total area of the Central Gateway is approximately 57 acres, of which approximately 10 acres are set-aside for the Truck Ancillary Maritime Support facility.
- For the West Gateway, the term of the Ground Lease is 66 years. The Initial Rent is \$0.04 per month per square foot of land, subject to the same stepped annual CPI increases and FMV adjustments as the Central and East Gateways. Assuming the West Gateway is developed as a Marine Terminal, the City will also receive a Participation Rent that will be 10% of the Total Gross Tariffs assessed on all goods, commodities, and services imported and exported from the facilities. If the West Gateway is developed as Research and Development and/or Office, the Initial Rent is \$0.04 per month per square foot of land, subject to the same stepped annual CPI increases and FMV adjustments as the Central and East Gateways. The total area of the West Gateway is approximately 27 acres.
- For the Rail Right of Ways, which areas are located outside of the West and Central Gateway properties but necessary to connect those properties to the Port Rail Terminal and the Union Pacific Railroad mainline and which rent will be associated with and the terms added to the Ground Lease for the first phase, the term will be 66 years and Initial Rent will be \$0.03 per month per square foot, subject to the same stepped annual CPI increases and FMV adjustment increases as the Central and East Gateways. The total area of Rail right of ways is approximately 10 acres.
- Each Gateway area must be taken down in its entirety when the public infrastructure is in place to enable the building of the private trade and logistics facilities. The private developments will be implemented in several stages within each of the leasehold properties. The private development must be completed according to a schedule that will have an outside completion date of 2020.

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- The Billboard Franchise and Lease Agreement is an aspect of the development that can get underway without completed public infrastructure and it is anticipated that planning and implementation of this agreement will begin immediately upon approval of the LDDA and Billboard Franchise and Lease Agreement. There are proposed to be five billboards on the City's land including two along the Bay Bridge Tollway on land the City is in the process of selling. It is the City's intent to retain ownership of the land required for those two billboard sites when it transfers the property to Caltrans for their construction of a new Bridge Maintenance Facility. The terms of the Franchise Agreement are that the City and Developer get 40% of the Gross Advertising Revenues, while Foster Company, the builder and operator of the billboards, receives 60%. The 40% share of revenues will be split 75% City and 25% Developer. The City and Developer will have discretion on how to use his earnings but both parties recognize it as an early source of revenues to address our respective Community Benefits obligations, particularly given the time-sensitivity of getting the West Oakland Jobs Center up and running in time for the commencement of horizontal construction.

The LDDA enables the construction of the public infrastructure improvements, which for the City portion of the OARB (which includes road and utility backbone infrastructure on the Port's portion of the OARB) and related necessary off-site intersection improvements is estimated to cost approximately \$247.2 million. This work will be accomplished through the Site Management Pass-Through Lease and a Design-Build Contract. The Site Management Pass-Through Lease will initially grant CCIG a mobilization fee of \$100,000 and a right of entry to prepare the site for the Public Improvements and then grant management of the existing leases, including the requirement to pass the revenues earned back to the City. The first step under the Site Management Pass-Through Lease is to establish a materials handling site. Discussions are underway with several sources of major amounts of soils that are critical for the public infrastructure project. Rather than having to pay to secure this soil, other parties would pay tipping fees for the right to deliver, by barge, and deposit the soils on the Project Site. Those tipping fees would get "passed through" to the City, both saving money by not having to purchase and barge in soil and creating funds to address other infrastructure costs. Also, pursuant to the Site Management Pass-Through Lease, the Developer will take control of the entire site to manage the termination of the existing leases and ready the buildings for demolition. Construction in terms of demolition and major grading and utilities should get underway summer 2013 and the work will be conducted pursuant to the Design-Build Contract.

The Public Improvements construction is to be performed through a design/build construction contract entered into between a construction general contractor and CCIG as Developer, pursuant to terms in the LDDA. The Design/ Build management terms will be very similar to the terms under which the infrastructure design work is being performed under the Second Amendment to the ENA; under which CCIG entered into contracts with the team of engineering design consultants that were identified in its response to the RFQ and RFP. This design team has demonstrated a thorough and efficient approach to designing the site, having spent less than \$5

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million of the budgeted \$14.1 million to be used for the design of the public infrastructure. The LDDA establishes that CCIG shall earn a fee of 4% of the total costs of design and construction for its role as developer, executing the contracts and managing the on-going design/build process.

The next stage of the design/build process is to complete the infrastructure design document to the approximately 35% level, at which point the scope of work can be accurately priced and a Gross Maximum Price (GMP) Contract awarded to a design/build general contractor. This design/build general contractor may be one of the contractors already on the CCIG team, such as Turner Construction or one of the other contractors on the team. This GMP contract is key to getting the TCIF funds allocated. There simply is not enough time to accomplish a more traditional 100% design/bid/build process and be assured to be under construction by the end of 2013. While a portion of the initial award of the design/build contract may be self performed, negotiated and not entail competitive bidding, as much as 75% of the construction contracting will be competitively bid, with at least three valid bids associated with every subcontract. This work will be managed in a manner to maximize the City's goals for Local Business Enterprise (LBE) and Small Local Business Enterprise (SLBE) contracts and will place a particular emphasis on West Oakland contractor opportunities. The experience of the CCIG/Turner team assures that every means and method will be used to secure high LBE/SLBE participation.

The Private Improvements will be constructed by the Developer after the Project Site has been remediated and backbone infrastructure installed. To effectuate the uses anticipated in this LDDA, the LDDA anticipates that a Planned Unit Development and Development Agreement (PUD/DA) process will follow this LDDA, which will amend the zoning code and provide for a plan review process and an assessment and assignment of Standard Conditions of Approval ("SCA") and Mitigation Measures and allocation of those costs.

Community Benefits and the Cooperation Agreement

The ENA with the Master Developer Prologis/CCIG contains a Community Benefits Exhibit, which outlined the topics for further discussion and consideration for inclusion as a term in the final LDDA. The topics centered on three broad categories: environmental/green development issues, contracting, and jobs.

The workshops led by Vice Mayor Nadel focused on environmental issues and contracting issues, which have been long-standing concerns of the West Oakland community. Specific recommendations that came out of the workshops convened by Vice Mayor Nadel with respect to environmental and green development practices were presented to Council on May 15, 2012. These environmental recommendations will be addressed through the City's SCA, which are imposed on all development projects, and through CEQA Mitigation Measures and/or other measures in the LDDA.

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Specifically, in addition to compliance with required environmental rules, regulations and mitigations, the City is committed to implement an ongoing West Oakland air quality monitoring program and is in consultation with the BAAQMD, Alameda County Public Health, and the West Oakland community about how best to implement such a program. The LDDA makes the developer responsible to cooperate with and fund a portion of the Air Quality Monitoring program. The applicable provisions of the SCA and Mitigation Measures and/or other measures will be passed on as performance requirements of all the developers on the City's OARB lands. Additionally, the LDDA honors the long standing commitment to a West Oakland Community Fund. The Developer will pay, upon taking possession, approximately \$16,000 per acre (its fair share of the per acreage cost) towards the West Oakland Community Fund. The contracting issues for the public infrastructure will be addressed by the City's existing 50/25 percent LBE/SLBE Ordinance, modified to capture the goal of maximizing West Oakland's business opportunities and requiring a capacity study to determine feasibility in full.

In November 2010, then Council President Jane Brunner and former Mayor Dellums' office assumed the lead role in convening large, inclusive groups of OARB stakeholders in focus sessions that resulted in consensus on a broad range of elements related to jobs. Oakland WORKS, a West Oakland based, city-wide advocacy alliance, became very involved in this process along with Revive Oakland!, the Alameda Labor Council, the Building and Construction Trades Council of Alameda County, the Construction Employers Association, and many other individuals and groups (together "Community Groups"). This expanded body was called the Army Base Jobs Working Group. Recommendations of the Army Base Jobs Working Group provided the framework for the negotiation of the Construction Jobs Policy and Operations Jobs Policy. All of the City's policies developed for local hire, disadvantaged workers, and the Jobs Center provide the baseline policies for the Jobs Policies, including the hiring goals of 50% local and 25% disadvantaged workers. The Construction and Operations Jobs Policies are referenced in the LDDA, the Cooperation Agreement, and separate Project Labor Agreements.

The Cooperation Agreement, which is between the City, specified Community and Labor Groups, the Alameda County Building and Construction Trades Council, and the Alameda County Central Labor Council, establishes the commitments of these parties to each other with respect to the development of the OARB Project, and requires the City to monitor and enforce the terms of the Cooperation Agreement, which would include ensuring that the Developer complies with the Construction and Operation Jobs Policies per the terms of the LDDA. The Cooperation Agreement is included in this report as *Exhibit A to the Resolution Authorizing the Cooperation Agreement*.

The City is currently negotiating a Project Labor Agreement ("PLA") with the Building Trades. This agreement will focus on construction jobs generated by the build out of Public Improvements on the OARB. Policies for the PLA will be aligned and consistent with the terms and conditions of the Cooperation Agreement, including local hiring. Once negotiation of the PLA has been completed, staff will submit it to the City Council for review. CCIG has already

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negotiated and entered into its own PLA with the Trades, and Prologis may also enter into a PLA for vertical construction. Staff is encouraging the City's other development partners on the OARB to enter into a PLA as well.

Key aspects of the Cooperation Agreement and the Community Benefits Agreement are still under negotiation. With regard to the Cooperation Agreement, the developer has expressed strong concern about the inability of the City to unilaterally amend the community jobs policy should elements of it prove to be commercially nonviable. With reference to the Community Benefits agreement, key elements of the community jobs policy are still being negotiated. Specially, we have not yet reached agreement on ban the box provisions, use of temporary agencies, credit for off-site employment of Oakland residents, and local hire on vertical construction. We are also well into PLA negotiations related to the horizontal infrastructure aspects of the project. The PLA will be consistent with and facilitate the goals of the Community Jobs Policies. We anticipate resolution of these issues in time for the three-day supplemental report.

CEQA Indemnity and Funding Agreement

In July 2010, the Redevelopment Agency entered into a First Amendment to the ENA with the Developer that in part addressed CEQA costs. The Agency, wishing to expedite obtaining CEQA and NEPA clearance to advance infrastructure development of the OARB, amended the ENA to provide for the Agency contracting with a consultant to prepare the necessary CEQA and NEPA documentation. The City Council authorized a contract with LSA Associates, Inc. to perform the CEQA/NEPA review for an amount not to exceed \$360,000. The Agency's contribution to the contract was capped at \$240,000 with the Developer responsible for costs exceeding the City's cap. The LSA costs have exceeded the agreed upon maximum cost of \$360,000. The final amount of City-paid CEQA-related third party costs has not yet been determined, but is estimated to be approximately \$503,000.

Under the terms of the proposed CEQA Indemnity and Funding Agreement, due to the public-private nature of the Project, the City and the Developer will share CEQA costs. Specifically, the Developer's obligation towards the costs of preparing the CEQA document is limited to third party costs paid by the City. The City and Developer will share equally all third party costs paid by the City up to \$503,000. The City will only be reimbursed by the Developer if the LDDA is approved. This means that the City will be responsible for all third party costs charged to the City in excess of \$503,000 and all CEQA-related City staff costs (estimated to be about \$140,000), which are paid for by developers for a typical project. However, this is not a typical project; the property is owned by the City and the Port; and the Developer's interests represent approximately 40% of the project studied in the CEQA Addendum; the Developer derives no benefit from the CEQA clearance if it does not enter into an LDDA.

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In this Agreement, the City and Developer agree that other developers that benefit from the CEQA clearance (such as Custom Alloy Scrap Sales, California Waste Solutions, and OMSS) should also pay towards the cost of the Addendum and the proceeds of their contribution be split prorated among the parties. The Developer will be responsible for any future environmental review required as it goes through the planning and development process, including all City staff costs, and all third party CEQA and NEPA costs.

The indemnity portion of this Agreement assures that should there be a CEQA challenge and after meeting and conferring, if the Developer elects to opt out of the defense, the City can terminate the Developer under the LDDA and proceed with the defense. If the Developer elects to proceed and the City opts out, the Developer will indemnify the City. The City and Developer may also potentially agree to share costs and defend jointly. In such a circumstance, Developer will contribute to the costs of defense on a prorata basis, as calculated by the acreage of the Ground Lease properties as compared to the acreage of the Project as a whole. This Agreement is required to be separate from the LDDA, because if a CEQA challenge is upheld, the indemnity provisions in an LDDA are no longer valid.

ANALYSIS

The Project as planned relies on TCIF funding, which is not assured. Southern California and the Metropolitan Transportation Commission have been lobbying CTC to release the \$242.1 million allocated to the Port of Oakland for other uses, and CTC itself questions the readiness of the project to receive TCIF funds. To persuade CTC not to reprogram the TCIF funding, the City and the Port need to demonstrate that (1) there is a clearly defined project; (2) the project has environmental clearance (see CEQA Review section below); (3) there is an unambiguous program for the use of TCIF funding, including the roles and responsibilities of the City and the Port in carrying out the program; (4) there are real funding sources that will match TCIF; and (5) the City and Port will be able to obligate the TCIF funds and begin construction before December 2013. The legislation proposed by staff are interrelated and must be adopted together to demonstrate the Project's progress to CTC's satisfaction.

The EBMUD MOA ensures that the OARB project is properly integrated with its neighbor EBMUD and that any impacts the OARB project may have are mitigated. Without the assurances and rights granted in the MOA, EBMUD may once again challenge the project.

The Amended and Restated CSA spells out for CTC the roles and responsibilities of the City and Port in implementing the OARB Project. Not only is it important with regard to CTC, the Amended and Restated CSA attached to this report is beneficial to the City in that it reallocates all of the Port's TCIF allocation from the 7th Street project to the OHIT project, which will enable the City to complete development of the backbone infrastructure for the OARB.

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The LDDA approval enables the Developer to move forward with the project. The LDDA authorizes the Developer to begin improvement of the Project Site within the timeframe set by CTC for TCIF funding. As important, it gives the Developer the contractual basis for investing in the design development and marketing of the OARB's Private Improvements; and the Developer's investment in the property will also provide a portion of the private match for the CTC grant.

PUBLIC OUTREACH/INTEREST

There have been three means of public outreach, each of which generated considerable interest and consensus building.

- With respect to jobs, staff met with the Army Base Jobs Working Group, which included community-based organizations, Alameda Labor Council, Oakland ACORN, East Bay Alliance for Sustainable Economy, Building and Construction Trades Council of Alameda County, Construction Employers Association, Oakland WORKS, Revive Oakland!, Oakland Workforce Investment Board, and City of Oakland Contract Compliance and Employment Services, and in a few instances the Developer. The Army Base Jobs Working Group meetings were open to anyone wishing to weigh in on developing a comprehensive set of goals, conditions and implementation processes regarding local hiring for the construction and operations phases of the OARB project. Upwards of 50 people participated in this process. While the group discussed each item at length, and voted on each item, Councilmember Jane Brunner and her staff recorded the recommendations offered by meeting participants.

With respect to environmental and contract opportunity concerns, Vice Mayor Nancy Nadel convened several West Oakland Community Benefits Workshops out of which emerged a matrix of environmental, green development, and contract opportunity consensus recommendations. All of which will be implemented through existing CEQA requirements or as specific requirements in the LDDA. In addition, staff has an ongoing dialog with the Alameda County Public Health Department ("ACPHD") in collaboration with West Oakland community groups, and intends to continue working with them on the critical issues of environmental health, including implementation of an additional air monitoring program.

The third aspect of community outreach has been at the initiative of the Developer. There have been scores of meetings with neighborhood and civic organizations. Upon the completion of the master plan in February, the Developer has been presenting the plan to community forums in several different parts of the City. The ensuing dialog has been helpful in informing the community about the "Working Waterfront" character of the development and the schedule for the project, particularly in terms of construction contracting and employment.

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COORDINATION

For the CEQA process, staff from the Office of Neighborhood Investment worked as a team with the Port, the Planning Department, and the Office of the City Attorney. In addition, staff consulted with the Transportation Services and Environmental Services Divisions of the Public Works Agency. Concurrent with the CEQA process, the same team sought input from the Gateway Park Working Group, EBMUD, and Caltrans in developing the master plan. In the preparation of this report, staff conferred with all the aforementioned as well as the Budget Office.

COST SUMMARY/IMPLICATIONS

Staff costs for the LDDA are still being calculated. CEQA related costs are addressed in the CEQA Indemnity and Funding Agreement. For the development itself, developer fees would cover the cost of Public Works staff for the Private Improvements portion of the Project. Staff costs to oversee the public infrastructure improvements, however, would come from City funds and potentially funding from the Alameda County Transportation Commission's Proposition B3 half cent sales tax measure, should that ballot measure be approved in November 2012.

The CSA framework with the Port will commit the City to increase its commitment to the OARB from \$32 million to \$54.5 million. The availability of that amount of funds is dependent upon consummating the \$18 million in OARB land sales, to the recyclers and Caltrans, and preserving the existing \$9 million in redevelopment funds associated with the OARB.

The costs for the Community Benefits Program are also still being calculated. Cost categories include the following:

1. Facilitating the creation and operation of the West Oakland Jobs Center
2. Ongoing compliance monitoring for community benefits commitments, including a) local hiring, b) local contracting, and c) environmental compliance mitigation measures, including additional air quality monitoring and reporting.
3. Possible staffing of an Oversight Committee or Commission.

Potential sources of revenue to fund the Community Benefits Program activities include:

- a) Oakland Workforce Investment Board for the Jobs Center
- b) Advance on West Oakland Community Fund
- c) Billboard revenue
- d) Commercially viable community fee on tenants
- e) Possessory interest (property taxes) targeted to support Army Base Community Benefits Program

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- f) Business License Tax revenue targeted to support Army Base Community Benefits Program
- g) Private contributions

To ensure that the Developer's cost obligations are met, the LLDA includes both security deposit requirements and a Guaranty.

A security for the LLDA itself is \$500,000 and separate security deposits will be required for each Ground Lease. With respect to the Guaranty, two Guarantees are similarly required – one for the LLDA, then once each Ground Lease is taken down, the Guaranty in that Ground Lease will prevail as those obligations. The Developer entity that will execute the LLDA and other agreements is a special purpose entity created for the purpose of developing this particular OARB Project. This entity has limited financial assets. The City/Agency has customarily required project developers to provide a financially strong guarantor entity to execute a Completion Guaranty that guarantees completion of construction of the project. If the developer retains other payment obligations, the City customarily requires a guarantee or other security to reduce the risk to the City's General Fund if the developer becomes unable to honor those other payment obligations.

In this case, staff continues to negotiate with the Developer what form of Completion Guaranty it will provide for completion of the OARB Project, and what type of security will be available to cover other potential Developer payment obligations such as, but not limited to, liability to pay any liquidated damages to EBMUD, the Developer's share of CEQA/NEPA costs and indemnity obligations under the Indemnity Agreement, any fines assessed for failure to adhere to the Contracting and Operations Jobs Policies, and environmental indemnity obligations. The LLDA provides that Prologis shall provide the guaranty with respect to the completion of the vertical improvements within the Central and East Gateway Areas at the time of lease execution, unless the Developer is able to show that the Ground Lease party has sufficient funds to guaranty the obligations thereunder and the City's consent to such demonstration of financial capacity shall be in the City's reasonable discretion. Further, the Ground Lease Guaranty may be assigned in parts as individual buildings are sold, so long as the assignee is able to show sufficient funds to guaranty the assigned obligations and the City has provided its consent as to financial capacity.

State Clawback Consideration

In March 2011, the City Council and the Agency approved a Funding Agreement that included funding for the development of the OARB. In addition, pursuant to a March 3, 2011 Purchase and Sale Agreement, the Agency sold and conveyed the Agency-owned portions of the OARB to the City by grant deed recorded January 31, 2012, excepting one approximately 16.7 acre parcel, which is subject to the public trust and transferred to the City as successor agency when the

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Agency dissolved on February 2, 2012.¹ Section 34167.5 of the California Health and Safety Code addresses agreements between redevelopment agencies and their host jurisdictions to transfer assets. It reads as follows:

Commencing on the effective date of the act adding this part, the Controller shall review the activities of redevelopment agencies in the state to determine whether an asset transfer has occurred after January 1, 2011, between the city or county, or city and county that created a redevelopment agency or any other public agency, and the redevelopment agency. If such an asset transfer did occur during that period and the government agency that received the assets is not contractually committed to a third party for the expenditure or encumbrance of those assets, to the extent not prohibited by state and federal law, the Controller shall order the available assets to be returned to the redevelopment agency or, on or after October 1, 2011, to the successor agency, if a successor agency is established pursuant to Part 1.85 (commencing with Section 34170). Upon receiving such an order from the Controller, an affected local agency shall, as soon as practicable, reverse the transfer and return the applicable assets to the redevelopment agency or, on or after October 1, 2011, to the successor agency, if a successor agency is established pursuant to Part 1.85 (commencing with Section 34170). The Legislature hereby finds that a transfer of assets by a redevelopment agency during the period covered in this section is deemed not to be in the furtherance of the Community Redevelopment Law and is thereby unauthorized.

This language suggests that the transfer of the funds and property for the agreements related to the development of the OARB Project may be subject to review by the State for potential "clawback," since the funds and property were transferred after January 1, 2011, unless an exemption applies. In fact, on April 24, 2012, the State notified the City that the City should reverse any transfer and return applicable assets to the successor agency (here the City, as successor agency) that occurred after January 1, 2011 between the City and the Agency.

Since the funds and land to implement the EBMUD MOA, the Amended and Restated CSA, and the LDDA and related agreements might be subject to an attempt by the State to return the funds and land to the successor agency, there could be risks to the City's General Purpose Fund if money is expended for the agreements and the State later deems the expenditures invalid.

¹ The City is in the process of seeking approval from the Army for the transfer of the Army Base land from the Agency to the City.

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SUSTAINABLE OPPORTUNITIES

Economic: The development of the former OARB has the potential to create thousands of construction and permanent jobs for Oakland residents and multi-million dollar contracting opportunities for local businesses. The project will generate millions of dollars in new tax revenue to the City's General Purpose Fund.

Environmental: The project will use, to the greatest extent possible, best management practices that not only reduce health and safety impacts to local residents, but also aim towards improving air quality, safe pedestrian and bike access, reduce water usage, and use alternative energy options to the extent they are commercially viable to reduce green-house gas emissions.

Social Equity: The comprehensive package of Community Benefits addresses the City's commitment to social equity by way of jobs for local residents, contracts for local businesses, and quality of life improvements for West Oakland residents.

CEQA

As previously stated, City staff worked with Port staff to prepare an Initial Study/Addendum which evaluated all of the proposed project's potentially significant environmental effects and concluded that the project would not result in new significant environmental impacts or a substantial increase in the severity of significant impacts already identified in prior CEQA reviews conducted for the OARB. Specifically, the Initial Study/Addendum found (1) there are no substantial changes to the OARB Project which would result in new significant environmental impacts or a substantial increase in the severity of significant impacts already identified in the 2002 Oakland Army Base Redevelopment Plan Environmental Impact Report, which was a "project level" EIR pursuant to CEQA Guidelines section 15180(b) ("2002 EIR"), the 2006 OARB Auto Mall Supplemental EIR and 2007 Addendum, the 2009 Addendum for the Central Gateway Aggregate Recycling and Fill Project, and the Port's 2006 Maritime Street Addendum (collectively called "Previous CEQA Documents"); (2) there are no substantial changes in circumstances that would result in new significant environmental impacts or a substantial increase in the severity of significant impacts already identified in the Previous CEQA Documents; and (3) there is no new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the Previous CEQA Documents were certified, which is expected to result in (a) new significant environmental effects or a substantial increase in the severity of significant environmental effects already identified in the Previous CEQA Documents or (b) mitigation measures which were previously determined not to be feasible would in fact be feasible, or which are considerably different from those recommended in the Previous CEQA Documents, and which would substantially reduce significant effects of the OARB Project, but the City declines to adopt them. Thus, in considering approval of the OARB Project, the City can rely on the Previous CEQA

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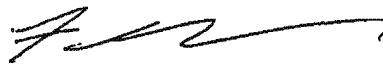
Documents and the 2012 Addendum. A summary of the IS/Addendum and CEQA Findings are provided in *Attachments B and C*, respectively.

The IS/Addendum and its appendices, as well as the Standard Conditions of Approval/Mitigation Monitoring and Reporting Program, were previously provided to the City Council under separate cover and are located in the Office of the City Clerk, the Planning, Building and Neighborhood Preservation Department, and on the Web at:

<http://www2.oaklandnet.com/Government/o/PBN/OurServices/Application/DOWD009157>

For questions regarding this report, please contact Pat Cashman, Project Manager, at 510.238.6281.

Respectfully submitted,



FRED BLACKWELL
Assistant City Administrator

Reviewed by:
Gregory Hunter, Neighborhood Investment Officer

Prepared by:
Pat Cashman, Project Manager
Office of Neighborhood Investment

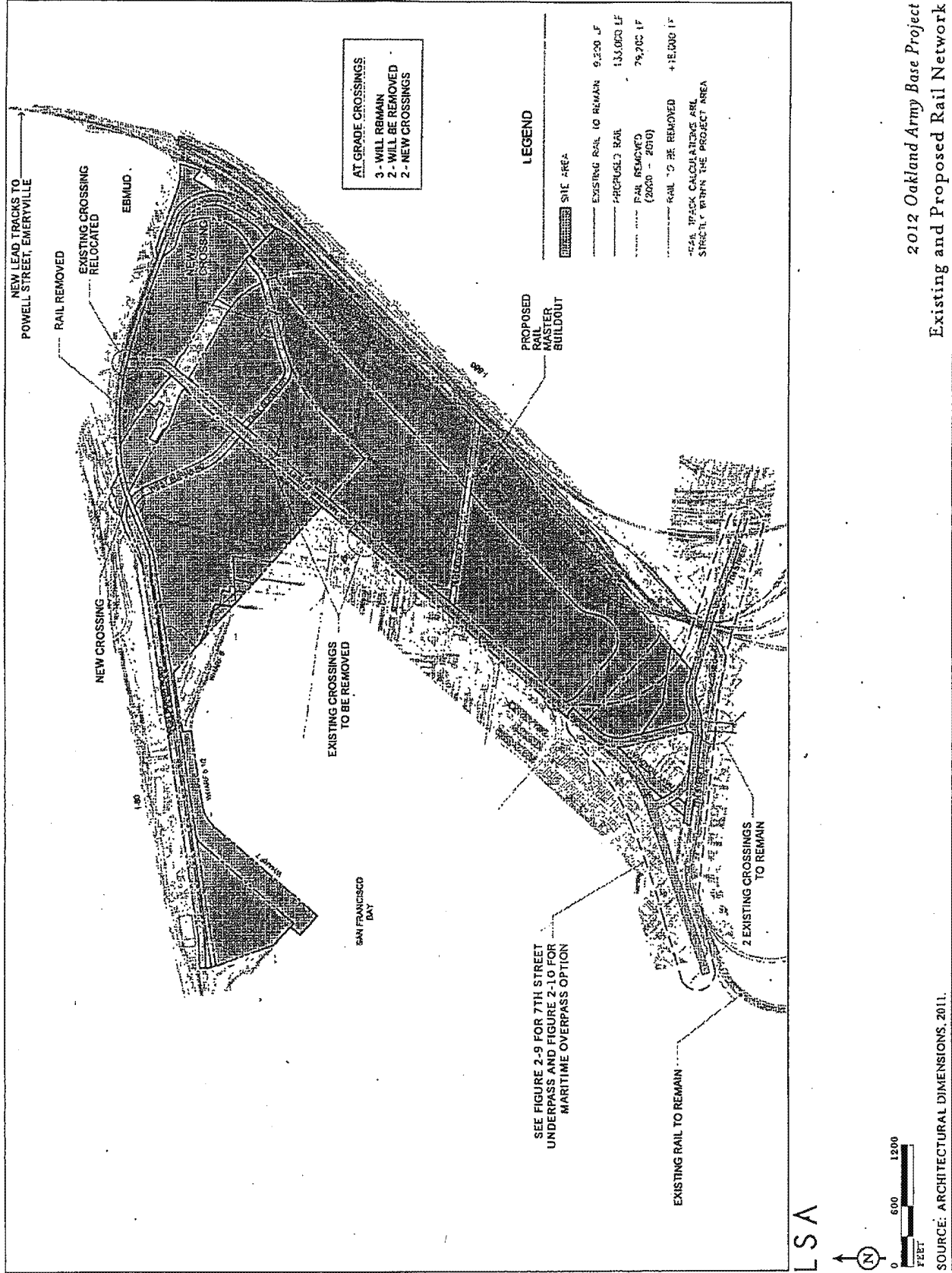
Attachment A – Project Site and Rail Right of Ways

Attachment B – Summary of the Initial Study/Addendum

Attachment C – CEQA Findings

> Attachments B & C available on the
City web site

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2012 Oakland Army Base Project
Existing and Proposed Rail Network
Attachment A - Railroad Right of Ways

Barbara J. Parker (SBN 69722)
 City Attorney
 Otis McGee, Jr. (SBN 71885)
 Chief Assistant City Attorney
 Colin Troy Bowen (SBN 152489)
 Supervising Deputy City Attorney
 OAKLAND CITY ATTORNEY
 One Frank Ogawa Plaza, 6th Floor
 Oakland, CA 94612
 Tel: 510.238.3601 Fax: 510.238.6500

Kevin D. Siegel (SBN 194787)
 E-mail: ksiegel@bwsllaw.com
 Gregory R. Aker (SBN 104171)
 E-mail: gaker@bwsllaw.com
 Timothy A. Colvig (SBN 114723)
 E-mail: tcolvig@bwsllaw.com
 Christopher M. Long (SBN 305674)
 E-mail: clong@bwsllaw.com
 BURKE, WILLIAMS & SORESENSEN, LLP
 1901 Harrison Street, Suite 900
 Oakland, CA 94612-3501
 Tel: 510.273.8780 Fax: 510.839.9104

Attorneys for Defendant
 CITY OF OAKLAND

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED
 TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO
 BAYKEEPER,

Defendants-Intervenors.

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

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

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

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

a. The Record Contains Abundant Substantial Evidence.

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

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

BAAQMD identified West Oakland as an area with high concentrations of air pollution and populations "most vulnerable to air pollution's health impacts." Myre Decl., Ex. 45 at OAK230300. The California EPA ("CalEPA") similarly designated much of West Oakland as a "disadvantaged community"—*i.e.*, as an area "disproportionately burdened by and vulnerable to existing multiple sources of pollution." *Id.* West Oaklanders experience high rates of chronic disease that increase susceptibility to air pollution (*e.g.*, asthma, heart disease, cancer). Long Decl., Ex. 17 [PHAP] at OAK8438, 8449-60; Ex. 65 [County corr.] at OAK4020-21. Air quality monitoring in West Oakland has detected exceedances of both the state and federal air quality standards for ambient levels of fine particulate matter (PM_{2.5}). Myre Decl., Ex. 45 at OAK230300-301.²² BAAQMD staff testified that "[t]here is a lot of work to be done to continue ... to reduce exposure of the public to pollution in West Oakland." Myre Decl., Ex. 29 at OB13677-78.

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

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

²² PM_{2.5} and PM₁₀ refer to particles less than 2.5 and 10 micrometers in diameter, respectively. Long Decl., Ex. 10 at OAK120931 [Chafe].

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

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

23 OBOT tries to minimize the dangers posed by the proposed Terminal’s expected PM_{2.5}
 24 emissions, falsely claiming that “[t]here is absolutely no evidence that the release of ‘any’
 25 quantum of particulate matter poses a danger.” OBOT Br., p. 34. The U.S. EPA, CalEPA, the
 26

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

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

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

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

²⁵ *Accord North Carolina v. Tenn. Valley Auth.*, 593 F.Supp.2d 812, 821 (W.D.N.C. 2009) *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010) (“PM_{2.5} exposure has significant negative impacts on human health, even when the exposure occurs at levels at or below the NAAQS”); *United States v. Cinergy Corp.*, 618 F.Supp.2d 942, 963 (S.D. Ind. 2009), order clarified, No. 1:99CV01693-LJM-JMS, 2009 WL 6327415 (S.D. Ind. June 23, 2009), *and rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010) (“Because the relationship between the dose-response curve for PM_{2.5} and mortality is linear, any reduction in PM_{2.5} concentration would have a corresponding reduction in mortality rate”).

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

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

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

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

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

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

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

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

14 ESA calculated the amount of coal dust that would be emitted from the trains’ arrival at
 15 the Port Railyard and from staging, storage, transfer and transloading. Myre Decl., Ex. 45 at
 16 OAK230369–377. ESA accounted for the use of Best Available Control Technology (“BACT”),
 17 which it assumed BAAQMD would require. *See, e.g., id.* at OAK230372–373. ESA calculated
 18 that despite the use of best practices/controlled operations, the Terminal would still emit each day
 19 98 pounds of PM₁₀ and 14.8 pounds of PM_{2.5} from fugitive coal dust. *Id.* at OAK230372, 376.²⁷

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

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

1 the Council.²⁸

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

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

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

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

20 Despite safety protocols, fires and explosions have occurred on trains and at coal storage
21 and handling facilities, causing injuries and deaths to workers, first responders, and others.²⁹
22 Several explosion tragedies that occurred from 1999 to 2011 involved coal dust collected from
23 arriving coal trains and in coal storage areas. For example, there were at least two separate fires
24

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

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

1 in the early 2000's on conveyors at the now-shuttered coal-handling terminal at the Los Angeles
 2 Export Terminal, fires at terminals in Scotland and Australia, and 13 reported coal fires on U.S.
 3 trains. Myre Decl., Ex. 45, at OAK230331, 382–383; Long Decl., Ex. 10 at OAK120982–84. In
 4 2009 and 2011, fires at coal transfer and handling facilities injured workers and killed firefighters
 5 in Wisconsin and South Dakota. Long Decl., Ex. 10 at OAK120983.³⁰

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

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

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

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

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

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

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

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

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

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

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

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

1 However, use of BACT does not eliminate all emissions; it only reduces emissions to the extent
 2 feasible—subject to explicit considerations of cost. Long Decl., Ex. 60 [BAAQMD Reg. 2, Rule
 3 2, § 202 (defining BACT)]; Long Decl., Ex. 58 [Chinkin Tr.] pp. 103:20-105:12; 106:19-110:16;
 4 *see* Sahu Decl., ¶¶5-7. Nor can BACT or BAAQMD prevent accidents, upsets or violations.

5 Thus, the City properly accounted for BAAQMD regulation.³³

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

16 **c. OBOT Cannot Refute the Greenhouse Gas Evidence.**

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

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

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

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

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

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

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

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

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

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

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

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

24 **C. Federal Law Does Not Preempt the Ordinance.**

25 **1. OBOT Bears a Heavy Burden to Prove Preemption.**

26 "[T]wo cornerstones [govern] pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S.
 27 555, 565 (2009). First, preemption is fundamentally a question of congressional intent. *Ass'n des*
 28 *Eleveurs de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017)

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

2. ICCTA Does Not Preempt the Ordinance.

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

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

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

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

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Robert P Feldman (Bar No. 69602)

2 bobfeldman@quinnemanuel.com

David E. Myre (Bar No. 304600)

3 davidmyre@quinnemanuel.com

Eliyahu Ness (Bar No. 311054)

4 eliness@quinnemanuel.com

555 Twin Dolphin Drive, 5th Floor

5 Redwood Shores, California 94065-2139

Telephone: (650) 801-5000

6 Facsimile: (650) 801-5100

7 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Meredith M. Shaw (Bar No. 284089)

8 meredithshaw@quinnemanuel.com

50 California Street, 22nd Floor

9 San Francisco, CA 94111

Telephone: (415) 875-6600

10 *Attorneys for Plaintiff*

11 *Oakland Bulk & Oversized Terminal, LLC*

12
13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAN FRANCISCO DIVISION

16 OAKLAND BULK & OVERSIZED
17 TERMINAL, LLC

18 Plaintiff,

19 vs.

20 CITY OF OAKLAND,

21 Defendants.

CASE NO. 3:14-CV-03985-JD

**DECLARATION OF DAVID E. MYRE IN
SUPPORT OF PLAINTIFF OAKLAND
BULK & OVERSIZED TERMINAL,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

1 I, David E. Myre, declare and state as follows:

2 1. I am a member of the State Bar of California, admitted to practice before this
3 Court, and an attorney at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, counsel for
4 Oakland Bulk & Oversized Terminal LLC (“OBOT”). Except as otherwise indicated, I have
5 personal knowledge of the facts stated herein and, if called as a witness, could and would testify
6 thereto.

7 2. I make this declaration in support of Plaintiff OBOT’s Motion for Summary
8 Judgment.

9 3. On November 20, 2017, I watched a portion of a video of a May 3, 2016 Oakland
10 City Council hearing, which was publically available on the following website
11 http://oakland.granicus.com/MediaPlayer.php?view_id=2&clip_id=1981. Approximately four
12 hours, thirty minutes and five seconds into that video, Oakland City Councilmember Noel Gallo
13 asked a question to “the administration” and stated, among other things: “the question to you is,
14 since we’ve been in delay delay delay for taking an action, and I’m ready to vote no on the coal, so
15 for me it’s, it’s now, this is now going to further delay it because you expanded your study from
16 the coal issue that was in front of us now to deal with all the other fossil fuels.”

17 4. Attached hereto as Exhibit 1 is a true and correct copy of Oakland City Ordinance
18 No. 13385, filed with the Oakland City Clerk on July 20, 2016, produced as OAK 0039568 by
19 Defendant City of Oakland in this litigation.

20 5. Attached hereto as Exhibit 2 is a true and correct copy of excerpts from the
21 deposition transcript of Phillip Tagami, taken on October 6, 2017 and continued on October 20,
22 2017 by Defendants in this litigation.

23 6. Attached hereto as Exhibit 3 is a true and correct copy of the Army Base Gateway
24 Redevelopment Project Lease Disposition and Development Agreement by and between the City
25 of Oakland and the Oakland Redevelopment Successor Agency and Prologis CCIG Oakland
26 Global, LLC, produced as OB019936 by Plaintiff in this litigation.

27 7. Attached hereto as Exhibit 4 is a true and correct copy of the Development
28 Agreement, made as of July 16, 2013, by and between the City of Oakland and Prologis CCIG

1 Oakland Global, LLC, regarding the property and project known as “Gateway Development /
2 Oakland Global,” produced as OAK 0054146 by Defendant City of Oakland in this litigation.

3 8. Attached hereto as Exhibit 5 is a true and correct copy of an Exclusive Negotiation
4 Agreement, made as of April 17, 2014 by and between Oakland Bulk and Oversized Terminal,
5 LLC, CCIG Oakland Global, LLC, and Terminals and Logistics Solutions, LLC, produced as
6 OB119605 by Plaintiff in this litigation.

7 9. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from the
8 deposition transcript of Bowie Resources Partners, LLC 30(b)(6) representative James Wolff,
9 taken on October 10, 2017 by Defendants in this litigation.

10 10. Attached hereto as Exhibit 7 is a true and correct copy of excerpts from the
11 deposition transcript of Terminal and Logistics Solutions, LLC 30(b)(6) representative Jerry
12 Bridges, taken on October 31, 2017 by Defendants in this litigation.

13 11. Attached hereto as Exhibit 8 is a true and correct copy of excerpts from the
14 deposition transcript of Mark McClure, taken on October 12, 2017 by Defendants in this litigation.

15 12. Attached hereto as Exhibit 9 is a true and correct copy of excerpts from the
16 deposition transcript of Stephen Sullivan, taken on November 14, 2017 by Plaintiff in this
17 litigation.

18 13. Attached hereto as Exhibit 10 is a true and correct copy of excerpts from the
19 deposition transcript of Oakland Global Rail Enterprises, Inc. 30(b)(6) representative Mark
20 McClure, taken on October 16, 2017 by Defendants in this litigation.

21 14. Attached hereto as Exhibit 11 is a true and correct copy of the Operating
22 Agreement of Oakland Global Rail Enterprise, LLC, made in July 9, 2013, by and between
23 California Capital & Investment Group, Inc., and West Oakland Pacific Railroad, produced as
24 OB026410 by Plaintiff in this litigation.

25 15. Attached hereto as Exhibit 12 is a true and correct copy of Switching Services
26 Agreement, made as of June 1, 2012, by and between BNSF Railway Company, Union Pacific
27 Railroad company, and Industrial Railways Company, produced as OB265160 by Plaintiff in this
28 litigation.

1 16. Attached hereto as Exhibit 13 is a true and correct copy of 1st Amendment to the
2 Switching Services Agreement, made as of September 1, 2012, by and between BNSF Railway
3 Company, Union Pacific Railroad company, and Industrial Railways Company, produced as
4 OB265177 by Plaintiff in this litigation.

5 17. Attached hereto as Exhibit 14 is a true and correct copy of 1st Amendment to the
6 Switching Services Agreement, made as of September 1, 2012, by and between BNSF Railway
7 Company, and Industrial Railways Company, produced as OB265181 by Plaintiff in this litigation.

8 18. Attached hereto as Exhibit 15 is a true and correct copy of Oakland Global Rail
9 Enterprise's Rail Operating Agreement Supporting Documents for Section 4.3 (4.3.11 – 4.3.2.9),
10 produced as OB007365 by Plaintiff in this litigation.

11 19. Attached hereto as Exhibit 16 is a true and correct copy of the Oakland Global Rail
12 Enterprise FRA mandated railroad safety programs, produced as OB008960 by Plaintiff in this
13 litigation.

14 20. Attached hereto as Exhibit 17 is a true and correct copy of a Sublease Agreement,
15 made as of December 15, 2016, by and between Oakland Bulk and Oversized Terminal, LLC, and
16 Oakland Global Rail Enterprise, LLC, produced as OBOT_B_059722 by Plaintiff in this litigation.

17 21. Attached hereto as Exhibit 18 is a true and correct copy of the rough deposition
18 transcript of David Buccolo, taken on November 16, 2017 by Defendants in this litigation.

19 22. Attached hereto as Exhibit 19 is a true and correct copy of an April 8, 2013, email
20 from Councilmember Dan Kalb to David Abel, subject RE: Army Base redevelopment project
21 (Port of Oakland), produced as OAK 0080133 by Defendant City of Oakland in this litigation.

22 23. Attached hereto as Exhibit 20 is a true and correct copy of excerpts from the
23 deposition transcript of Patrick Cashman, taken on August 28, 2017 by Plaintiff in this litigation.

24 24. Attached hereto as Exhibit 21 is a true and correct copy of a October 23, 2012,
25 email from Joanne Park to Kevin Schumacher and Pat Cashman, among others, subject: OAB –
26 CPUC – draft application, attachment: Draft CPUC Application COMBINED.pdf, produced as
27 OB238279 by Plaintiff in this litigation.

28

1 25. Attached hereto as Exhibit 22 is a true and correct copy of excerpts from
2 Defendant-Intervenor Sierra Club's Objections and Responses to Plaintiff Oakland Bulk &
3 Oversized Terminal, LLC's, first set of Requests for Admissions, dated October 20, 2017.

4 26. Attached hereto as Exhibit 23 is a true and correct copy of a October 21, 2015,
5 email from ESA employee Crescentia Brown to Michael Manka and Tim Rimpo, among other
6 ESA employees, subject: Oakland Needs ESA: Coal by Rail/Ship!, produced as ESA_038786 by
7 third-party ESA in this litigation.

8 27. Attached hereto as Exhibit 24 is a true and correct copy of excerpts from the
9 deposition transcript of City of Oakland 30(b)(6) representative Darin Ranelletti, taken on October
10 3, 2017 by Plaintiff in this litigation.

11 28. Attached hereto as Exhibit 25 is a true and correct copy of excerpts from the
12 deposition transcript of City of Oakland 30(b)(6) representative Claudia Cappio, taken on June 26,
13 2017 by Plaintiff in this litigation.

14 29. Attached hereto as Exhibit 26 is a true and correct copy of excerpts from the
15 deposition transcript of Sabrina Landreth, taken on October 11, 2017 by Plaintiff in this litigation.

16 30. Attached hereto as Exhibit 27 is a true and correct copy of excerpts from the
17 deposition transcript of City of Oakland 30(b)(6) representative Claudia Cappio, taken on October
18 11, 2017 by Plaintiff in this litigation.

19 31. Attached hereto as Exhibit 28 is a true and correct copy of the Agenda Report filed
20 on June 24, 2016, from Claudia Cappio to Sabrina B. Landreth, subject: Public Hearing to
21 Consider a Report and Recommendation for Options to Address Coal and Coke Issues, produced
22 as OAK 0242419 by Defendant City of Oakland in this litigation.

23 32. Attached hereto as Exhibit 29 is a true and correct copy of the transcript of the
24 Oakland City Council Public Hearing on Coal or Petroleum Coke in Oakland, on September 21,
25 2015, produced as OB013518 by Plaintiff in this litigation.

26 33. Attached hereto as Exhibit 30 is a true and correct copy of a October 5, 2015 email
27 from BAAQMD employee Henry Hilken to City of Oakland employee Doug Cole, among others,
28

1 subject RE: Follow Up Questions on Coal's Public Health and/or Safety Impacts, produced as
2 OAK 2154 by Defendant City of Oakland in this litigation.

3 34. Attached hereto as Exhibit 31 is a true and correct copy of an Agenda Report dated
4 April 21, 2016, from Claudia Cappio to Sabrina B. Landreth, subject: Status Report on Coal and
5 Authorization of a Professional Services Contract with Environmental Science Associates,
6 produced as OAK 0036500 by Defendant City of Oakland in this litigation.

7 35. Attached hereto as Exhibit 32 is a true and correct copy of a January 8, 2016, email
8 from ESA employee Crescentia Brown to Chuck Bennett and Tim Rimpo, among other ESA
9 employees, subject: FWD: Oakland Coal Effects Review – ESA Approach - Scope, attachments:
10 SOW Oakland Coal Effects Review_ESA_010816.pdf, produced as ESA_039067 by third-party
11 ESA in this litigation.

12 36. Attached hereto as Exhibit 33 is a true and correct copy of excerpts from the
13 deposition transcript of ESA 30(b)(6) representative Victoria Evans, taken on October 31, 2017 by
14 Plaintiff in this litigation.

15 37. Attached hereto as Exhibit 34 is a true and correct copy of an Agenda Report dated
16 February 3, 2016 from Claudia Cappio to Sabrina B. Landreth, subject: Status Report on Coal,
17 produced as BAYKEEPER00001651 by Defendant-Intervenor San Francisco Baykeeper in this
18 litigation.

19 38. Attached hereto as Exhibit 35 is a true and correct copy of excerpts from the
20 deposition transcript of ESA 30(b)(6) representative Crescentia Brown, taken on August 22, 2017
21 by Plaintiff in this litigation.

22 39. Attached hereto as Exhibit 36 is a true and correct copy of a February 18, 2016
23 email from ESA employee Crescentia Brown to Brian Baxter, Chuck Bennett, Victoria Evans, and
24 Cory Barringhaus, among other ESA employees, subject: Oakland Coal Update, produced as
25 ESA_035748 by third-party ESA in this litigation.

26 40. Attached hereto as Exhibit 37 is a true and correct copy of a May 4, 2016 email
27 from ESA employee Crescentia Brown to Victoria Evans, Cory Barringhaus, and Chuck Bennet,
28

1 subject RE: OBOT Kick-Off Prep#2, produced as ESA_038570 by third-party ESA in this
2 litigation.

3 41. Attached hereto as Exhibit 38 is a true and correct copy of a February 13, 2016
4 email from Claudia Cappio to Anne Campbell Washington and Sabrina Landreth, subject: RE:
5 Tues coal item, produced as OAK 0116161 by Defendant City of Oakland in this litigation.

6 42. Attached hereto as Exhibit 39 is a true and correct copy of a Professional or
7 Specialized Service Agreement, made as of May 4, 2016, by and between the City of Oakland and
8 Environmental Science Associates, produced as ESA_035907 by third-party ESA in this litigation.

9 43. Attached hereto as Exhibit 40 is a true and correct copy of several social media
10 posts made by Oakland City Councilmembers, collected in the manner described in the
11 Declaration of Megan Morodomi submitted contemporaneously herewith, produced as OB275145
12 by Plaintiff in this litigation.

13 44. Attached hereto as Exhibit 41 is a true and correct copy of a May 24, 2016, email
14 from ESA employee Victoria Evans to Cory Barringhaus, Tim Rimpo, and Crescentia Brown,
15 subject RE: OBOT – Health Impacts Conclusions example - INTERNAL ESA REVIEW ONLY,
16 produced as ESA_035458 by ESA in this litigation.

17 45. Attached hereto as Exhibit 42 is a true and correct copy of a May 10, 2016, email
18 from City of Oakland employee Heather Klein to Mark Wald, Kevin D. Siegel, Claudia Cappio,
19 Darin Ranelletti, Crescentia Brown, Victoria Evans, Cory Barringhaus and Winnie Woo, subject:
20 ESA Scope of Work Weekly Check-in, produced as ESA_035361 by third-party ESA in this
21 litigation.

22 46. Attached hereto as Exhibit 43 is a true and correct copy of a May 26, 2016, email
23 from ESA employee Victoria Evans to Tim Rimpo and Cory Barringhaus, subject RE: covers and
24 domes ETC, attachments: Control Measures Summary with Implementation
25 Actions_April11_2016.pdf, produced as ESA_035466 by third-party ESA in this litigation.

26 47. Attached hereto as Exhibit 44 is a true and correct copy of a June 18, 2016 email
27 from ESA employee Victoria Evans to Cory Barringhaus, subject: Obot, produced as
28 ESA_036587 by third-party ESA in this litigation.

1 48. Attached hereto as Exhibit 45 is a true and correct copy of a June 23, 2016, ESA
2 Report prepared for the City of Oakland, produced as OAK 0230290 by Defendant City of
3 Oakland in this litigation.

4 49. Attached hereto as Exhibit 46 is a true and correct copy of a May 11, 2016 email
5 from City employee Claudia Cappio to Phil Tagami and Mark McClure, subject: 2 Questions
6 Regarding OBOT plans, produced as OAK 0062177 by Defendant City of Oakland in this
7 litigation.

8 50. Attached hereto as Exhibit 47 is a true and correct copy of the HDR Engineering
9 report on Air Quality & Human Health and Safety Assessment of Potential Coal Dust Emissions,
10 dated September 15, 2015, produced as OB018547 by Plaintiff in this litigation.

11 51. Attached hereto as Exhibit 48 is a true and correct copy of CCIG/OBOT/TLS
12 Responses and Information for City Follow-Up Questions to September 21 Informational Hearing,
13 dated October 6, 2015, produced as OAK 0007461 by Defendant City of Oakland in this litigation.

14 52. Attached hereto as Exhibit 49 is a true and correct copy of the Oakland Bulk and
15 Oversize Terminal Basis of Design Volume 1, dated July 21, 2015, produced as OB004318 by
16 Plaintiff in this litigation.

17 53. Attached hereto as Exhibit 50 is a true and correct copy of Oakland City Council
18 Resolution No. 86234, passed on June 27, 2016, produced as OAK 0039559 by Defendant City of
19 Oakland in this litigation.

20 54. Attached hereto as Exhibit 51 is a true and correct copy of a redline document,
21 prepared at my direction on or about November 19 and 20, 2017. Specifically, at my direction the
22 following PDF documents were converted into Microsoft word files: (a) a draft of Oakland City
23 Council Resolution No. 86234, stamped by the City with the date June 24, 2016; (b) the final
24 Oakland City Council Resolution No. 86234, stamped by the City with the date June 28, 2016;
25 (c) a draft of Oakland City Council Ordinance No. 13385, stamped by the City with the date June
26 24, 2016; and (d) the final Oakland City Council Ordinance No. 13385, stamped by the City with
27 the date July 20, 2016. From those word files, and also at my direction, two redlines were created:
28 (1) one comparing the draft version of Oakland City Council Resolution No. 86234 with the final

1 version (documents (a) and (b) above); and (2) one comparing the draft version of Oakland City
2 Council Ordinance No. 13385 with the final version (documents (c) and (d) above). Those two
3 redlines are attached as Exhibit 51.

4 55. Attached hereto as Exhibit 52 is a true and correct copy of Attachment 7 to the
5 Army Base Gateway Redevelopment Project Lease Disposition and Development Agreement,
6 produced as OB026394 by Plaintiff in this litigation.

7 56. Attached hereto as Exhibit 53 is a true and correct copy of the excerpts from
8 deposition transcript of Nadia Moore, taken on November 7, 2017 by Plaintiff in this litigation.

9 57. Attached hereto as Exhibit 54 is a true and correct copy of the excerpts from
10 deposition transcript of Andrew Gray, taken on November 10, 2017 by Plaintiff in this litigation.

11 58. Attached hereto as Exhibit 55 is a true and correct copy of the excerpts from
12 deposition transcript of Ranajit Sahu, taken on November 15, 2017 by Plaintiff in this litigation.

13 59. Attached hereto as Exhibit 56 is a true and correct copy of an Excel spreadsheet
14 titled "Emissions Summary" submitted by Ranajit Sahu as the supplemental Attachment F to his
15 expert report dated October 10, 2017, submitted on behalf of Defendant City of Oakland.

16 60. Attached hereto as Exhibit 57 is a true and correct copy of an Excel spreadsheet
17 with the file-name "ESA_033434_OBOT - Emission Calculations - Coal.XLSX," produced as
18 ESA_033434 by third-party ESA in this litigation.

19 61. Attached hereto as Exhibit 58 is a true and correct copy of an Excel spreadsheet
20 with the file-name "ESA_036556.XLSX," produced as ESA_036556 by third-party ESA in this
21 litigation.

22 62. Attached hereto as Exhibit 59 is a true and correct copy of an Agenda Report dated
23 September 10, 2015, from City employee Claudia Cappio to Sabrina B. Landreth, subject: Coal's
24 Public Health and/or Safety Impacts, produced as OAK 0034145 by Defendant City of Oakland in
25 this litigation.

26 63. Attached hereto as Exhibit 60 is a true and correct copy of a June 15, 2016 email
27 from Steve Radis to Cory Barringhaus and Victoria Evans, subject RE: Privileged & Confidential:
28 Combustion, etc., produced as ESA_036704 by third-party ESA in this litigation.

64. Attached hereto as Exhibit 61 is a true and correct copy of a January 6, 2016, ESA Draft Approach and Preliminary Scope of Work for the City of Oakland, produced as ESA_035965 by third-party ESA in this litigation.

65. Attached hereto as Exhibit 62 is a true and correct copy of a September 10, 2015 email from City employee John Monetta to Claudia Cappio, subject: 2014 Resolution – Coal Transportation, attachments: City Resolution 85054 – Opposing Coal Transportation.pdf, produced as OAK 0062806 by Defendant City of Oakland in this litigation.

66. Attached hereto as Exhibit 63 is a true and correct copy of Standard Conditions of Approval and Mitigation Monitoring and Reporting Program for the 2012 Oakland Army Base (OARB) Project, produced as OAK 0093 by Defendant City of Oakland in this litigation.

67. Attached hereto as Exhibit 64 is a true and correct copy of The EPA’s AP-42 Chapter 13, section 13.2.5 guidance for estimating “Industrial Wind Erosion”, produced as OB322920 by Plaintiff in this litigation.

68. Attached hereto as Exhibit 65 is a true and correct copy of an email from ESA employee Tim Rimpo to Victoria Evans and Cory Barringhaus, subject RE: PRIVILEGED & CONFIDENTIAL: Admin Draft #2, attachments: 05-Health Effects_061616_AD#2 for city_ETR Comments.docx, produced as ESA_036589 by third-party ESA in this litigation.

69. Attached hereto as Exhibit 66 is a true and correct copy of a document titled “Draft for Internal Discussion Only,” produced as ESA_003384 by third-party ESA in this litigation.

Executed November 20, 2017, in San Francisco, California

/s/ David E. Myre
David E. Myre

EXHIBIT 5

EXCLUSIVE NEGOTIATION AGREEMENT
(OBOT/Terminal Project Property)

This Exclusive Negotiation Agreement ("Agreement") is entered into as of April 17, 2014 (the "Effective Date"), by and among Oakland Bulk and Oversized Terminal, LLC, a California limited liability company ("OBOT"), CCIG Oakland Global, LLC, a California limited liability company ("CCIG"), and Terminals and Logistics Solutions, LLC, a Delaware limited liability company ("TLS"). OBOT and CCIG are collectively referred to herein as the "OBOT Parties."

RECITALS

A. On or about October 24, 2012, the City of Oakland ("City") and Prologis/CCIG Oakland Global, LLC, a Delaware limited liability company ("Prologis/CCIG") entered into that certain Lease Disposition and Development Agreement whereby Prologis/CCIG acquired the exclusive right to enter into three ground leases for portions of City-owned property (the "LDDA"). The three lease areas subject to the LDDA are commonly referred to as the "East Gateway," the "Central Gateway," and the "West Gateway."

B. CCIG is a member of Prologis/CCIG. The Prologis/CCIG Limited Liability Agreement provides that CCIG has the right to (1) make all decisions and exercise all rights under the LDDA related to the West Gateway ground lease premises during the LDDA term and (2) to cause Prologis/CCIG to assign the LDDA rights related to the West Gateway ground lease premises to a CCIG affiliate. OBOT is the CCIG affiliate formed for the purpose of accepting the assignment of the LDDA rights related to the West Gateway ground lease premises, ground leasing such property and developing a rail served marine terminal thereon. Concurrently with the Effective Date, OBOT and Prologis/CCIG will be processing an assignment of Prologis/CCIG's rights and obligations related to the West Gateway under the LDDA to OBOT with the City, which assignment is a Permitted Transfer pursuant to Section 7.3 of the LDDA and subject to the conditions set forth in Section 7.4.1 and 7.4.3-7.4.7, inclusive of the LDDA (the "Partial Assignment").

C. The West Gateway ground lease premises is more particularly described on Exhibit A attached hereto, however, this Agreement only includes the portion of the West Gateway ground lease premises that is designated for development into a bulk and oversized marine terminal (the "Project") which are commonly referred to as Berths 7 and 8 (the "Project Property") and this Agreement expressly excludes the balance of the West Gateway that is not necessary for the Project. The Project Property is shown on the land plan attached hereto as Exhibit B. The excluded portion of the West Gateway ground lease premises consists of the portion identified in the ground lease as the "Railroad R/O/W Property" and that portion of the "West Gateway Property" identified on Exhibit B as being designated for development as the railroad spur and related railroad improvements.

D. CCIG has entered into an Exclusive Negotiating Agreement with the Port of Oakland regarding the potential ground lease of additional property for the purposes to developing additional marine terminal facilities thereon (the "Port ENA"). The parties acknowledge that the Port ENA property and any development thereon is expressly excluded from the "Project Property"

and the "Project", and that the provisions of this Agreement shall not apply to such Port ENA property.

B. TLS desires to obtain the exclusive right to negotiate with the OBOT Parties regarding the formation of a new joint venture with one or more of the OBOT Parties or a sublease of the Project Property to develop and operate the Project.

AGREEMENT

Now, therefore, the parties hereby agree as follows:

1. Exclusive Negotiation. The parties hereby agree to negotiate exclusively and in good faith with each other for the Term (as defined in Section 3 below) of this Agreement regarding the terms of the following potential transactions/matters: either (a) the terms of an operating agreement for the proposed Project joint venture (the "Operating Agreement") or (b) the terms of the applicable sublease documents for the Project Property (collectively, the "Sublease"). The Operating Agreement and the Sublease, as applicable, are referred to herein as the "Transaction Document." Without limiting the generality of the foregoing, the parties agree that during the Term of this Agreement, the OBOT Parties shall not, and shall cause their respective affiliates not to, directly or indirectly, alone or as a partner, officer, director, consultant, agent, independent contractor, member or shareholder of any entity, solicit, initiate, encourage, facilitate, respond to (other than to decline) or enter into any discussions with, or enter into any agreement or understanding with, any person or entity other than TLS regarding a joint venture, lease, sublease, sale, acquisition, merger, financing transaction or any type of similar or related transaction that involves any of the OBOT Parties, the Project Property or the Project. For the purposes of this Agreement, Prologis/CCIG shall not be deemed to be an affiliate of the OBOT Parties after the date TLS has been provided with a copy of the fully executed Partial Assignment approved by the City. By entering into this Agreement, the parties do not commit themselves to enter into a binding Transaction Document. The parties agree that, other than the obligations set forth in this Section 1, the parties shall have no legal obligation to the other with respect to the proposed joint venture, Project Property, Project or the proposed Transaction Document unless and until the parties have negotiated, executed, and delivered a mutually acceptable Transaction Document. The parties acknowledge that despite complying with the terms of this Agreement, they may not reach agreement on the terms of, and may not enter into, a Transaction Document.

Notwithstanding the foregoing to the contrary, the OBOT Parties are expressly authorized to engage in the following negotiations regarding the Property and the Project:

- a. Negotiations with the City related to the terms of the LDDA, including amendments thereto;
- b. Negotiations with the State of California, Department of Transportation ("Caltrans") regarding Caltrans' current temporary construction easement affecting the Property and a sublease or other right of possession for all or a part of the Property related to Caltrans' Bay Bridge project; and



c. Negotiations with governmental and regulatory agencies related to any permits or authorizations related to the development of the Project.

2. Exclusivity Payment. TLS shall pay Five Hundred Thousand Dollars (\$500,000) to OBOT within three (3) business days after the Effective Date (the "Initial Exclusivity Payment").

3. Term of Exclusive Negotiation. This Agreement shall commence on the Effective Date and expire on the date that is nine (9) months after the Effective Date ("Initial Term"), provided that TLS shall have the right (but not the obligation) to extend the term of this Agreement for an additional three (3) month period beyond the Initial Term ("First Option Term") by paying OBOT the sum of One Hundred Thousand Dollars (\$100,000) ("Second Exclusivity Payment") on or before the close of business on the last day of the Initial Term, and provided that TLS shall have the right (but not the obligation) to extend the term of this Agreement for an additional three (3) month period beyond the First Option Term ("Second Option Term") by paying OBOT the sum of One Hundred Thousand Dollars (\$100,000) ("Third Exclusivity Payment") on or before the close of business on the last day of the First Option Term. The Initial Term and, subject to the timely exercise of the applicable option to extend and payment of the applicable funds, the First Option Term and the Second Option Term, are collectively referred to herein as the "Term." The Initial Exclusivity Payment and any Second Exclusivity Payment and Third Exclusivity Payment timely paid pursuant to this Section 3 are collectively referred to herein as the "Exclusivity Payment."

Subject to the provisions of Section 5 below, the Exclusivity Payment paid to OBOT shall be immediately non-refundable to TLS whether or not the parties are able to reach an agreement on a Transaction Document. If the parties reach an agreement regarding a Transaction Document, the Exclusivity Payment paid to OBOT shall be credited to any capital contributions or rent payable by TLS under the Transaction Document; provided, however, in no event shall OBOT be obligated to convey the Exclusivity Payment to the new joint venture on TLS' behalf.

4. Due Diligence. TLS shall have access on a confidential basis (subject to the Confidentiality Agreement (as defined in Section 7 below)) to all information in the possession or control of the OBOT Parties or the sole member of OBOT (the California Capital & Investment Group, Inc.) regarding the Project Property or the proposed Project. OBOT shall have the right to receive on a confidential basis (subject to the Confidentiality Agreement) copies of TLS' due diligence materials that relate to the Project Property or the proposed Project. All of the materials shall be provided without representation or warranty other than, to the delivering party's actual knowledge, such materials are true and correct copies of the documents in their possession or control.

TLS agrees that it shall not contact the City of Oakland, the Port of Oakland or their respective officials, employees or representatives regarding the Project Property or the proposed Project without OBOT's prior written consent, which consent may be granted, conditioned or withheld in OBOT's sole and absolute discretion. Further, in the event that OBOT elects to grant its consent to TLS' contact with the City or Port parties, OBOT shall have the right to participate in all material communications conducted pursuant to such consent.

5. Remedies. In the event that a party breaches its obligation to negotiate exclusively and in good faith as required by this Agreement, the non-defaulting party may elect between the following as its sole and exclusive remedy for such breach upon written notice to the other party:

a. To (i) require the defaulting party to cease any negotiations with any third party, (ii) extend the Term of this Agreement for a period equal to the prior breach and (iii) require the defaulting party to comply with the terms of this Agreement for the balance of the Term (in which case the non-breaching party shall be entitled to (a) an injunction restraining any breach by the defaulting party, (b) specific performance of the defaulting party's obligations hereunder and (c) such other relief as a court may find appropriate to restrain any such breach, and the parties further agree that the non-defaulting party shall not be required to demonstrate or prove actual damages or post any bond or other security or demonstrate the likelihood of irreparable damage in order to obtain the injunctive relief set forth above); or

b. To terminate this Agreement and (i) if one of the OBOT Parties is the defaulting party, TLS shall be entitled to a refund of the Exclusivity Payment paid to OBOT and (ii) if TLS is the defaulting party, OBOT shall be entitled to retain the Exclusivity Payment paid to OBOT.

THE PARTIES AGREE THAT IT WOULD BE IMPRACTICABLE AND EXTREMELY DIFFICULT TO ASCERTAIN THE ACTUAL DAMAGES SUFFERED AS A RESULT OF A PARTY'S DEFAULT UNDER THIS AGREEMENT, AND THAT UNDER THE CIRCUMSTANCES EXISTING AS OF THE DATE OF THIS AGREEMENT, THE LIQUIDATED DAMAGES PROVIDED FOR IN THIS SECTION 5(b) REPRESENT A REASONABLE ESTIMATE OF THE DAMAGES WHICH THE NON-DEFAULTING PARTY WILL INCUR AS A RESULT OF SUCH BREACH, PROVIDED, HOWEVER, THAT THIS PROVISION SHALL NOT LIMIT THE NON-DEFAULTING PARTY'S EXPRESS RIGHTS TO RECEIVE REIMBURSEMENT FOR ATTORNEYS' FEES. THE PARTIES ACKNOWLEDGE THAT THE PAYMENT OF SUCH LIQUIDATED DAMAGES IS NOT INTENDED AS A FORFEITURE OR PENALTY, BUT IS INTENDED TO CONSTITUTE LIQUIDATED DAMAGES TO THE NON-DEFAULTING PARTY IN THE EVENT OF A TERMINATION UNDER SECTION 5(b) ABOVE. THE PARTIES HAVE SET FORTH THEIR INITIALS BELOW TO INDICATE THEIR AGREEMENT WITH THE LIQUIDATED DAMAGES PROVISION CONTAINED IN THIS SECTION.


OBOT Parties


TLS

6. Brokerage. The parties acknowledge that the proposed transaction would be a principal to principal transaction. No party shall be obligated to pay a broker fee on behalf of any other party.

7. Confidentiality. The parties agree that the existence of this Agreement and all negotiations pursuant to this Agreement shall be subject to the terms of a Confidentiality Agreement of even date herewith between the parties.

8. Amendment; Complete Agreement. Any amendment or supplement to this Agreement must be in writing and executed by all parties. This Agreement contains the entire agreement and understanding between the parties concerning the subject matter of this Agreement and supersedes all prior agreements, terms, understandings, conditions, representations and warranties, whether written or oral, made by either party concerning the matters which are the subject of this Agreement. This Agreement has been drafted through a joint effort of the parties and their counsel and, therefore, shall not be construed in favor of or against either of the parties.

9. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California.

10. Severability. If any provision of this Agreement or application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement (including the application of such provision to persons or circumstances other than those to which it is held invalid or unenforceable) shall not be affected thereby, and each provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

11. Counterparts, Headings, And Defined Terms. This Agreement may be executed in counterparts, each of which shall be an original, but all of which together shall constitute one Agreement. The headings to sections of this Agreement are for convenient reference only and shall not be used in interpreting this Agreement.

12. Time of the Essence. Time is of the essence of this Agreement.

13. Waiver. Except as expressly provided herein to the contrary, no waiver by any party of any of the terms or conditions of this Agreement or any of their respective rights under this Agreement shall be effective unless such waiver is in writing and signed by the party charged with the waiver.

14. Attorneys' Fees. If any action or proceeding is commenced by any party to enforce their rights under this Agreement or to collect damages as a result of the breach of any of the provisions of this Agreement, the prevailing party in such action or proceeding, including any bankruptcy, insolvency or appellate proceedings, shall be entitled to recover all reasonable costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, in addition to any other relief awarded by the court.

15. Assignment. No party shall be entitled to assign any of its rights or obligations under this Agreement, directly or indirectly, by operation of law or otherwise, without the prior, written consent of the other party, which consent may be granted, withheld or conditioned in such party's sole and absolute discretion. Any purported assignment in violation of the terms of this Agreement shall be void.

IN WITNESS WHEREOF, the parties do hereby execute this Agreement as of the date first written above.

Oakland Bulk and Oversized Terminal, LLC,
a California limited liability company

By: 
Phil Tagami
Its: President of Sole Member

CCIG Oakland Global, LLC,
a California limited liability company

By: 
Phil Tagami
Its: President of Sole Member

Terminals and Logistics Solutions, LLC,
a Delaware limited liability company


By: 
Name: JOHN SIEGEL
Title: Authorized Person

Exhibit A

Legal Description of the West Gateway Ground Lease Premises

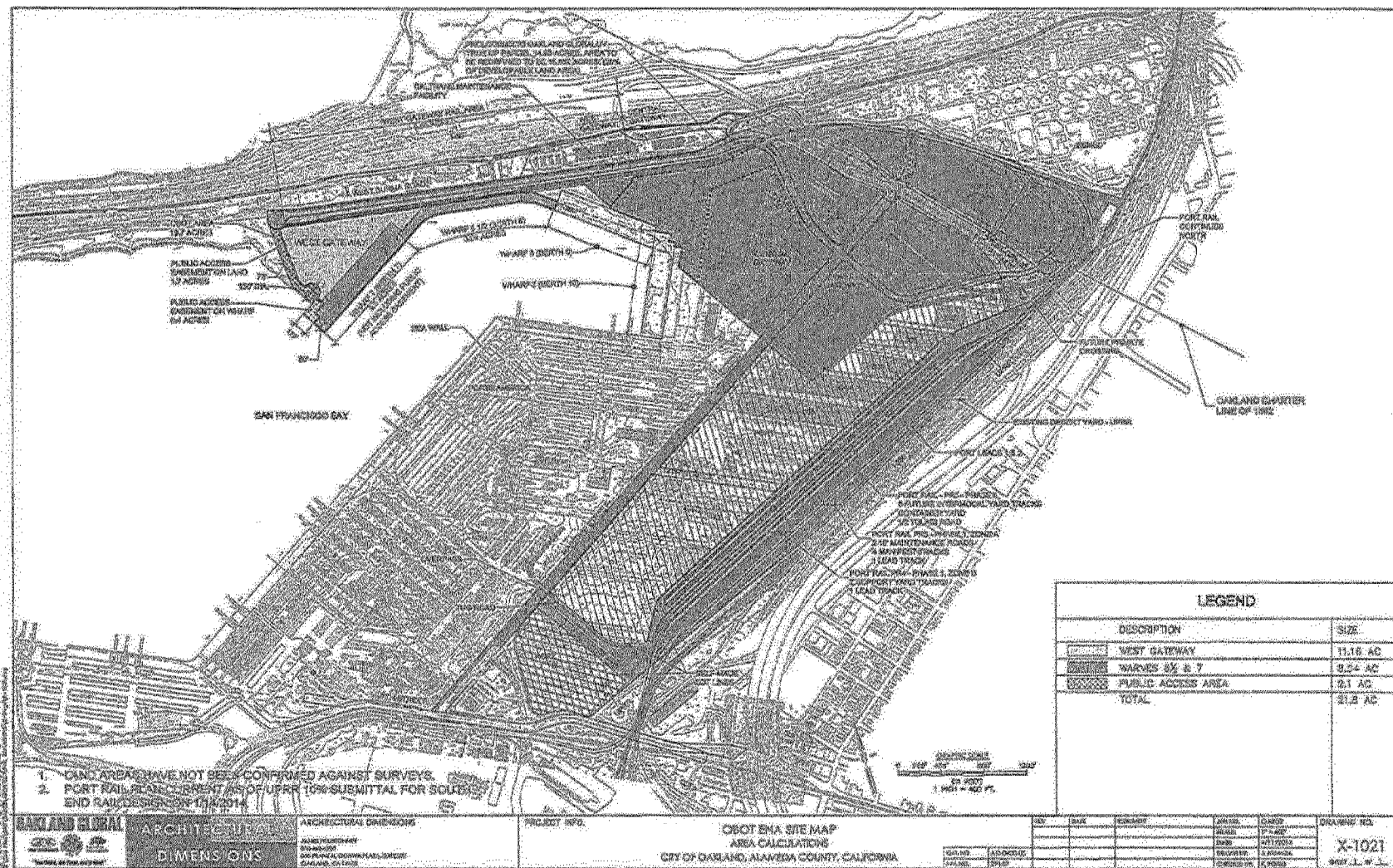
That certain real property located in the City of Oakland, State of California, more particularly described as Parcels 9 and 10 as shown on Parcel Map 10095 recorded in the Official Records of Alameda County on August 13, 2013 as Series No. 2013277934, and as also described in the form Ground Lease for the West Gateway attached as an exhibit to the LDDA.

②

Exhibit B
Land Plan

[See attached]

①



2

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

2 Robert P. Feldman (Bar No. 69602)

3 bobfeldman@quinnemanuel.com

4 David Myre (Bar No. 304600)

5 davidmyre@quinnemanuel.com

6 Eliyahu Ness (Bar No. 311054)

7 eliness@quinnemanuel.com

8 555 Twin Dolphin Drive, 5th Floor

9 Redwood Shores, California 94065-2139

10 Telephone: (650) 801-5000

11 Facsimile: (650) 801-5100

12 QUINN EMANUEL URQUHART & SULLIVAN, LLP

13 Meredith M. Shaw (Bar No. 284089)

14 meredithshaw@quinnemanuel.com

15 50 California Street, 22nd Floor

16 San Francisco, CA 94111

17 Telephone: (415) 875-6600

18 *Attorneys for Plaintiff*

19 *Oakland Bulk & Oversized Terminal, LLC*

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

**DECLARATION OF LYLE CHINKIN IN
SUPPORT OF PLAINTIFF OAKLAND
BULK & OVERSIZED TERMINAL,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

DECLARATION OF LYLE CHINKIN

I, Lyle Chinkin, declare as follows:

I. Qualifications

1. I have over 30 years of professional consulting experience in air quality and about five years of experience at the California Air Resources Board (CARB). I am a nationally recognized expert in emission inventory development and assessment and air quality analysis. I have worked on projects for federal, state, and local government agencies; universities; public and private research consortiums; and major corporations.

2. My areas of expertise include (1) developing and improving regional emission inventories; (2) providing independent assessments of emission inventories using bottom-up and top-down evaluation techniques; (3) conducting field studies to obtain real-world data and improve activity estimates and emission factors; (4) conducting scoping studies to develop conceptual models of community-scale air quality; (5) assisting with State Implementation Plan (SIP) development; and (6) providing expert testimony and presentations to public boards.

3. I currently serve as Chief Scientist and President Emeritus of Sonoma Technology, Inc.

4. I received my Bachelor of Science (BS) and a Master of Science (MS) degree in Atmospheric Science from the University of California at Davis.

5. A true and correct copy of my full curriculum vitae is attached to this declaration as Exhibit A.

II. BAAQMD Enforces the National Ambient Air Quality Standards in the Bay Area

6. Air pollution is regulated at the federal, State, and regional level. The Environmental Protection Agency ("EPA") has developed National Ambient Air Quality Standards (the "NAAQS")

1 for six common air pollutants, also known as “criteria air pollutants.”¹ Ex. B. The NAAQS are the
 2 maximum concentrations allowed by EPA of a given criteria pollutant in the ambient air. *See id.*
 3 According to the EPA, the NAAQS “provide public health protection, including protecting the
 4 health of ‘sensitive’ populations such as asthmatics, children, and the elderly.” *Id.*

5 7. If the air quality in a geographic area is cleaner than the national standards set out in
 6 the NAAQS, then the area is designated as “in attainment” of the NAAQS by the EPA; otherwise,
 7 the area is “out of attainment” or in “nonattainment.”² *See* Ex. C.

8 8. The Bay Area Air Quality Management District (“BAAQMD”) is the agency that
 9 regulates air quality in the Bay Area region. To that end, BAAQMD monitors air quality at
 10 monitoring stations around the Bay Area, including a station in West Oakland, and publishes the
 11 data on the internet.³ *See* Ex. D.

12 9. One of the criteria pollutants that BAAQMD monitors in West Oakland is fine
 13 particulate matter, also referred to as “PM2.5.” *See id.* (I define particulate matter in paragraphs 14-
 14 16 below)

15 10. If any BAAQMD monitoring station (including the one in West Oakland) indicates
 16 that pollutant concentrations are higher than the NAAQS for a given criteria pollutant, then the entire
 17 Bay Area becomes “out of attainment” for that pollutant.

18 11. As part of its responsibility for monitoring air quality in the Bay Area, BAAQMD
 19 also receives applications for Permits to Operate from facilities that are new sources of air pollution.

21 ¹ Attached hereto as Exhibit B is a true and correct copy of webpage from EPA’s website at
 22 <https://www.epa.gov/criteria-air-pollutants/naaqs-table>, last accessed on November 19, 2017.

23 ² Attached hereto as Exhibit C is a true and correct copy of a webpage from the EPA’s
 24 website, available at [https://www.epa.gov/criteria-air-pollutants/naaqs-designations-](https://www.epa.gov/criteria-air-pollutants/naaqs-designations-process)
[process](https://www.epa.gov/criteria-air-pollutants/naaqs-designations-process), last accessed on November 19, 2017.

25 ³ Attached hereto as Exhibit D is a true and correct copy of a webpage on BAAQMD’s
 26 website, available at [http://www.baaqmd.gov/about-air-quality/current-air-quality/air-](http://www.baaqmd.gov/about-air-quality/current-air-quality/air-monitoring-data?DataViewFormat=daily&DataView=aqi&StartDate=11/19/2017&ParameterId=316)
[monitoring-](http://www.baaqmd.gov/about-air-quality/current-air-quality/air-monitoring-data?DataViewFormat=daily&DataView=aqi&StartDate=11/19/2017&ParameterId=316)
 27 [data?DataViewFormat=daily&DataView=aqi&StartDate=11/19/2017&ParameterId=316](http://www.baaqmd.gov/about-air-quality/current-air-quality/air-monitoring-data?DataViewFormat=daily&DataView=aqi&StartDate=11/19/2017&ParameterId=316),
 last accessed on November 19, 2017.

Under BAAQMD's permitting guidelines, BAAQMD will not issue a Permit to Operate to any facility that would cause the Bay Area to become out of attainment for a given criteria pollutant.⁴ See Ex. E at 7.

III. Emissions Estimates and Modelling

12. In general, there are two steps in determining the potential impact to air quality of a new source of emissions: i) estimating emissions, and ii) modelling. Emissions estimates predict the quantity of a given pollutant that would be emitted into the air from a facility. Air quality modeling uses emissions estimates as an input—along with other variables such as weather and topography—and predicts pollutant concentrations in the ambient air. Ordinarily, modelling will be necessary only if the estimated emissions exceed some threshold of significance, such as the CEQA (California Environmental Quality Act) Thresholds of Significance (described more fully in paragraph 35).

IV. ESA Report

13. I have reviewed the report produced by Environmental Science Associates ("ESA") for the City of Oakland (the "ESA Report"). I have also reviewed ESA's spreadsheets, emails and memoranda produced in this litigation, as well as portions of the deposition transcripts of ESA's two Rule 30(b)(6) witnesses, Crescentia Brown and Victoria Evans.

14. Table 5-7 of the ESA Report provides ESA's estimates of particulate matter ("PM") emissions associated with the Terminal. See Declaration of David Myre in Support of Plaintiff OBOT's Motion for Summary Judgment ("Myre Decl."), Ex. 45 (ESA Report) at 5-17. Table 5-7 also includes a column for total suspended particulate ("TSP"). The term "PM" describes a complex mixture of solid and liquid particles of various sizes in the atmosphere. The term "total suspended particulate" ("TSP") is a measure of the total mass concentration of PM in the air. TSP is no longer relied upon by regulatory agencies to assess air quality.

⁴ Attached hereto as Ex. E is a true and correct copy of BAAQMD's Permit Handbook, available on BAAQMD's website at <http://www.baaqmd.gov/~media/files/engineering/permit-handbook/baaqmd-permit-handbook.pdf>, last accessed on November 19, 2017.

1 15. Modern nomenclature describes PM in terms of particle size and chemical
2 composition. Generally, the smaller the particle size, the more deeply it can penetrate the respiratory
3 system and move into the bloodstream.

4 16. The size of particles in the atmosphere can vary tremendously. Particle sizes are
5 often classified in three size ranges: i) Ultra-fine particles (less than 1 Micron in diameter); ii) Fine
6 particles (2.5 microns in diameter or less), commonly referred to as “PM2.5”; and iii) Coarse
7 particles (10 microns in diameter or less), commonly referred to as “PM10.”

8 17. Table 5-7 is divided into two parts: the top portion addresses “Rail Transport”; the
9 bottom portion addresses “OBOT Operations.” The estimates for Rail Transport are divided into
10 several geographic areas: “BAAQMD,” “Oakland,” “So Emeryville,” “San Leandro, and also
11 contains estimates for “Staging at Port Railyard, Rail Spur Trip to OBOT” (hereafter “Staging”).
12 The estimates for “OBOT Operations” in the lower half of the Table are divided into various
13 “operations” or activities that would occur at the OBOT terminal: “Unloading,” “Storage,”
14 “Transfer,” and “Transloading.”

15 18. Table 5-7 contains estimates for PM emissions on a daily basis (lbs/day) and yearly
16 basis (tons/year).

17 19. ESA made numerous errors in arriving at the emissions estimates reported in Table 5-
18 7. I address two of those errors below.

19
20 **A. ESA’s Emissions Estimates for Staging**

21 20. AP-42 is a document published by the EPA containing guidance for how to estimate
22 emissions from various sources. *See* Myre Decl., Ex. 63 (AP-42 13.2.5). To calculate emissions
23 from Staging,⁵ ESA used EPA’s AP-42 Chapter 13 Section 13.2.5 guidance for “industrial wind
24 erosion” (“AP-42 13.2.5”).

25
26 ⁵ According to ESA, its “Staging” estimates are supposed to “address[] the impact of staging of
27 the four segments of the coal unit trains at the Port Railyard while waiting unloading [sic] at the
28 OBOT.” *See* Myre Decl., Ex. 45 at 5-10.

1 21. One of the inputs to the emission factor equations in AP-42 13.2.5 is “threshold
2 friction velocity” (“TFV”). TFV is the minimum friction velocity that is required to initiate
3 movement of dust particles by wind. In general, holding wind-speed constant, the lower the TFV,
4 the more material will be blown away by the wind.

5 22. For use in AP-42 13.2.5, the EPA provides a table of TFVs associated with different
6 types of “aggregate” material. Myre Decl., Ex. 64 (AP-42 13.2.5) at OB322924. For example, one
7 option is “fine coal dust on a concrete pad” which has a very low TFV. Another option is “uncrusted
8 coal pile” which has a higher TFV. *Id.*

9 23. The wind tunnel measurement study cited by the EPA that was the basis for the TFV
10 data for “uncrusted coal pile” explains that the term “uncrusted coal pile” refers to a coal pile that
11 had not yet developed a “crust.” A crust may develop naturally or form from the application of a
12 topping agent. An uncrusted pile would have a lower TFV than a crusted coal pile.

13 24. As reflected in ESA’s spreadsheet for its staging calculations (*see* Myre Decl., Ex. 7),
14 screen-captured and highlighted below, when estimating emissions from Staging, ESA used the TFV
15 for “fine coal dust on a concrete pad” rather than “uncrusted coal pile.” As Victoria Evans, ESA’s
16 project manager for the ESA Report, testified, ESA’s air quality analysts told her during the
17 preparation of the ESA Report told her that it was “incorrect” to use the TFV for “fine coal dust”
18 rather than an “uncrusted coal pile.” Myre Decl., Ex. 33 at 262:17-20. According to Ms. Evans, the
19 choice of “uncrusted coal pile” rather than “fine coal dust” was “obvious.” *Id.* at 263:17. Another
20 ESA employee wrote a memorandum to the same effect: in criticizing the basis of the emissions
21 estimates submitted by Earthjustice, he wrote that an “uncrusted coal pile” was “more representative
22 material” than “fine coal dust.” Myre Decl., Ex. 66 at ESA_003385.

35 ESA_033434_OBOT - Emission Calculations - Coal.XLSX - Excel

FILE HOME INSERT PAGE LAYOUT FORMULAS DATA REVIEW VIEW WorkSite

Clipboard Font Alignment Number Styles

D52 OBOT Response to Comment

Fugitive Dust During Staging at Port Railroad and Transport on Rail Spur to OBOT

Coal

Month	Wind Speed	
	Max 5-second	Max 2-minute
June 2015	32	30
July 2015	30	24
August 2015	29	24
September 2015	32	28
October 2015	38	31
November 2015	44	32
December 2015	46	37
January 2016	39	35
February 2016	44	36
March 2016	46	40
April 2016	37	32
May 2016	36	32
Maximum, mph	46	40
Maximum, m/s	20.6	17.9

Source: National Oceanic and Atmospheric Association (NOAA), Quality Controlled Local Climatological Data (QCLCD), Accessed May 30, 2016.

Parameter	Value	Reference
Fastest mile value at 6 feet, mph	40	NOAA LCD Data
Fastest mile value at 6 feet, m/s	17.9	Calculated
Fastest mile value at 6 feet, cm/s	1788.16	Calculated
Corrected fastest mile value at 10 m, cm/s	2233.7	Calculated, AP-42 Chapter 13.2.5
Corrected fastest mile value at 10 m, m/s	22.3	Calculated
Corrected fastest mile value at 10 m, mph	50.0	Calculated
Friction velocity, m/s	1.18	Calculated, AP-42 Chapter 13.2.5
Threshold friction velocity, m/s	0.54	AP-42 Chapter 13.2.5, for "Fine coal dust on concrete pad" from Eastern power plant
Roughness height, cm	0.2	AP-42 Chapter 13.2.5, for "Fine coal dust on concrete pad" from Eastern power plant
Erosion potential, g/m ²	40.14	Calculated, AP-42 Chapter 13.2.5
Particle size multiplier, 30µm	1	AP-42 Chapter 13.2.5
Particle size multiplier, 15µm	0.6	AP-42 Chapter 13.2.5
Particle size multiplier, 10µm	0.5	AP-42 Chapter 13.2.5
Particle size multiplier, 2.5µm	0.075	AP-42 Chapter 13.2.5
Number of coal cars	104	Basis of Design
Length of open area of coal car, ft	65	CSX, Railroad Equipment (https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment/)
Width of open area of coal car, ft	10.67	CSX, Railroad Equipment (https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment/)
Area of open area of coal car, ft ²	693.3	Calculated
Area of open area of coal car, m ²	64.4	Calculated
Total open area of 26-car segment, m ²	1674.7	Calculated
Total open area of train, m ²	6698.3	Calculated
Annual throughput of facility, metric tons	5,000,000	Basis of Design
Number of operating days per year	350	OBOT Response to Comment
Average number of trains per day	1.5	OBOT Response to Comment
Total open area per day, m ²	10048.4	Calculated
Disturbances per railcar	1	Assumed
Uncontrolled	lb/day	tons/yr
PM10 emissions	889.26	155.62
PM15 emissions	533.56	93.37
PM10 emissions	444.63	77.81
PM2.5 emissions	66.69	11.67

Coal-Mainline Rail Transport Coal-OBOT Emissions Coal-Staging Coal-OBOT-Unloading Coal-OBOT-Storage Coal-OBOT-Transfer Coal-OBOT-Transfer

25. I have reviewed the expert reports of the City's expert, Dr. Ranajit Sahu, as well as his spreadsheets containing his emissions calculations. Attached to the Myre Declaration as Exhibit 56 are the spreadsheets Dr. Sahu used to calculate emissions for his Expert Report and Supplemental Expert Report. Dr. Sahu has testified that he obtained the spreadsheets from ESA, made some adjustments, and incorporated ESA's spreadsheet mostly unchanged into his reports. See Myre Decl., Ex. 56 at 12:23-25, 220:11-21. Dr. Sahu's testimony is consistent with my review of his spreadsheets which appear identical in most respects to ESA's spreadsheets.

26. As the below screen-capture from Dr. Sahu's spreadsheet for Staging reflects, he did not adjust ESA's use of the TFM for "fine coal dust."

Fugitive Dust During Staging at Port Railyard and Transport on Rail Spur to OBOT Coal

Month	Wind Speed	
	Max 5-second	Max 2-minute
June 2015	32	30
July 2015	30	24
August 2015	29	24
September 2015	32	28
October 2015	38	31
November 2015	44	32
December 2015	46	37
January 2016	39	35
February 2016	44	36
March 2016	46	40
April 2016	37	32
May 2016	36	32
Maximum, mph	46	40
Maximum, m/s	20.6	17.9

Source: National Oceanic and Atmospheric Association (NOAA), Quality Controlled Local Climatological Data (QCLCD), Accessed May 30, 2016.

Parameter	Value	Reference
Fastest mile value at 6 feet, mph	40	NOAA LCD Data
Fastest mile value at 6 feet, m/s	17.9	Calculated
Fastest mile value at 6 feet, cm/s	1788.16	Calculated
Corrected fastest mile value at 10 m, cm/s	2233.7	Calculated, AP-42 Chapter 13.2.5
Corrected fastest mile value at 10 m, m/s	22.3	Calculated
Corrected fastest mile value at 10 m, mph	50.0	Calculated
Friction velocity, m/s	1.18	Calculated, AP-42 Chapter 13.2.5
Threshold friction velocity, m/s	0.54	AP-42 Chapter 13.2.5, for "Fine coal dust on concrete pad" from Eastern power plant
Roughness height, cm	0.2	AP-42 Chapter 13.2.5, for "Fine coal dust on concrete pad" from Eastern power plant
Erosion potential, g/m ²	40.14	Calculated, AP-42 Chapter 13.2.5
Particle size multiplier, 30µm	1	AP-42 Chapter 13.2.5
Particle size multiplier, 15µm	0.6	AP-42 Chapter 13.2.5
Particle size multiplier, 10µm	0.5	AP-42 Chapter 13.2.5
Particle size multiplier, 2.5µm	0.075	AP-42 Chapter 13.2.5
Number of coal cars	104	Basis of Design
Length of open area of coal car, ft	65	CSX, Railroad Equipment (https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment/)
Width of open area of coal car, ft	10.67	CSX, Railroad Equipment (https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment/)
Area of open area of coal car, ft ²	693.3	Calculated
Area of open area of coal car, m ²	64.4	Calculated
Total open area of 26-car segment, m ²	1674.7	Calculated
Total open area of train, m ²	6698.9	Calculated
Annual throughput of facility, metric tons	5,000,000	Basis of Design
Number of operating days per year	350	OBOT Response to Comment
Average number of trains per day	15	OBOT Response to Comment
Total open area per day, m ²	10048.4	Calculated
Disturbances per railcar	1	Assumed
Uncontrolled	lb/day	tons/yr
PM ₁₀ emissions	889.26	155.62
PM ₁₅ emissions	533.56	93.37
PM ₁₀ emissions	444.63	77.81
PM _{2.5} emissions	66.69	11.67

27. An ESA internal spreadsheet created during the preparation of the ESA Report reflects that ESA in fact calculated an emissions estimate using the TFV for an “uncrusted coal pile. See Myre Decl., Ex. 58 (ESA_036556); Ex. 33 (Evans Tr.) at 269:12-18. A screen-capture of this spreadsheet is below. The spreadsheet reflects that the use of TFV for “uncrusted coal pile” resulted in far lower emissions estimates for PM2.5 from Staging than is contained in Table 5-7.⁶ ESA did not use these values in its Report.

Month	Max 5-second	Max 2-minute
June 2015	32	30
July 2015	30	24
August 2015	29	24
September 2015	32	28
October 2015	38	31
November 2015	44	32
December 2015	46	37
January 2016	39	36
February 2016	44	36
March 2016	46	40
April 2016	37	32
May 2016	36	32
Maximum, mph	46	40
Maximum, m/s	20.8	17.9

Source: National Oceanic and Atmospheric Association (NOAA), Quality Controlled Local Climatological Data (QCLCD), Accessed May 30, 2016.

Parameter	Value	Reference
Fastest mile value at 6 feet, mph	40	NOAA QCLCD Data
Fastest mile value at 6 feet, m/s	17.3	Calculated
Fastest mile value at 6 feet, cm/s	1768.16	Calculated
Corrected fastest mile value at 10 m, cm/s	2261.9	Calculated, AP-42 Chapter 13.2.5
Corrected fastest mile value at 10 m, m/s	22.6	Calculated
Corrected fastest mile value at 10 m, mph	50.6	Calculated
Friction velocity, m/s	1.20	Calculated, AP-42 Chapter 13.2.5
Threshold friction velocity, m/s	1.12	AP-42 Chapter 13.2.5, for "Uncrusted coal pile" from Western surface coal mine
Roughness height, cm	0.3	AP-42 Chapter 13.2.5, for "Uncrusted coal pile" from Western surface coal mine
Erosion potential, g/m ²	2.33	Calculated, AP-42 Chapter 13.2.5
Particle size multiplier, 30µm	1	AP-42 Chapter 13.2.5
Particle size multiplier, 15µm	0.6	AP-42 Chapter 13.2.5
Particle size multiplier, 10µm	0.5	AP-42 Chapter 13.2.5
Particle size multiplier, 2.5µm	0.075	AP-42 Chapter 13.2.5
Number of coal cars	104	Basis of Design
Length of open area of coal car, ft	65	CSX, Railroad Equipment (https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment/)
Width of open area of coal car, ft	10.67	CSX, Railroad Equipment (https://www.csx.com/index.cfm/customers/resources/equipment/railroad-equipment/)
Area of open area of coal car, ft ²	693.3	Calculated
Area of open area of coal car, m ²	64.4	Calculated
Total open area of 26-car segment, m ²	1674.7	Calculated
Total open area of train, m ²	6698.9	Calculated
Annual throughput of facility, metric tons	5,000,000	Basis of Design
Railcar capacity, metric tons	110	Basis of Design
Number of operating days per year	365	Basis of Design
Average number of trains per day	1.2	Calculated
Total open area per day, m ²	8088.0	Calculated
Disturbances per railcar	1	Assumed
Uncontrolled	lb/day	tons/yr
PM10 emissions	4155	181.93
PM15 emissions	24.93	109.19
PM10 emissions	20.78	91.00
PM2.5 emissions	3.12	13.65

Summary of Dust from Waiting Trains:

Source	PM10 emissions (lb/day)	PM15 emissions (lb/day)	PM10 emissions (tons/yr)	PM2.5 emissions (tons/yr)
Barge	4155	24.93	181.93	109.19
Storage Dome	20.78	3.12	91.00	13.65
Railcar Transfer Building	4155	24.93	181.93	109.19
Conveyor Transfer Points	4155	24.93	181.93	109.19

⁶ ESA’s spreadsheet (ESA_036556), screen-captured above, contains a mathematical error in converting from pounds per day to tons per year which results in incorrect values in the “tons/yr” column. If the error is corrected, annual PM2.5 emissions drop from 13.65 to 0.57 tons per year.

28. I have used ESA/Dr. Sahu's spreadsheet to recalculate emissions for Staging using the TFV for "uncrusted coal pile" rather than "fine coal dust." Using the TFV for "uncrusted coal pile" results in emissions that are approximately 17 times lower than if "fine coal dust" is used: annual PM2.5 emissions drop from 11.67⁷ tons per year to 0.68 tons per year; daily PM2.5 emissions drop from 66.69 lbs/day to 3.87 lbs/day.

B. ESA's Estimates for OBOT Operations

29. The ESA Report states with respect to the four "OBOT Operations" ("Unloading," "Transfer," "Storage" and "Transloading") that potential dust emissions from each operation would be controlled by enclosing the operations as well as by using dust control and collection technologies, which would include dry fogging systems and watersprays. *See* Myre Decl., Ex. 45 at 2-9-2-10, 5-13-5-14. ESA acknowledges that the technologies that would be employed at the Terminal would be considered "Best Available Control Technology" ("BACT") by BAAQMD. *Id.* at 5-13-5-14.

30. Table 5-6 of the ESA Report (Myre Decl., Ex. 45 at 5-13) purports to estimate emissions "of **Controlled** Fugitive Coal Dust Emissions From Unloading, Storage, Transfer, and Transloading of Coal at OBOT." *Id.* (emphasis added). Those estimates are incorporated into Table 5-7 as "OBOT Operations." *Id.* at 5-17.

31. The ESA Report characterized its estimates for "Unloading, Storage, Transfer, and Transloading of Coal at OBOT" as being "Controlled" when they were in fact estimates of *uncontrolled* emissions. This can be seen from internal ESA documents. First, ESA's final spreadsheets—that is, those prepared immediately prior to the submission of the final ESA Report to the City—label the emissions from "Unloading," "Storage," "Transfer" and "Transloading" as "uncontrolled emissions." Myre Decl., Ex. 57 (ESA_033434). In the below screen-capture of ESA's spreadsheet for "Unloading" I have highlighted those "uncontrolled emissions" values that

⁷ Table 5-7 lists PM2.5 emissions from Staging as 18 tons/year. *See* Ex. 45 (ESA Report) at 5-17. However, ESA's and Sahu's spreadsheet containing the calculations for Table 5-7 reflect that the correct value should have been 11.67 tons per year.

were ultimately incorporated into Table 5-7. The same is true for “Storage,” “Transfer,” and “Transloading.”

Parameter	Value	Reference
Particle size multiplier, PM30	0.74	AP-42, Chapter 13.2.4
Particle size multiplier, PM15	0.48	AP-42, Chapter 13.2.4
Particle size multiplier, PM10	0.35	AP-42, Chapter 13.2.4
Particle size multiplier, PM5	0.2	AP-42, Chapter 13.2.4
Particle size multiplier, PM2.5	0.053	AP-42, Chapter 13.2.4
Mean wind speed, mph	11	Assumed wind speed inside railcar transfer building (partial enclosure; assumed half maximum wind speed)
Material moisture content, %	2.7	AP-42, Chapter 13.2.4, Table 13.2.4-1 for "Coal-fired power plant", "Coal (as received)"; minimum value
Emission factor, PM30, lb/ton	0.00434	Calculated
Emission factor, PM15, lb/ton	0.00281	Calculated
Emission factor, PM10, lb/ton	0.00205	Calculated
Emission factor, PM5, lb/ton	0.00117	Calculated
Emission factor, PM2.5, lb/ton	0.00031	Calculated
Annual throughput, metric tons	5,000,000	Basis of Design
Annual throughput, tons	5,511,550	Calculated
Uncontrolled emissions, PM30, lb/day	66.0	Calculated
Uncontrolled emissions, PM15, lb/day	42.8	Calculated
Uncontrolled emissions, PM10, lb/day	31.2	Calculated
Uncontrolled emissions, PM5, lb/day	17.8	Calculated
Uncontrolled emissions, PM2.5, lb/day	4.7	Calculated
Uncontrolled emissions, PM30, lb/yr	23,897	Calculated
Uncontrolled emissions, PM15, lb/yr	15,501	Calculated
Uncontrolled emissions, PM10, lb/yr	11,302	Calculated
Uncontrolled emissions, PM5, lb/yr	6,459	Calculated
Uncontrolled emissions, PM2.5, lb/yr	1,712	Calculated
Uncontrolled emissions, PM30, ton/yr	11.9	Calculated
Uncontrolled emissions, PM15, ton/yr	7.8	Calculated
Uncontrolled emissions, PM10, ton/yr	5.7	Calculated
Uncontrolled emissions, PM5, ton/yr	3.2	Calculated
Uncontrolled emissions, PM2.5, ton/yr	0.9	Calculated

Average Wind Speeds, Oakland Intl Airport	mph
June 2015	12.2
July 2015	14
August 2015	12.9
September 2015	15.9
October 2015	12.7
November 2015	19.3
December 2015	20.2
January 2016	13.9
February 2016	17.9
March 2016	19.6

32. Second, another ESA spreadsheet (Myre Decl., Ex. 58) contains two tables as reflected in the below screen-capture. The spreadsheet appears to be comparing “Uncontrolled Emissions” with “Controlled Emissions,” which is the precise issue I am addressing here. In the “Uncontrolled Emissions” table, the values for “Railcar transfer building,” “Enclosed conveyor transfer points,” “Fugitive emissions from barge loading,” and “Fugitive emissions from storage pile inside dome” are identical, respectively, to “Unloading,” “Transfer,” “Storage” and “Transloading” in Tables 5-6 and 5-7. I have highlighted in the below screen-capture the figures that appear in Table 5-7. In the table on the same spreadsheet for “Controlled Emissions,” however, emissions

estimates appear to reflect “controls” by “BAAQMD 2016 Clean Air Plan BACT”⁸ for each of the four OBOT Operations. The values in the “Controlled Emissions” table reflect a “PM Control Efficiency” of 99% which lowers the “uncontrolled” emissions estimates by 99%.

ESA_036556.XLSX - Excel

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BAAQMD 2016 Clean Air Plan BACT

	A	B	C	D	E	F	G	H	I	J	K
1											
2		Uncontrolled Emissions Summary, tons/year									
3		Source			CO	HC	NOX	SOX	PM10	PM2.5	CO2e
4		Long-haul locomotive exhaust emissions			36.54	5.76	148.23	0.13	3.71	3.59	14,142.59
5		Switching locomotive exhaust emissions			2.97	0.47	12.04	0.01	0.30	0.29	1149.14
6		Fugitive coal dust from railcars waiting at Port Rail Facility and Spur Track			-	-	-	-	91.00	13.65	-
7		Railcar transfer building			-	-	-	-	5.65	0.86	-
8		Enclosed conveyor transfer points			-	-	-	-	4.93	0.75	-
9		Fugitive emissions from barge loading			-	-	-	-	5.65	0.86	-
10		Fugitive emissions from storage pile inside dome			-	-	-	-	1.52	0.23	-
11		Total uncontrolled emissions			39.51	6.23	160.27	0.14	112.75	20.22	15,291.73
12											
13											
14		Controlled Emissions Summary, tons/year									
15		Source	PM Control Efficiency, %	Control Methods/Regulation	CO	HC	NOX	SOX	PM10	PM2.5	CO2e
16		Long-haul locomotive exhaust emissions	0%	N/A	36.54	5.76	148.23	0.13	3.71	3.59	14,142.59
17		Switching locomotive exhaust emissions	0%	N/A	2.97	0.47	12.04	0.01	0.30	0.29	1,149.14
18		Fugitive coal dust from railcars waiting at Port Rail Facility and Spur Track	85%	Surfactant	-	-	-	-	13.65	2.05	-
19		Railcar transfer building	99%	BAAQMD 2016 Clean Air Plan BACT	-	-	-	-	0.06	0.01	-
20		Enclosed conveyor transfer points	99%	BAAQMD 2016 Clean Air Plan BACT	-	-	-	-	0.05	0.01	-
21		Fugitive emissions from barge loading	99%	BAAQMD 2016 Clean Air Plan BACT	-	-	-	-	0.06	0.01	-
22		Fugitive emissions from storage pile inside dome	99%	BAAQMD 2016 Clean Air Plan BACT	-	-	-	-	0.02	0.00	-
23		Total uncontrolled emissions			39.51	6.23	160.27	0.14	17.83	5.96	15,291.73

33. Finally, the 99% reduction in emissions reflected in the “Controlled Emissions” table in Exhibit 58 to the Myre Declaration is consistent with other ESA documents and testimony regarding ESA’s conversations with BAAQMD representatives. For example, in Exhibit 65 to the Myre Declaration, ESA’s air quality analyst, Tim Rimpo, comments on a draft of Chapter 5 of the ESA Report (in Comment “[TR10]” in the margin) “[c]an we reference our discussion with BAAQMD that the BACT measures that would be required would achieve a minimum of 90% control and likely would achieve 99% control?” Myre Decl., Ex. 65 at ESA_036603. ESA’s project manager (Victoria Evans) has testified that in ESA’s discussions with BAAQMD, ESA was informed by BAAQMD that permitting requirements would result in a 95 percent reduction in

⁸ “BACT” is a commonly used acronym for “Best Available Control Technology.”

emissions at the Terminal, and that ESA did not disagree with BAAQMD's statement. Myre Decl., Ex. 33 (Evans Tr.) at 238:3-239:16.

34. Taking the low end of BAAQMD's "minimum" dust control requirement of 90%, as referenced above, total PM2.5 emissions from "Unloading," "Transfer," "Storage" and "Transloading," using ESA's own emissions formula for those operations, would drop from 2.7 tons/year to 0.27 tons/year, and 14.8 to 1.48 lbs/day.

35. I have reviewed the June 23, 2016 City Staff Report ("Staff Report"). The Staff Report contains a reprint of Table 5-7 on page 12. *See* Myre Decl., Ex. 28 at 12. It states that "overall emissions from the OBOT project are expected to exceed the City of Oakland's CEQA Thresholds of Significance." *Id.* CEQA (California Environmental Quality Act) Thresholds of Significance are generally used by public agencies (including BAAQMD) to screen for potentially significant sources of pollution in the context of environmental impact review. The City's CEQA Thresholds of Significance for PM2.5 are 10 tons per year and 54 pounds per day. *Id.*

36. By correcting the TFV in ESA's Staging calculation (*see* paragraph 28 above) and reporting controlled rather than uncontrolled emissions from OBOT Operations (assuming a 90% control efficiency), the PM2.5 emissions for Staging and OBOT Operations in Table 5-7 would drop from 21 tons per year to 0.84 tons per year, or 4.6 pounds per day. If those changes were incorporated into Table 5-7's estimates for "PROJECT TOTAL – Oakland," the total PM2.5 emissions reported in Table 5-7 would drop from 21 to 6.95 tons per year and 115 to 38.4 pounds per day. These are below the City's CEQA Thresholds of Significance of 10 tons per year and 54 pounds per day.

V. Greenhouse Gas Emissions and Long Range Transport of Pollutants

37. With respect to greenhouse gas ("GHG") emissions, the Staff Report and the ESA Report estimated that "15.65 million metric tons of CO2 would be produced annually if all exported coal were combusted in power plants overseas." Myre Decl., Ex. 45 at 7-4. According to ESA this would result in 18.3 million metric tons ("MMT") of CO2e emissions, which would cause an

1 “incremental increase” in GHG emissions . *Id.* The Staff Report contains the same estimate of 18.3
2 MMT. *See* Myre Decl., Ex. 28 at 15.

3 38. The ESA Report states that this increase in GHG emissions would contribute
4 “incrementally to global climate change along with sea level rise that would be experienced locally
5 in Oakland.” Myre Decl., Ex. 45 at 7-4. The ESA Report contains no comparison of 18.3 MMT to
6 the total inventory global GHGs. The ESA Report contains no estimate of the magnitude of the
7 increase in local sea levels, if any, that would be attributable to the hypothetical “incremental
8 increase” in GHG emissions. The Staff Report and the City’s coal Ordinance also do not contain
9 such estimates.

10 39. The ESA Report also states that overseas combustion of coal and petcoke will cause
11 the resulting pollution to be transported to the Bay Area. ESA states that “characterizing the
12 magnitude and impacts of transported pollution is difficult” and that “[t]he amount of pollution being
13 transported on international scales is generally quite small compared to domestic sources.” Myre
14 Decl., Ex. 45 at 7-8. The ESA Report does not contain an estimate of the “magnitude and impacts of
15 transported pollution.” The Staff Report and the Ordinance also do not contain such estimates.

16 40. I have attempted to estimate the local effect on sea levels assuming the coal exported
17 from the Terminal did in fact result in 18.3 MMT per year of CO₂e emissions. If compared to
18 global inventories, 18.3 MMT would represent on the order of 0.04% (less than one tenth of one
19 percent) of the global total. This number is conservative in a number of respects. The theoretical
20 effect of such a small increment on sea levels is far too small to meaningfully measure or estimate.

21 41. Regarding the burning of coal overseas, I estimate that burning 5 million metric tons
22 of coal in East Asia could *theoretically* cause an increase of 0.0001 µg/m³ of PM_{2.5} in North
23 America. This is far too small to meaningfully measure or estimate.

24 **VI. Other California Terminals**

25 42. I visited a terminal in Long Beach, California, that primarily exports petroleum coke.
26 I have confirmed that the Long Beach coke terminal operates pursuant to a SCAQMD permit by
27

1 searching SCAQMD's public permit database, available at
2 <http://www3.aqmd.gov/webappl/fim/prog/search.aspx>.

3 43. I have also confirmed that the Long Beach coal terminal that is referenced in the
4 ESA Report (Myre Decl., Ex. 45 at 2-21) operates pursuant to a permit from SCAQMD. I did this
5 by searching SCAQMD's public permit database, available at
6 <http://www3.aqmd.gov/webappl/fim/prog/search.aspx>.

7
8
9 I declare under penalty of perjury under the laws of the United States of America that the
10 foregoing is true and correct. Executed November 20, 2017, at Petaluma, California

11
12
13
14 /s/ Lyle Chinkin
Lyle Chinkin

ATTESTATION

I, Robert Feldman, am the ECF User whose ID and password are being used to file "Declaration of Lyle Chinkin in Support of Plaintiff Oakland Bulk & Oversized Terminal, LLC's Motion for Summary Judgment." In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that Lyle Chinkin has concurred in this filing.

DATED: November 20, 2017

/s/ Robert Feldman
Robert Feldman

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

2 Robert P. Feldman (Bar No. 69602)

3 bobfeldman@quinnemanuel.com

4 David Myre (Bar No. 304600)

5 davidmyre@quinnemanuel.com

6 Eliyahu Ness (Bar No. 311054)

7 eliness@quinnemanuel.com

8 555 Twin Dolphin Drive, 5th Floor

9 Redwood Shores, California 94065-2139

10 Telephone: (650) 801-5000

11 Facsimile: (650) 801-5100

12 QUINN EMANUEL URQUHART & SULLIVAN, LLP

13 Meredith M. Shaw (Bar No. 284089)

14 meredithshaw@quinnemanuel.com

15 50 California Street, 22nd Floor

16 San Francisco, CA 94111

17 Telephone: (415) 875-6600

18 Attorneys for Plaintiff

19 OAKLAND BULK & OVERSIZED TERMINAL, LLC

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
NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Date: January 10, 2018

Time: 10 a.m.

Ctrm.: No. 2, 17th Floor

Honorable Vince Chhabria

V. THE CITY BREACHED THE DEVELOPMENT AGREEMENT

OBOT is likewise entitled to summary judgment that the City breached the DA. The DA permits new regulations to be applied to the Terminal only if there is “substantial evidence” of a condition “substantially dangerous” to the health or safety of “occupants or users of the Project,” or its “adjacent neighbors.” Ex. 4 (DA) at § 3.4.2; *see also* D.E. 71, at 2.³⁹ Any such new law or regulation may impair a vested right only if the law or regulation is “necessary” to protect health and safety. *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 421 (2016); *Davidson v. Cty. of San Diego*, 49 Cal. App. 4th 639, 648-49 (1996). This standard is far more demanding than the deferential standard by which general welfare or zoning ordinances may be judged. *See Stewart Enterprises*, 248 Cal. App. 4th at 422–23. On the undisputed facts, no substantial danger to health or safety can be established.

A. Pre-Existing Regulations Will Undisputedly Prevent a Substantial Danger

1. The BAAQMD Permit Process Will Prevent a Substantial Danger to Air Quality

The Ordinance recited without supporting evidence that “pre-existing local, state and/or federal laws are inapplicable and/or insufficient to protect and promote the health, safety and/or general welfare” of Oakland “Constituents.” Ex. 1 (Ordinance) at 2. The Resolution contained the same finding. Ex. 50 (Resolution) at 2. This finding is insufficient to satisfy Section 3.4.2 for at least two reasons. *First*, the finding is unsupported by any, much less substantial evidence, all of which is to the contrary. *Second*, while this finding might support the application of the Ordinance to “facilities” without OBOT’s vested rights (if there were any such facilities), it fails to address, much less satisfy, the “substantial danger” test in Section 3.4.2. This was no drafting error: comprehensive federal and state laws ensure that operations at the Terminal will not result

³⁹ There were no negotiations or discussions about the meaning of 3.4.2 between the parties. *See* Ex. 24 (Ranelletti Tr.) at 207:17-212:24. DA Section 3.4.2 provides: “City shall have the right to apply City Regulations adopted by the City after the Adoption Date, if such application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety.” Ex. 4.

1 in a condition substantially dangerous to health and safety.⁴⁰

2 It is well established that “[t]wo statutory schemes regulate air quality in California: the
3 federal Clean Air Act (42 U.S.C. §§ 7401 et seq.) and the California Clean Air Act (Cal. Health &
4 Safety Code § 39000 et seq.).” *Friends of Oceano Dunes, Inc. v. San Luis Obispo Cty. Air*
5 *Pollution Control Dist.*, 235 Cal. App. 4th 957, 961 (2015). Under the Federal Clean Air Act
6 (“FCAA”), the Environmental Protection Agency (“EPA”) sets national ambient air quality
7 standards (“NAAQS”) for the maximum allowable concentration of a given pollutant. *Id.*; *see*
8 *also* Chinkin Decl., ¶ 6. As the City’s retained health expert witness in this litigation testified, the
9 NAAQS were designed by the EPA to “protect public health, including the health of at-risk
10 (sensitive) populations.” Ex. 53 (Moore Tr.) at 42:1-14, 63:11-21; *see also* Chinkin Decl., ¶ 6.

11 The FCAA delegates to each state the primary responsibility for protection of air quality
12 within its geographic boundaries. *Friends of Oceano Dunes*, 235 Cal. App. 4th at 961. Pursuant
13 to this delegation and the California Clean Air Act, Cal. Health & Safety Code § 39000, *et seq.*
14 (“CCAA”), the California Air Resources Board is charged with developing and enforcing a State
15 Implementation Plan to ensure compliance with federal air quality standards. *See* Cal. Health &
16 Safety Code § 39602. As relevant here, the CCAA further assigns regulatory authority over air
17 quality to regional “air districts,” such as BAAQMD for the Bay Area, and the South Coast Air
18 Quality Management District (“SCAQMD”) for certain southern California counties. *Nat. Res.*
19 *Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 651 F.3d 1066, 1069 (9th Cir. 2011). The
20 mission of a California Air District is to “achieve and maintain compliance, in its regional
21 jurisdiction, with state and federal ambient air quality standards”—air quality standards that
22 protect the public. *Cal. Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist.*, 62 Cal. 4th 369,
23 378 (2015); *see also* Ex. 53 (Moore Tr.) at 42:1-13, 63:11-21. To accomplish this objective,
24 BAAQMD “monitors air quality, issues permits to certain emitters of air pollution, and
25 promulgates rules to control emissions.” *Cal. Bldg. Indus. Assoc.*, 62 Cal. 4th at 378.

26 ⁴⁰ As part of its original Scope of Work, ESA had proposed to “[d]evelop a matrix indicating
27 jurisdictional authority for regulation of operational activity covered in the Project or for relevant
28 health and safety aspects.” *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 187:6-15; Ex. 32 (1/8/16
ESA Email with SOW) at ESA_039073. At the City’s instruction, however, it did not do so. *See*
Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 187:6-15.

1 There is no dispute that OBOT must obtain an Authority to Construct and Permit to
 2 Operate (“BAAQMD Permit”) before it may construct, operate and continue to operate the
 3 Terminal. *See* Tagami Decl. ¶ 3; Ex. 24 (Ranelletti Tr.) at 284:1-9, 290:16-19; Ex. 27 (Cappio
 4 Tr.) at 175:2-10, 177:4-178:3. For several reasons it is likewise undisputed that a BAAQMD
 5 Permit—if it is issued—will protect against a substantially dangerous air quality condition.

6 *First*, the City has admitted this central proposition. Claudia Cappio, the Deputy City
 7 Administrator with overall responsibility for the OBOT project and the principal author and
 8 signatory to the June 24 Staff Report,⁴¹ appeared as the City’s Rule 30(b)(6) witness. Ms. Cappio
 9 testified she “ha[s] [no] reason to think that BAAQMD would enforce EPA standards in a way
 10 that permitted a substantial danger to people in the City of Oakland,” Ex. 27 (Cappio Tr.) at 273:1-
 11 12; likewise, she never “reach[ed] a determination that BAAQMD’s rules and regulations were
 12 inadequate to ensure adequate air quality with respect to the OBOT terminal.” *Id.* at 180:18-23.

13 *Second*, three coal or petcoke terminals are currently operating in the BAAQMD region
 14 with BAAQMD permits. *See* Ex. 45 (ESA Report) at 2-18-2-20; Ex. 33 (ESA 10/31/17 30(b)(6)
 15 Tr.) at 76:21-25, 77:25-78:9, 82:17-24. Neither the Ordinance, the Resolution, nor the ESA
 16 Report addresses the fact that these terminals operate pursuant to BAAQMD permits and none of
 17 these documents cites any evidence that these nearby terminals pose a substantial danger to
 18 anyone. The SCAQMD likewise has issued permits to two such terminals at the Port of Long
 19 Beach.⁴² The City Council made no finding that any of these terminals had Air District permits or
 20 that they posed any substantial danger.

21 *Third*, the Ordinance itself demonstrates that a BAAQMD permit protects against a
 22 substantial danger. The Ordinance expressly exempts from its scope “on-site manufacturing
 23 facilities” *in Oakland* that “consume” (*e.g.*, burn) coal or coke so long as they are operated
 24 pursuant to “permits granted by the [BAAQMD].” Ex. 1 at § 8.60.040(C). The City’s Rule
 25 30(b)(6) witness admitted that reliance on a BAAQMD permit would ensure safe air quality for

26 ⁴¹ *See* Ex. 27 (Cappio Tr.) at 207:12-208:2, 419:1-12.

27 ⁴² *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 84:16-85:13; Declaration of Lyle Chinkin in
 28 Support of OBOT’s Motion for Summary Judgment (“Chinkin Decl.”) ¶¶ 42-43; Ex. 45 (ESA
 Report) at 2-18-21 (listing terminals but not reporting that they operate with Air District permits or
 even claiming they posed a substantial danger).

1 manufacturing facilities that consume coal. *See* Ex. 25 (Cappio Tr.) at 55:7-17, 87:3-88:1; *see*
 2 *also* Tagami Decl. ¶ 5 (OBOT will not burn coal). The City Council did not explain why the
 3 BAAQMD permit process is sufficient to ensure safe air quality for manufacturing facilities that
 4 “consume” coal—and, by necessity, handle and store it—but not for a modern terminal.

5 Finally, to ensure that the concentration of pollutants is below the NAAQS,⁴³ BAAQMD
 6 monitors air quality at stations around the Bay Area, including a station in West Oakland. *See*
 7 Chinkin Decl. ¶ 8-9. If even a single BAAQMD monitor in the Bay Area becomes “out of
 8 attainment” (that is, if the concentration of a certain pollutant at that location is higher than the
 9 NAAQS threshold), the entire Bay Area region becomes “out of attainment” for that pollutant, and
 10 BAAQMD must act to bring it back into attainment. *See Id.* ¶ 10; Ex. 27 (Cappio Tr.) at 178:5-
 11 16. BAAQMD’s permitting requirements for any new emissions source provide that “[a] permit
 12 application cannot be approved unless [a] modeling analysis demonstrates that the proposed
 13 source emissions will not interfere with the attainment or maintenance of a National Ambient Air
 14 Quality Standard (NAAQS).” Chinkin Decl. ¶ 11; Chinkin Decl. Ex. E (BAAQMD Permit
 15 Handbook). Thus, if a modeling analysis showed that “[t]he Storage or Handling of Coal or
 16 Coke” at OBOT would cause “exceedances of ambient air quality standards,” BAAQMD would
 17 not issue the relevant permits without appropriate controls and mitigation. The City Council’s
 18 record contained no such modeling analysis: the City refused to allow ESA to do any modeling.
 19 *See* Ex. 33 (ESA 10/31/17 30(b)(6) Tr.) at 203:1-10.⁴⁴

20 **2. The City’s Evidence Establishes that the BAAQMD Permit Process** 21 **Should Have Been Allowed to Proceed**

22 The Ordinance states that it seeks to “eliminat[e] *any* risk of release into the environment

23 ⁴³ As set forth above, the NAAQS are the maximum allowable concentrations of specific
 pollutants in the ambient air. *See* Chinkin Decl. ¶ 6.

24 ⁴⁴ The ESA Report contains “emissions estimates.” *See* Ex. 45 (ESA Report) at 5-17. Such
 25 estimates purport to estimate the amount of emissions of “fugitive coal dust” that would be
 26 released during the transportation of coal by rail and from the unloading, storage, transfer and
 27 transloading of coal at the Terminal. *See id.* Emission estimates are only part of the process of
 28 predicting the impact of those emissions on air quality. Chinkin Decl. ¶ 12. “Modeling” is used to
 predict whether, and to what extent, those emissions would increase the concentration of
 pollutants at a given location. *Id.* Modeling is only as good as the emissions estimates on which
 the models are based; if the estimates are flawed, the model will be similarly flawed to the same
 extent. *See* Ex. 54 (Gray Tr.) at 194:13-19.

(including without limitation airborne particulate . . .).” Ex. 1 at § 8.60.010 (emphasis added). There is absolutely no evidence that the release of “any” quantum of particulate matter poses a danger, much less a substantial danger: as the City’s retained health expert in this litigation testified, the U.S. EPA (which the City’s expert concedes is both competent and capable) has identified “permissible” concentrations of pollutants, including particulate matter, below which the “health of any sensitive group of the population” will be protected. Ex. 53 (Moore Tr.) at 63:5-21, 92:21-93:1; *see also* Declaration of Dr. Andrew Maier in Support of OBOT’s Motion for Summary Judgment (“Maier Decl.”), ¶¶ 3-5; Ex. 20 (Cashman Tr.) at 171:10-15 (even operation of office park “would increase the amount of PM 2.5 and PM 10 emissions in the air”).

The Ordinance also recites a “Finding,” incorporated into the Resolution, that the “transport and Storing and Handling of Coal or Coke” would pose a substantial danger because Coal and Coke “release fugitive dust, as particulate matter (PM10) and fine particulate matter (PM 2.5)” Ex. 1 (Ordinance) at § 8.60.020(B)(1)(a). The Ordinance contains no numerical estimates of these emissions. The only numerical emissions estimates that are arguably presented by the Ordinance were incorporated by reference from the June 23, 2016 Staff Report, which in turn relied on the ESA Report. *See* Ex. 1 (Ordinance) at 3; Ex. 27 (Cappio Tr.) at 247:16-248:5; Ex. 28 (6/23/16 Staff Report) at Attachment C. The Staff Report reproduced the following table from the ESA Report that purported to be a “Summary of Emissions Estimates . . . at OBOT”:

**SUMMARY OF EMISSIONS ESTIMATES FROM RAIL TRANSPORT,
STAGING/SPUR TRAVEL, UNLOADING, STORAGE, TRANSFER AND SHIP LOADING OF COAL AT
OBOT**

Fugitive Coal Dust Emissions Source*	tons/yr			lbs/day		
	TSP	PM ₁₀	PM _{2.5}	TSP	PM ₁₀	PM _{2.5}
Rail Transport*						
BAAQMD	2,102	988	148	12,012	5,646	847
Oakland	82	38	6	468	220	33
So Emeryville	35	17	3	203	95	14
San Leandro	98	46	7	562	264	40
Staging at Port Railyard, Rail Spur Trip to OBOT	156	78	18	889	445	67
SUBTOTAL - Oakland	238	116	18	1,357	665	100
OBOT Operations						
Unloading	11.9	5.7	0.9	66.0	31.2	4.7
Storage	3.2	1.5	0.2	17.7	8.4	1.3
Transfer	10.4	4.9	0.7	57.6	27.2	4.1
Transloading	11.9	5.7	0.9	66.0	31.2	4.7
SUBTOTAL	37.5	17.7	2.7	207.3	98.1	14.8
PROJECT TOTAL** - Oakland	276	134	21	1,564	763	115

1 See Ex. 28 (Staff Report) at 12. Based on this table (hereafter referred to as “Table 5-7”⁴⁵), the
 2 City Staff wrote in the Staff Report that “overall emissions from the OBOT project are expected to
 3 exceed the City of Oakland CEQA Thresholds of Significance” which would be “presumptively a
 4 substantially dangerous condition to health.”⁴⁶ *Id.* Notably, ESA made no such statement. See
 5 Ex. 45 (ESA Report) at 5-17-5-18. Neither the Ordinance nor the Resolution contain any
 6 reference to “thresholds” other than the “City of Oakland CEQA Thresholds of Significance,” and
 7 the City concedes that these thresholds were the only air quality thresholds potentially considered
 8 by the City Council.⁴⁷ Ex. 27 (Cappio Tr.) at 314:18–315:2.

9 Table 5-7 is divided into two parts: the top portion addresses “Rail Transport”; the bottom
 10 portion addresses “OBOT Operations.” The estimates for “Rail Transport” are divided into
 11 several geographic areas, *i.e.*, “BAAQMD,” “Oakland,” “So Emeryville,” “San Leandro,” and also
 12 contains estimates for “Staging at Port Railyard, Rail Spur Trip to OBOT” (hereafter “Staging”).⁴⁸
 13 See Chinkin Decl. ¶ 17. The estimates for “OBOT Operations” are divided into various
 14 “operations” or activities, *i.e.*, “Unloading,” “Storage,” “Transfer,” and “Transloading.” *Id.* Table
 15 5-7 reports emissions of particulate matter in columns labeled “TSP,” “PM10” and “PM2.5,”
 16 which contain numbers for different sizes of particulate matter emissions. *Id.* ¶¶ 15-16.

17 The values reported in Table 5-7 are incorrect for many reasons. For example, the
 18 emissions estimates for “Staging at Port Railyard, Rail Spur Trip to OBOT” are 17 times higher
 19 than they should be. *Id.* ¶ 28. ESA arrived at this grossly inflated result because it disregarded its

21 ⁴⁵ For ease of reference, OBOT refers herein to the table that depicts the emissions estimates as
 22 “Table 5-7” as it is labelled in the ESA Report. The Staff Report table on page 12 is identical to
 23 Table 5-7 in numerical values. Compare Ex. 28 (Staff Report) at 12 with Ex. 45 (ESA Report) at
 24 5-17. The differences in the tables are the omission of the phrase “uncontrolled air emissions . . .
 25 .” and the addition of the double asterisk (**) at the bottom of the Staff Report table.

24 ⁴⁶ Although Table 5-7 estimates PM10 and PM2.5 emissions, the Staff Report statement
 25 regarding “substantial danger” based on CEQA thresholds specifically referred to PM2.5
 26 emissions. See Ex. 27 (Cappio Tr.) at 292:8-17.

26 ⁴⁷ CEQA Thresholds of Significance are generally used during the environmental review of
 27 projects to screen for potentially significant sources of pollutants. Chinkin Decl., ¶ 35. If
 28 estimated emissions from a facility exceed those thresholds, then ordinarily modelling is done to
 determine whether the emissions would cause violations of the NAAQS. See *id.*, ¶ 12

⁴⁸ As used by ESA, “Staging” refers to the movement of the trains once they exit the mainline
 until they unload the coal. See Ex. 45 (ESA Report) at 5-10-5-11.

own documentation and used as a key input in its emissions formula a “threshold friction velocity” value that it now concedes was “obvious[ly]” incorrect. Ex. 33 (ESA 10/31/17 Tr.) at 262:11-263:20; Chinkin Decl. ¶¶ 20-24. As another example, ESA’s estimates for “OBOT Operations” are reported as based on “Controlled Operations” (*i.e.*, the emissions that would result after dust mitigation technology is applied) but the numbers in the ESA Report are actually the estimates for “uncontrolled” operations. *See id.* ¶¶ 29-33. By correcting those two flaws in ESA’s estimates, the resulting emissions would be well below the City’s own significance thresholds. *Id.* ¶¶ 35-36.

The City’s response to these flaws in the ESA Report has been two fold. First, the City’s retained expert for this litigation (Ranajit Sahu) essentially repeated the same mistakes, coming to almost identical numerical values as ESA. Chinkin Decl. ¶ 25-26; Ex. 55 (Sahu Tr.) at 220:11-21. Tellingly, Sahu testified that he did not know whether the ESA estimates were for Controlled or Uncontrolled operations, *id.* at 15:13-16:17, despite having adopted ESA’s estimates for three out of four OBOT Operations entirely unchanged. *See* Chinkin Decl. ¶ 25; *compare* Ex. 56 (Sahu Spreadsheets) *with* Ex. 57 and Ex. 58 (ESA Spreadsheets). Likewise, Sahu did not address in his reports the use of the wrong threshold friction velocity; in fact, his calculations used the same value. *See* Chinkin Decl. ¶ 26; Ex. 56 (Sahu Spreadsheets); Ex. 55 (Sahu Tr.) at 220:11-21.

Far more important for purposes of this motion, however, is Sahu’s excuse for ESA’s errors: his opinion is that no emissions estimates for the Terminal should have been offered by ESA (or by him, now) because the documentation of the proposed Terminal on which ESA relied (which was provided by OBOT during the public hearing process leading to the Ordinance) was preliminary.⁴⁹ Of course the documentation was preliminary: the OBOT Basis of Design itself states that it is a “first step in the project’s design process,” representing about 10% of that process. Ex. 49 (Basis of Design) at OB004322. The ESA Report specifically noted that OBOT’s plans were merely “conceptual.” Ex. 45 (ESA Report) at 2-1. The material point for this Motion, however, is that Sahu’s testimony effectively establishes that the ESA Report could not have been substantial evidence of a substantial danger. He admitted that “to assess whether the emissions”

⁴⁹ *See* Ex. 55 (Sahu Tr.) at 119:22-120:12, 123:20-24, 124:18-125:3, 126:20-127:10, 127:15-17, 140:21-141:1, 142:8-14, 177:18-178:3, 192:16-24, 201:7-10, 258:21-259:4; 260:23-261:13.

1 from the Terminal “are going to present a significant harm to adjacent folks and impacted
 2 residents” would require “precis[ion] in the engineering estimates,” *see* Ex. 55 (Sahu Tr.) at 128:7-
 3 13—the precision he conceded would be required by an air district such as BAAQMD before it
 4 would issue a permit. *See id.* at 261:14-262:11.⁵⁰ The City, however, was in such a “crazy” rush
 5 to adopt an unnecessary ban⁵¹ that it passed the Ordinance without the required data subs rather
 6 than permitting BAAQMD to address air quality in the appropriate course.

7 **3. OSHA and Cal/OSHA Worker Safety Regulations Will Prevent a** 8 **Substantial Danger to Workers**

9 The Ordinance included a finding, incorporated into the Resolution, that “[w]orkers would
 10 be closest to the fugitive coal dust and respirable fine particulates during transport and staging of
 11 loaded cars for unloading and within the enclosed facilities.” Ex. 1 (Ordinance) at
 12 § 8.60.020(B)(1)(d). The City failed to make any findings, however, that existing regulations of
 13 applicable agencies, including the federal Occupational Safety and Health Administration
 14 (“OSHA”) and Cal/OSHA,⁵² would be insufficient to protect workers from a “substantially
 15 dangerous” condition at the Terminal.

16 The City acknowledged at deposition that OSHA applies regulations for health and safety
 17 of workers at the Terminal. *See* Ex. 27 (Cappio Tr.) at 174:16-18, 175:12-15. Critically for
 18 present purposes, the City has further admitted that it did not “reach a determination that OSHA’s
 19 rules and regulations would be inadequate to ensure [worker] safety at the terminal.” *Id.* at 181:1-
 20 9. Nor did the City determine that workers at other coal terminals had suffered any ill effects
 21 whatsoever from working at those terminals. *Id.* at 338:4-12. Unlike the City, ESA actually
 22 evaluated OSHA’s “airborne coal dust restrictions,” Ex. 33 (10/31/17 ESA 30(b)(6) Tr.) at
 23 187:19-24, and did not conclude that the OSHA restrictions were insufficient to protect workers at
 24 the Terminal. *Id.* at 188:9-11.

25 Both OSHA and Cal/OSHA set “Permissible Exposure Limits” (“PELs”) for exposure to

26 ⁵⁰ ESA has similarly conceded that it would have needed “to do more than [ESA] did to satisfy
 27 CEQA analysis or an air quality permit.” Ex. 33 (10/31/17 ESA 30(b)(6) Tr.) at 62:18-20.

⁵¹ *See* Ex. 37 (5/4/16 Internal ESA Email) at ESA_038570.

28 ⁵² Cal/OSHA is common name for the California Division of Occupational Safety and Health.
See Tagami Decl. ¶ 3.

1 coal dust. Maier Decl. ¶ 6. OBOT has always agreed that the Terminal will be subject to, and will
 2 comply with, all OSHA and Cal/OSHA regulations, *see* Ex. 47 (10/6/15 OBOT/TLS Response to
 3 City Questions) at OAK0007469, Tagami Decl. ¶ 3, which would include PELs. The City has
 4 made no findings that such PELs, or any other requirements of OSHA or Cal/OSHA will not
 5 protect against a “substantially dangerous” condition. *See* Ex. 27 (Cappio Tr.) at 181:1-9.

6 In sum, the record did not—and could not—support a finding that it was “necessary” to
 7 ban coal to protect workers’ health.

8 **4. Pre-Existing Fire Safety Measures Will Prevent a Substantial Fire** 9 **Danger**

10 The Ordinance made a number of “findings,” incorporated into the Resolution, regarding
 11 the potential dangers of coal fires. Setting aside the inaccuracy of these findings, it is undisputed
 12 that the City did not, and could not, make a finding that the City’s current regulations and
 13 requirements would be inadequate to protect against any “substantial danger.”

14 A September 10, 2015 Staff Report (“Sep. 10 Staff Report”), Ex. 59 at 5, produced by City
 15 Staff acknowledged that the National Fire Protection Association (“NFPA”) “rates the health risks
 16 and fire risks for commodities on a scale from 0 - 4” in its “704 Material Hazards for Emergency
 17 Response index.” *Id.* Bituminous coal, the Staff Report stated, has an “NFPA rating of one (1)
 18 for health risks and a rating of one (1) for fire risks as there are no reactivity or low fire risks
 19 associated with that commodity.” *Id.* The Oakland Fire Department (“OFD”) Marshal reported
 20 the same ranking to Ms. Cappio, who—as the City’s 30(b)(6) witness—acknowledged this meant
 21 the danger ranking of coal to be “low . . . as the rankings for commodities go.” Ex. 27 (Cappio
 22 Tr.) at 163:11-164:10. As Ms. Cappio testified, she understood that the OFD:

23 use[s] [NFPA ratings] as a basis for evaluating materials that may be stored,
 24 managed or . . . handled on particular sites throughout the City of Oakland or
 25 actually when they’re responding to an emergency, let’s say there’s a car accident
 26 involving a tanker and that tanker has a particular set of ratings, they know
 27 immediately what some of the dangers or risks may be.

28 *Id.* at 166:3-23. In other words, the OFD would consider bituminous coal a low risk commodity.
 And the Ordinance—which refers to coal generally and not to bituminous coal in particular—
 ignored that the terminal operator had already agreed in writing to handle only bituminous coal in

1 response to a specific question from the City. Ex. 48 (9/15/15 HDR Report) at OAK0007470.

2 Ms. Cappio attended meetings with the OFD, including Miguel Trujillo, the City's current
3 Fire Marshal, to discuss "permitting and processing of the plans for a bulk terminal." Ex. 27
4 (Cappio Tr.) at 169:15-170:3. Among these meetings was "a joint meeting" in the spring of 2016
5 attended by OBOT representatives. *See id.* at 171:12-17. Ms. Cappio specifically recalled that the
6 OFD did not say it would disapprove of a terminal because it would handle coal. *Id.* at 173:11-13;
7 *see also* Tagami Decl. ¶ 4.

8 Indeed, the OFD's assessment is supported by ESA's sub-consultant on fire safety (Steve
9 Radis), *see* Ex. 33 (10/31/17 ESA Tr.) at 15:7-14), who wrote: "Major fires at coal terminals are
10 not common or widespread," Ex. 60 (6/15/16 Internal ESA Email) at ESA_036704.
11 Mr. Radis's opinion was written in response to the City's request to ESA for more information on
12 "spontaneous combustion and related issues" to "bolster" the safety section of the ESA Report.
13 *See id.* at ESA_03706. Mr. Radis's response to the request to "bolster" the fire safety section
14 appears to have been copied, verbatim, into Chapter 6 of the ESA Report—except for his
15 statement that "[m]ajor fires at coal terminals are not common or widespread, but have happened
16 in the past." *See* Ex. 45 (ESA Report at 6-1-6-4); Ex. 35 (Brown Tr.) at 218:3-14, 219:9-19.

17 Even in the unlikely event of a fire at the Terminal, the ESA Report does not conclude that
18 OFD could not adequately respond to fires; on the contrary, it plainly states the opposite by noting
19 only that "a significant investment in both equipment and training is necessary for local fire
20 departments to respond to a coal fire." *See* Ex. 45 (ESA Report) at 6-3. The parties to the DA
21 fully agreed that OBOT must submit a "fire safety phasing plan" to the City's Fire Services
22 Division which would include "all of the fire safety features incorporated into the project and the
23 schedule for implementation of the features." Ex. 59 (Standard Conditions of Approval /
24 Mitigation Measures) at 48. If the OBOT fire safety plan did not adequately "address fire hazards
25 associated with the project," the Fire Services Division could "require changes to the plan or may
26 reject the plan" *Id.*

27 In sum, there was no evidence that applying a blanket ban on coal through the Terminal
28 was "necessary" to prevent a substantially dangerous fire condition.

1 **B. Any Incremental Impact on Greenhouse Gases and Global Pollution**
2 **Undisputedly Cannot Impact the Health and Safety of Terminal Occupants**
3 **and Adjacent Neighbors “in Any Meaningful Way”**

4 The City’s findings in the Ordinance, incorporated into the Resolution, include the
5 statement that “[t]he export of Coal from facilities at the City of Oakland, including in West
6 Oakland, would lead to the burning of Coal overseas.” *See* Ex. 1 (Ordinance) at 7. This may well
7 be the actual reason for the passage of the Ordinance, but it does not satisfy the DA’s requirement
8 of “substantial evidence” of a “substantial danger” to “adjacent neighbors” for several reasons.
9 *See* Ex. 4 (DA) § 3.4.2.

10 *First*, with respect to global greenhouse gas (“GHG”) emissions, assuming, as ESA did,
11 that OBOT would export 5 million tons per year of coal, the burning of that coal would contribute
12 approximately 0.04% to global emissions. Chinkin Decl. ¶ 40. The insignificance of GHG
13 emissions on Oakland is noted in ESA’s comment on an internal draft of its original SOW:

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

18 Ex. 61 (1/6/2016 Internal ESA Draft SOW) at ESA_035975.

19 *Second*, with respect to the City’s finding regarding the “incremental effect” of pollution
20 from the combustion of the exported coal affecting the Bay Area, the result is the same: the local
21 impact of any such pollution would be immeasurably small. *See* Chinkin Decl. ¶¶ 39, 41.

22 Finally, and quite tellingly, the ESA Report characterizes the impact on global GHG
23 emissions and local sea levels as “incremental,” but does not quantify the size of the
24 “increment[.]” *See* Ex. 45 (ESA Report) at 7-4; Chinkin Decl. ¶ 38. The ESA Report similarly
25 does not state that the “incremental” effect would constitute a “substantially dangerous” condition.

26 In sum, the City cannot seriously contend that an almost immeasurable increase in GHG
27 and air pollution—no matter how small that increment is—would constitute a substantial health
28 and safety danger to “adjacent neighbors” of the Terminal. *See* Ex. 4 (DA) § 3.4.2.

29 **CONCLUSION**

30 OBOT’s motion for summary judgment should be granted.

1 Dated: November 20, 2017

Respectfully submitted,

2
3 By: /s/ Robert P. Feldman

Robert P. Feldman

4 Attorney for Plaintiff
5 OAKLAND BULK & OVERSIZED
6 TERMINAL, LLC
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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)	Case Number: 3:16-CV-7014-VC
Oakland Bulk & Oversized Terminal, LLC)	
)	JOINT CASE MANAGEMENT
Plaintiff,	)	STATEMENT
)	
)	
vs.)	
)	
City of Oakland)	
)	
Defendant.)	
)	
Sierra Club and San Francisco Baykeeper,	)	Date: July 12, 2017
	)	Time: 1:30 p.m.
	)	Ctrm.: No. 4, 17 th Floor
Defendants-Intervenors.	)	Judge: Honorable Vince Chhabria

Pursuant to Rules 16 and 26 of the FRCP, Civil Local Rule 16-9, and the Standing Order for All Judges of the Northern District of California – Contents of the Joint Case Management Statement, 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 Case Management Statement for the Case Management Conference set for July 12, 2017, at 1:30 P.M.

1. Jurisdiction & Service: Service was effected on the City on December 9, 2016. D.E. 10. By Order dated June 6, 2017 the Court recognized Defendant-Intervenors as permissive intervenors and accepted their Answer for filing. D.E. 71. On June 27, 2017, the City filed its Answer. D.E. 77.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and 28 U.S.C. § 1367, and venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(b)(2).

2. Facts: See Joint CMC Statement for April 20, 2017 CMC. D.E. 60.

1 **3. Legal Issues:** OBOT alleges three claims for relief, which raise legal issues as noted:

- 2 1. Unconstitutionality under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3):
Whether the prohibition on the storage and handling of coal and petcoke by
3 OBOT within the City, imposes burdens on interstate commerce in violation of
4 the Commerce Clause.
- 5 2. Preemption under:
- 6 a. The Interstate Commerce Commission Termination Act, 49 U.S.C.
§ 10501 *et seq.* (“ICCTA”)—whether the ICCTA, in particular provisions
7 governing “transportation by rail carriers”, preempts the Ordinance and
Resolution.
- 8 b. The Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*
9 (“HMTA”)—whether the challenged regulation of the subject
commodities is covered by the HMTA and its implementing regulations
10 and preempted thereunder.
- 11 c. The Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.*—whether the
12 challenged regulation unreasonably discriminates against shippers of coal
and petcoke.
- 13 3. Breach of the Development Agreement (“DA”): Whether the City’s adoption and
14 application of the Ordinance and Resolution to OBOT is a breach of the DA, and
whether OBOT’s claim is time-barred.

15 Separate Statement by the City:

16 Since the last CMC, a legal issue has arisen as to whether OBOT plans to seek
17 damages in this action or will commit to forego any claims for damages, which
18 implicates the City’s guaranteed and paramount right to a jury trial on all claims seeking
19 damages *before* trial of any non-jury issues. This issue is addressed in depth at section 11
20 below (pp. 6-11.)

21 **4. Motions**

22 Joint Statement by the Parties:

23 On June 6, 2017, the Court denied the City’s motion to dismiss the breach of
24 contract claim (third claim for relief), recognized Defendant-Intervenors as permissive
25 intervenors, and denied Defendant-Intervenors’ motion to dismiss the dormant
26 Commerce Clause claim (first claim for relief). D.E. 71.

27 There are no pending motions.

28 Separate Statement by OBOT: As discussed in Section 16 below, on April 20, 2017, the

11. Relief:**Separate Statement by OBOT:**

As noted in Section 5 above, OBOT filed a First Amended Complaint that revised Section D of its Prayer for Relief from “Award 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 above alleged misconduct.” to “Award 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 above 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.”

OBOT, without coyness or equivocation (*see* Section 11 Separate Statement by the City below), stands by its statements regarding the relief it is seeking in the two prior CMC Statements. Like any party to litigation, however, OBOT cannot foreclose the possibility of seeking damages at any point in the future.

Given the above, OBOT respectfully requests that the Court order that no appearance, or, in the alternative, only telephonic appearances, are necessary for the July 12, 2017 case management conference.

Separate Statement by the City:

First, the City does not concur that the Court should order that there not be appearances at the CMC. Second, the City believes there are significant issues, including as discussed below.

A. OBOT’S STATEMENTS THAT IT WAS NOT SEEKING DAMAGES AND ASSOCIATED REQUEST FOR AN EXPEDITED COURT TRIAL.

OBOT expressly stated in the two prior CMC Statements that it was not seeking damages and instead was seeking an expedited trial by the Court. Specifically:

The Joint CMC Statement for the for the April 20, 2017 CMC states:

Barbara J. Parker (SBN 69722)
City Attorney
Otis McGee, Jr. (SBN 71885)
Chief Assistant City Attorney
Colin Troy Bowen (SBN 152489)
Supervising Deputy City Attorney
OAKLAND CITY ATTORNEY
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612
Tel: 510.238.3601 Fax: 510.238.6500

Kevin D. Siegel (SBN 194787)
E-mail: ksiegel@bwsllaw.com
Gregory R. Aker (SBN 104171)
E-mail: gaker@bwsllaw.com
Christopher M. Long (SBN 305674)
E-mail: clong@bwsllaw.com
BURKE, WILLIAMS & SORESENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612-3501
Tel: 510.273.8780 Fax: 510.839.9104

Attorneys for Defendant
CITY OF OAKLAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO
BAYKEEPER,

Defendants-Intervenors.

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

**ANSWER TO FIRST AMENDED
COMPLAINT**

DEMAND FOR JURY TRIAL

Judge: Honorable Vince Chhabria

1 Defendant CITY OF OAKLAND ("City") hereby answers the First Amended Complaint,
 2 filed on June 14, 2017 ("Complaint") by Plaintiff OAKLAND BULK & OVERSIZED
 3 TERMINAL, LLC ("OBOT" or "Plaintiff") as follows:

4 **NATURE OF THE ACTION**

5 1. Answering paragraph 1, the City denies that it unconstitutionally abused its power.
 6 Further answering paragraph 1, the allegations therein are characterizations of OBOT's case that
 7 do not require a response. To the extent the foregoing does not answer any allegation of fact in
 8 paragraph 1, the City denies each and every allegation stated therein.

9 2. Answering the first sentence of paragraph 2, the City admits that OBOT seeks
 10 declaratory and injunctive relief against enforcement of Oakland City Council Ordinance
 11 No. 13385 C.M.S. (the "Ordinance") and Oakland City Council Resolution No. 86234 C.M.S.
 12 (the "Resolution"), and that the Ordinance and Resolution collectively prohibit the storage and
 13 handling of coal and coke at bulk materials facilities or terminals throughout the City of Oakland,
 14 including in and around OBOT's proposed rail and marine terminal. Answering the remaining
 15 allegations of the first sentence of paragraph 2, the City lacks sufficient information or knowledge
 16 to answer the allegations stated therein, and on that basis denies each and every allegation stated
 17 therein. Answering the second sentence of paragraph 2, the City denies each and every allegation
 18 stated therein.

19 3. Answering paragraph 3, the City admits that a Development Agreement dated
 20 July 16, 2013 ("DA") exists. Further answering paragraph 3, the allegations stated therein seek to
 21 characterize the contents of public records, which speak for themselves. Answering the
 22 remaining allegations of paragraph 3, the City lacks sufficient information or knowledge to
 23 answer the allegations stated therein, and on that basis denies each and every allegation stated
 24 therein. Answering footnote number 1 to paragraph 3, the allegations stated therein seek to
 25 characterize the contents of dictionary definitions, which speak for themselves. To the extent the
 26 foregoing does not answer any allegation of fact in paragraph 3, the City denies each and every
 27 allegation stated therein.

28 4. Answering paragraph 4, the City lacks sufficient information or knowledge to

1 answer the allegations stated therein, and on that basis denies each and every allegation stated
2 therein.

3 5. Answering paragraph 5, the City lacks sufficient information or knowledge to
4 answer the allegations stated therein, and on that basis denies each and every allegation stated
5 therein.

6 6. Answering paragraph 6, the City lacks sufficient information or knowledge to
7 answer the allegations stated therein, and on that basis denies each and every allegation stated
8 therein.

9 7. Answering the first and second sentences of paragraph 7, the City lacks sufficient
10 information or knowledge to answer the allegations stated therein, and on that basis denies each
11 and every allegation stated therein. Answering the third sentence of paragraph 7, the City denies
12 each and every allegation stated therein.

13 8. Answering paragraph 8, the City admits that it passed the Ordinance and
14 Resolution in 2016. Answering the remaining allegations of paragraph 8, the allegations stated
15 therein seek to characterize the contents of public records, which speak for themselves. To the
16 extent the foregoing does not answer any allegation of fact in paragraph 8, the City denies each
17 and every allegation stated therein.

18 9. Answering paragraph 9, the City denies each and every allegation stated therein.

19 10. Answering paragraph 10, the City denies each and every allegation stated therein.

20 11. Answering paragraph 11, the City denies each and every allegation stated therein.

21 12. Answering paragraph 12, the City denies each and every allegation stated therein.

22 13. Answering paragraph 13, the allegations therein are characterizations of OBOT's
23 case that do not require a response. To the extent the foregoing does not answer any allegation of
24 fact in paragraph 13, the City denies each and every allegation stated therein.

25 **PARTIES**

26 14. Answering paragraph 14, the City lacks sufficient information or knowledge to
27 answer the allegations stated therein, and on that basis denies each and every allegation stated
28 therein.

15. Answering paragraph 15, the City admits each and every allegation stated therein.

JURISDICTION AND VENUE

16. Answering paragraph 16, the allegations therein are legal contentions and conclusions of law that do not require a response. To the extent the foregoing does not answer any allegation of fact in paragraph 16, the City denies each and every allegation stated therein.

17. Answering paragraph 17, the allegations therein are conclusions of law that do not require a response. To the extent the foregoing does not answer any allegation of fact in paragraph 17, the City denies each and every allegation stated therein.

18. Answering paragraph 18, the City admits that it is located within the Northern District of California. Answering the remaining allegations of paragraph 18, the allegations therein are legal contentions and conclusions of law that do not require a response. To the extent the foregoing does not answer any allegation of fact in paragraph 18, the City denies each and every allegation stated therein.

19. Answering paragraph 19, the allegations therein are legal contentions and conclusions of law that do not require a response. To the extent the foregoing does not answer any allegation of fact in paragraph 19, the City denies each and every allegation stated therein.

INTRADISTRICT ASSIGNMENT

20. Answering paragraph 20, the allegations therein are legal contentions and conclusions of law that do not require a response. To the extent the foregoing does not answer any allegation of fact in paragraph 20, the City denies each and every allegation stated therein.

FACTUAL BACKGROUND

21. Answering the first sentence of paragraph 21, the City admits each and every allegation stated therein. Answering the second sentence of paragraph 21, the City admits that the former Oakland Army Base provided, prior to its closure, jobs and economic benefits for the City, and except as expressly admitted herein, the City denies each and every allegation of the second sentence of paragraph 21. Answering the third sentence of paragraph 21, the allegations therein seek to characterize the contents of public records, which speak for themselves. Answering any remaining allegations of fact in paragraph 21, the City denies each and every allegation stated

1 therein.

2 22. Answering paragraph 22, the allegations stated therein seek to characterize the
3 contents of public records, which speak for themselves. To the extent the foregoing does not
4 answer any allegation of fact in paragraph 22, the City denies each and every allegation stated
5 therein.

6 23. Answering paragraph 23, the allegations stated therein seek to characterize the
7 contents of public records, which speak for themselves. To the extent the foregoing does not
8 answer any allegation of fact in paragraph 23, the City denies each and every allegation stated
9 therein.

10 24. Answering the first sentence of paragraph 24, the allegations stated therein seek to
11 characterize the contents of public records, which speak for themselves. Answering the second
12 sentence of paragraph 24, the City lacks sufficient information or knowledge to answer the
13 allegations stated therein, and on that basis denies each and every allegation stated therein. To
14 the extent the foregoing does not answer any allegation of fact in paragraph 24, the City denies
15 each and every allegation stated therein.

16 25. Answering paragraph 25, the City denies each and every allegation stated therein.

17 26. Answering paragraph 26, the City lacks sufficient information or knowledge to
18 answer the allegations stated therein, and on that basis denies each and every allegation stated
19 therein.

20 27. Answering paragraph 27, the allegations stated therein seek to characterize the
21 contents of public records, which speak for themselves. To the extent the foregoing does not
22 answer any allegation of fact in paragraph 27, the City denies each and every allegation stated
23 therein.

24 28. Answering the first and third sentences of paragraph 28, the allegations stated
25 therein seek to characterize the contents of public records, which speak for themselves.
26 Answering the second sentence of paragraph 28, the City lacks sufficient information or
27 knowledge to answer the allegations stated therein, and on that basis denies each and every
28 allegation stated therein. To the extent the foregoing does not answer any allegation of fact in

1 paragraph 28, the City lacks sufficient information or knowledge to answer the allegations stated
2 therein, and on that basis denies each and every allegation stated therein.

3 29. Answering the first sentence of paragraph 29, the allegations stated therein seek to
4 characterize the contents of a public record, which speaks for itself. Answering the second
5 sentence of paragraph 29, the allegations therein are conclusions of law that do not require a
6 response. To the extent the foregoing does not answer any allegation of fact in paragraph 29, the
7 City lacks sufficient information or knowledge to answer the allegations stated therein, and on
8 that basis denies each and every allegation stated therein.

9 30. Answering paragraph 30, the allegations stated therein seek to characterize the
10 contents of public records, which speak for themselves. To the extent the foregoing does not
11 answer any allegation of fact in paragraph 30, the City lacks sufficient information or knowledge
12 to answer the allegations stated therein, and on that basis denies each and every allegation stated
13 therein.

14 31. Answering paragraph 31, the allegations stated therein seek to characterize the
15 contents of public records, which speak for themselves. Answering footnote number 2 to
16 paragraph 31, the allegations therein seek to characterize the contents of public records and are
17 legal contentions and conclusions of law that do not require a response. To the extent the
18 foregoing does not answer any allegation of fact in paragraph 31 or footnote number 2, the City
19 lacks sufficient information or knowledge to answer the allegations stated therein, and on that
20 basis denies each and every allegation stated therein.

21 32. Answering paragraph 32, the City lacks sufficient information or knowledge to
22 answer the allegations stated therein, and on that basis denies each and every allegation stated
23 therein.

24 33. Answering paragraph 33, the City lacks sufficient information or knowledge to
25 answer the allegations stated therein, and on that basis denies each and every allegation stated
26 therein.

27 34. Answering paragraph 34, the City lacks sufficient information or knowledge to
28 answer the allegations stated therein, and on that basis denies each and every allegation stated

1 therein.

2 35. Answering the first and second sentences of paragraph 35, the City lacks sufficient
3 information or knowledge to answer the allegations stated therein, and on that basis denies each
4 and every allegation stated therein. Answering the third sentence of paragraph 35, insofar as the
5 allegations therein contain characterizations of the DA, the allegations stated therein seek to
6 characterize the contents of a public record, which speaks for itself. Answering the remaining
7 allegations of the third sentence of paragraph 35, the City lacks sufficient information or
8 knowledge to answer the allegations stated therein, and on that basis denies each and every
9 allegation stated therein. To the extent the foregoing does not answer any allegation of fact in
10 paragraph 35, the City lacks sufficient information or knowledge to answer the allegations stated
11 therein, and on that basis denies each and every allegation stated therein.

12 36. Answering the first and second sentences of paragraph 36, the City denies each
13 and every allegation stated therein.

14 a. Answering the first sentence of subparagraph "a" of paragraph 36, the City admits
15 that the Oakland City Council unanimously passed Resolution No. 85054 C.M.S.,
16 a "Resolution to Oppose Transportation of Hazardous Fossil Fuel Materials,
17 Including Crude Oil, Coal, and Petroleum Coke, Along California Waterways,
18 Through Densely Populated Areas, Through the City of Oakland" on June 17,
19 2014. Answering the second sentence of subparagraph "a" of paragraph 36,
20 insofar as the allegations therein contain characterizations of Resolution No. 85054
21 C.M.S., the allegations stated therein seek to characterize the contents of a public
22 record, which speaks for itself. Answering the third sentence of subparagraph "a"
23 of paragraph 36, the City denies each and every allegation stated therein. To the
24 extent the foregoing does not answer any allegation of fact in subparagraph "a" of
25 paragraph 36, the City lacks sufficient information or knowledge to answer the
26 allegations stated therein, and on that basis denies each and every allegation stated
27 therein.

28 b. Answering subparagraph "b" of paragraph 36, the allegations stated therein seek to

1 characterize the contents of public records, which speak for themselves. To the
 2 extent the foregoing does not answer any allegation of fact in subparagraph "b" of
 3 paragraph 36, the City denies each and every allegation stated therein..

4 c. Answering subparagraph "c" of paragraph 36, the City lacks sufficient information
 5 or knowledge to answer the allegations stated therein, and on that basis denies
 6 each and every allegation stated therein.

7 d. Answering subparagraph "d" of paragraph 36, the allegations stated therein seek to
 8 characterize the contents of public records, which speak for themselves. To the
 9 extent the foregoing does not answer any allegation of fact in subparagraph "d" of
 10 paragraph 36, the City denies each and every allegation stated therein

11 To the extent the foregoing does not answer any allegation of fact in paragraph 36, the
 12 City lacks sufficient information or knowledge to answer the allegations stated therein, and on
 13 that basis denies each and every allegation stated therein.

14 37. Answering paragraph 37, the City admits that the City Council held a public
 15 hearing in September 2015. The City denies each and every remaining allegation stated in
 16 paragraph 37.

17 38. Answering the first and second sentences of paragraph 38, the City admits each
 18 and every allegation stated therein. Answering the third sentence of paragraph 38, the allegations
 19 seek to characterize the contents of public records, which speak for themselves. To the extent the
 20 foregoing does not answer any allegation of fact in paragraph 38, the City denies each and every
 21 allegation stated therein

22 39. Answering paragraph 39, the allegations seek to characterize the contents of public
 23 records, which speak for themselves. To the extent the foregoing does not answer any allegation
 24 of fact in paragraph 38, the City denies each and every allegation stated therein.

25 40. Answering paragraph 40, the allegations stated therein seek to characterize the
 26 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
 27 any allegation of fact in paragraph 40, the City denies each and every allegation stated therein.

28 41. Answering paragraph 41, the City admits that the City Council retained

1 Environmental Science Associates ("ESA") but denies each and every remaining allegation stated
2 therein.

3 42. Answering paragraph 42, the City denies each and every allegation stated therein.

4 43. Answering paragraph 43, the City lacks sufficient information or knowledge to
5 answer the allegations stated therein, and on that basis denies each and every allegation stated
6 therein.

7 44. Answering paragraph 44, the allegations stated therein seek to characterize the
8 contents of public records, which speak for themselves. To the extent the foregoing does not
9 answer any allegation of fact in paragraph 44, the City denies each and every allegation stated
10 therein.

11 45. Answering paragraph 45, the City admits that on or about June 23, 2016, the City
12 made the final ESA Report available to the general public. The City denies the remaining
13 allegations of paragraph 45.

14 46. Answering the first sentence of paragraph 46, the City admits that it released
15 proposed drafts of the Ordinance and Resolution on or about June 24, 2016. Answering the
16 second sentence of paragraph 46, the City admits that it released the Staff Report on or about June
17 24, 2016. Further answering the second sentence of paragraph 46, insofar as the allegations
18 therein contain characterizations of the Staff Report, the allegations stated therein seek to
19 characterize the contents of a public record, which speaks for itself. To the extent the foregoing
20 does not answer any allegation of fact in paragraph 46, the City lacks sufficient information or
21 knowledge to answer the allegations stated therein, and on that basis denies each and every
22 allegation stated therein.

23 47. Answering paragraph 47, the City admits that the City Council held a public
24 hearing on June 27, 2016, at which the City Council adopted the Resolution and held a first vote
25 on the Ordinance. The City denies that the Ordinance was adopted on June 27, 2016 and denies
26 the remaining allegations in paragraph 47.

27 48. Answering paragraph 48, insofar as the allegations therein contain
28 characterizations of the ESA Report, the allegations stated therein seek to characterize the

1 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
 2 any allegation of fact in paragraph 48, the City lacks sufficient information or knowledge to
 3 answer the allegations stated therein, and on that basis denies each and every allegation stated
 4 therein.

5 49. Answering paragraph 49, the City denies each and every allegation stated therein.

6 50. Answering the first sentence of paragraph 50, insofar as the allegations therein
 7 contain characterizations of the ESA Report, the allegations stated therein seek to characterize the
 8 contents of a public record, which speaks for itself. Answering the second and third sentences of
 9 paragraph 50, the City lacks sufficient information or knowledge to answer the allegations stated
 10 therein, and on that basis denies each and every allegation stated therein. To the extent the
 11 foregoing does not answer any allegation of fact in paragraph 50, the City lacks sufficient
 12 information or knowledge to answer the allegations stated therein, and on that basis denies each
 13 and every allegation stated therein.

14 51. Answering paragraph 51, the City denies each and every allegation stated therein.

15 52. Answering paragraph 52, insofar as the allegations therein contain
 16 characterizations of the ESA Report or the City Council's administrative record, the allegations
 17 stated therein seek to characterize the contents of public records, which speak for themselves. To
 18 the extent the foregoing does not answer any allegation of fact in paragraph 52, the denies each
 19 and every allegation stated therein.

20 53. Answering paragraph 53, insofar as the allegations therein contain
 21 characterizations of the ESA Report, the allegations stated therein seek to characterize the
 22 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
 23 any allegation of fact in paragraph 53, the City denies each and every allegation stated therein.

24 54. Answering paragraph 54, insofar as the allegations therein contain
 25 characterizations of the ESA Report, the allegations stated therein seek to characterize the
 26 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
 27 any allegation of fact in paragraph 54, the City denies each and every allegation stated therein.

28 55. Answering paragraph 55, the City denies each and every allegation stated therein.

1 56. Answering the first sentence of paragraph 56, the City admits that the Terminal
2 and its emission controls have not yet been constructed. Answering the remainder of paragraph
3 56, the City denies each and every allegation stated therein.

4 57. Answering paragraph 57, insofar as the allegations therein contain
5 characterizations of the ESA Report, the allegations stated therein seek to characterize the
6 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
7 any allegation of fact in paragraph 57, the City denies each and every allegation stated therein.

8 58. Answering paragraph 58, insofar as the allegations therein contain
9 characterizations of the ESA Report, the allegations stated therein seek to characterize the
10 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
11 any allegation of fact in paragraph 58, the City denies each and every allegation stated therein.

12 59. Answering paragraph 59, the City denies each and every allegation stated therein.

13 60. Answering paragraph 60, insofar as the allegations therein contain
14 characterizations of the ESA Report, the allegations stated therein seek to characterize the
15 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
16 any allegation of fact in paragraph 60, the City lacks sufficient information or knowledge to
17 answer the allegations stated therein, and on that basis denies each and every allegation stated
18 therein.

19 61. Answering the first sentence of paragraph 61, the City lacks sufficient information
20 or knowledge to answer the allegations stated therein, and on that basis denies each and every
21 allegation stated therein. Answering the remaining allegations of paragraph 61, insofar as the
22 allegations therein contain characterizations of the ESA Report, the allegations stated therein seek
23 to characterize the contents of a public record, which speaks for itself. To the extent the
24 foregoing does not answer any allegation of fact in paragraph 61, the City lacks sufficient
25 information or knowledge to answer the allegations stated therein, and on that basis denies each
26 and every allegation stated therein.

27 62. Answering the first sentence of paragraph 62, the City lacks sufficient information
28 or knowledge to answer the allegations stated therein, and on that basis denies each and every

1 allegation stated therein. Answering the remaining allegations of paragraph 62, insofar as the
2 allegations therein contain characterizations of the ESA Report, the allegations stated therein seek
3 to characterize the contents of a public record, which speaks for itself. To the extent the
4 foregoing does not answer any allegation of fact in paragraph 62, the City lacks sufficient
5 information or knowledge to answer the allegations stated therein, and on that basis denies each
6 and every allegation stated therein.

7 63. Answering paragraph 63, the City lacks sufficient information or knowledge to
8 answer the allegations stated therein, and on that basis denies each and every allegation stated
9 therein.

10 64. Answering paragraph 64, the City lacks sufficient information or knowledge to
11 answer the allegations stated therein, and on that basis denies each and every allegation stated
12 therein.

13 65. Answering paragraph 65, the City lacks sufficient information or knowledge to
14 answer the allegations stated therein, and on that basis denies each and every allegation stated
15 therein.

16 66. Answering paragraph 66, the City lacks sufficient information or knowledge to
17 answer the allegations stated therein, and on that basis denies each and every allegation stated
18 therein.

19 67. Answering paragraph 67, the City lacks sufficient information or knowledge to
20 answer the allegations stated therein, and on that basis denies each and every allegation stated
21 therein.

22 68. Answering paragraph 68, insofar as the allegations therein contain
23 characterizations of the ESA Report or the City Council's administrative record, the allegations
24 stated therein seek to characterize the contents of public records, which speak for themselves. To
25 the extent the foregoing does not answer any allegation of fact in paragraph 68, the City denies
26 each and every allegation stated therein.

27 69. Answering paragraph 69, the allegations stated therein are legal contentions and
28 legal conclusions for which no response is required. To the extent the foregoing does not answer

1 any allegation of fact in paragraph 69, the City denies each and every allegation stated therein.

2 70. Answering paragraph 70, insofar as the allegations therein contain
3 characterizations of the ESA Report, the allegations stated therein seek to characterize the
4 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
5 any allegation of fact in paragraph 70, the City denies each and every allegation stated therein.

6 71. Answering paragraph 71, the allegations stated therein are legal contentions and
7 conclusions of law to which no response s required. To the extent the foregoing does not answer
8 any allegation of fact in paragraph 71, the City lacks sufficient information or knowledge to
9 answer the allegations stated therein, and on that basis denies each and every allegation stated
10 therein.

11 72. Answering paragraph 72, insofar as the allegations therein contain
12 characterizations of BAAQMD regulations, the allegations stated therein are legal contentions
13 and seek to characterize the contents of public records, which speak for themselves. To the extent
14 the foregoing does not answer any allegation of fact in paragraph 72, the City lacks sufficient
15 information or knowledge to answer the allegations stated therein, and on that basis denies each
16 and every allegation stated therein.

17 73. Answering paragraph 73, the City denies each and every allegation stated therein.

18 74. Answering paragraph 74, insofar as the allegations therein contain
19 characterizations of BAAQMD regulations, the allegations stated therein are legal contentions
20 and seek to characterize the contents of public records, which speak for themselves. To the extent
21 the foregoing does not answer any allegation of fact in paragraph 74, the City lacks sufficient
22 information or knowledge to answer the allegations stated therein, and on that basis denies each
23 and every allegation stated therein.

24 75. Answering paragraph 75, insofar as the allegations therein contain
25 characterizations of the ESA Report, the allegations stated therein seek to characterize the
26 contents of a public record, which speaks for itself. Answering the remaining allegations of
27 paragraph 75, the City lacks sufficient information or knowledge to answer the allegations stated
28 therein, and on that basis denies each and every allegation stated therein.

1 76. Answering paragraph 76, the City denies each and every allegation stated therein.

2 77. Answering paragraph 77, the allegations therein seek to characterize the contents
3 of public records, which speak for themselves. Answering the remaining allegations of paragraph
4 77, the City lacks sufficient information or knowledge to answer the allegations stated therein,
5 and on that basis denies each and every allegation stated therein.

6 78. Answering paragraph 78, insofar as the allegations therein contain
7 characterizations of the ESA Report or the City Council's administrative record, the allegations
8 stated therein seek to characterize the contents of public records, which speak for themselves.
9 Answering the remaining allegations of paragraph 78, the City lacks sufficient information or
10 knowledge to answer the allegations stated therein, and on that basis denies each and every
11 allegation stated therein.

12 79. Answering paragraph 79, insofar as the allegations seek to characterize the
13 contents of public records, which speak for themselves. To the extent the foregoing does not
14 answer any allegation of fact in paragraph 79, the City denies each and every allegation stated
15 therein.

16 80. Answering the first sentence of paragraph 80, the City admits each and every
17 allegation stated therein. Answering the remaining allegations in paragraph 80, insofar as the
18 allegations therein contain characterizations of the ESA Report, the allegations stated therein seek
19 to characterize the contents of a public record, which speaks for itself. To the extent the
20 foregoing does not answer any allegation of fact in paragraph 80, the City lacks sufficient
21 information or knowledge to answer the allegations stated therein, and on that basis denies each
22 and every allegation stated therein.

23 81. Answering paragraph 81, the City avers that the allegations stated therein are
24 conclusions of law to which no response s required. To the extent the foregoing does not answer
25 any allegation of fact in paragraph 81, the City denies each and every allegation stated therein.

26 82. Answering the first sentence paragraph 82, insofar as the allegations therein
27 contain characterizations of the ESA Report, the allegations stated therein seek to characterize the
28 contents of a public record, which speaks for itself. To the extent the foregoing does not answer

1 any allegation of fact in the first sentence of paragraph 82, the City denies each and every
2 allegation stated therein. Answering the second sentence of paragraph 82, the City denies each
3 and every allegation stated therein.

4 83. Answering paragraph 83, the City denies each and every allegation stated therein.

5 84. Answering paragraph 84, the City denies each and every allegation stated therein.

6 85. Answering paragraph 85, insofar as the allegations therein contain
7 characterizations of the ESA Report or the City Council's administrative record, the allegations
8 stated therein seek to characterize the contents of public records, which speaks for themselves.
9 To the extent the foregoing does not answer any allegation of fact in paragraph 85, the City basis
10 denies each and every allegation stated therein.

11 86. Answering paragraph 86 (including the subparagraphs), the City lacks sufficient
12 information or knowledge to admit or deny that commodities will in fact be transported to the
13 proposed Terminal in the manner in which Plaintiff describes and proposes, and on that basis
14 denies each and every allegation stated therein. To the extent the foregoing does not answer any
15 allegation of fact in paragraph 86, the City basis denies each and every allegation stated therein.

16 87. Answering the first sentence of paragraph 87, the City lacks sufficient information
17 or knowledge to admit or deny that commodities will in fact be transloaded in the manner in
18 which Plaintiff describes and proposes, and on that basis denies each and every allegation stated
19 therein. Answering the remainder of paragraph 87, the City denies each and every allegation
20 stated therein.

21 88. Answering paragraph 88, insofar as the allegations therein contain
22 characterizations of the ESA Report, the allegations stated therein seek to characterize the
23 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
24 any allegation of fact in paragraph 88, the City admits that the ESA Report describes fire risks
25 and dangers associated therewith, including at the Terminal and other locations, and describes
26 fires that have occurred at coal piles and in rail cars. Answering the remainder of paragraph 88,
27 the City denies each and every allegation stated therein.

28 89. Answering paragraph 89, insofar as the allegations therein contain

1 characterizations of the ESA Report, the allegations stated therein seek to characterize the
2 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
3 any allegation of fact in paragraph 89, the City denies each and every allegation stated therein.

4 90. Answering paragraph 90, insofar as the allegations therein contain
5 characterizations of the ESA Report or other public documents, the allegations stated therein seek
6 to characterize the contents of public records, which speaks for themselves. To the extent the
7 foregoing does not answer any allegation of fact in paragraph 90, the City basis denies each and
8 every allegation stated therein.

9 91. Answering paragraph 91, the City denies each and every allegation stated therein.

10 92. Answering paragraph 92, insofar as the allegations therein contain
11 characterizations of the ESA Report, the allegations stated therein seek to characterize the
12 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
13 any allegation of fact in paragraph 92, the City admits that members of the public commented on
14 greenhouse gases and that the ESA Report evaluated the comments and other evidence, and,
15 except as expressly admitted, the City denies each and every allegation stated in paragraph 92.

16 93. Answering the first sentence of paragraph 93, the allegations stated therein seek to
17 characterize the contents of a public record, which speaks for itself. Answering the second
18 sentence of paragraph 93, the City denies each and every allegation stated therein. To the extent
19 the foregoing does not answer any allegation of fact in paragraph 93, the City denies each and
20 every allegation stated therein.

21 94. Answering the first sentence of paragraph 94, the allegations stated therein seek to
22 characterize the contents of a public record, which speaks for itself. To the extent the foregoing
23 does not answer any allegation of fact in paragraph 94, the City denies each and every allegation
24 stated therein.

25 95. Answering the first sentence of paragraph 95, the allegations stated therein seek to
26 characterize the contents of a public record, which speaks for itself. To the extent the foregoing
27 does not answer any allegation of fact in the first sentence of paragraph 95, the City denies each
28 and every allegation stated therein.

1 96. Answering paragraph 96, insofar as the allegations therein contain
 2 characterizations of the City's Staff Report, the allegations stated therein seek to characterize the
 3 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
 4 any allegation of fact in paragraph 96, the City admits that the Staff Report relied, in part, on a
 5 report by Zoe Chafe regarding coal and petcoke, including without limitation health and safety
 6 effects that would be caused by storing and handling these commodities at the proposed Terminal,
 7 and, except as expressly admitted, the City denies each and every allegation stated therein.

8 97. Answering paragraph 97, the City admits each and every allegation stated therein.

9 98. Answering paragraph 98, the City admits that Zoe Chafe was retained to prepare a
 10 report. Further answering paragraph 98, insofar as the allegations therein contain
 11 characterizations of the report prepared by Zoe Chafe (the "Chafe Report"), the allegations stated
 12 therein seek to characterize the contents of a public record, which speaks for itself. To the extent
 13 the foregoing does not answer any allegation of fact in paragraph 98, the City lacks sufficient
 14 information or knowledge to answer the allegations stated therein, and on that basis denies each
 15 and every allegation stated therein.

16 99. Answering paragraph 99, the City denies each and every allegation stated therein.

17 100. Answering the first sentence of paragraph 100, the City denies each and every
 18 allegation stated therein. Answering the second sentence of paragraph 100, the allegations stated
 19 therein seek to characterize the contents of a public record, which speaks for itself. To the extent
 20 the foregoing does not answer any allegation of fact in paragraph 100, the City denies each and
 21 every allegation stated therein.

22 101. Answering paragraph 101, the City denies each and every allegation stated
 23 therein.

24 102. Answering paragraph 102, the City denies each and every allegation stated therein.

25 103. Answering paragraph 103, the City denies each and every allegation stated therein.

26 104. Answering paragraph 104, insofar as the allegations therein contain
 27 characterizations of the Chafe Report, the allegations stated therein seek to characterize the
 28 contents of a public record, which speaks for itself. Answering any allegation of fact in

1 paragraph 104, the City admits that the Chafe Report explains the health and safety risks of
2 exposure to PM_{2.5}, and except as expressly admitted, the City denies each and every allegation
3 stated therein.

4 105. Answering the first sentence of paragraph 105, insofar as the allegations therein
5 contain characterizations of the Chafe Report, the allegations stated therein seek to characterize
6 the contents of a public record, which speaks for itself. Answering the second sentence of
7 paragraph 105, the City lacks sufficient information or knowledge to answer the allegations stated
8 therein, and on that basis denies each and every allegation stated therein. To the extent the
9 foregoing does not answer any allegation of fact in paragraph 105, the City lacks sufficient
10 information or knowledge to answer the allegations stated therein, and on that basis denies each
11 and every allegation stated therein.

12 106. Answering the first sentence of paragraph 106, insofar as the allegations therein
13 contain characterizations of the Chafe Report, the allegations stated therein seek to characterize
14 the contents of a public record, which speaks for itself. Answering the second sentence of
15 paragraph 106, the City lacks sufficient information or knowledge to answer the allegations stated
16 therein, and on that basis denies each and every allegation stated therein. To the extent the
17 foregoing does not answer any allegation of fact in paragraph 106, the City denies each and every
18 allegation stated therein.

19 107. Answering the first sentence of paragraph 107, insofar as the allegations therein
20 contain characterizations of the Chafe Report, the allegations stated therein seek to characterize
21 the contents of a public record, which speaks for itself. Answering any allegation of fact in the
22 first sentence of paragraph 107 and the remainder of paragraph 107, the City denies each and
23 every allegation stated therein.

24 108. Answering paragraph 108, the City denies each and every allegation stated therein.

25 109. Answering paragraph 109, the City denies each and every allegation stated in
26 paragraph 109.

27 110. Answering paragraph 110, the allegations stated therein seek to characterize the
28 contents of a public record, which speaks for itself. To the extent the foregoing does not answer

1 any allegation of fact in paragraph 110, the City denies each and every allegation stated therein.

2 111. Answering paragraph 111, the City denies each and every allegation stated therein.

3 112. Answering paragraph 112, the allegations stated therein seek to characterize the
4 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
5 any allegation of fact in paragraph 112, the City denies each and every allegation stated therein.

6 113. Answering paragraph 113, insofar as the allegations therein contain
7 characterizations of the Chafe Report, the allegations stated therein seek to characterize the
8 contents of a public record, which speaks for itself. To the extent the foregoing does not answer
9 any allegation of fact in paragraph 113, the City denies each and every allegation stated therein.

10 114. Answering paragraph 114, insofar as the allegations therein contain
11 characterizations of the Chafe Report or the City Council's administrative record, the allegations
12 stated therein seek to characterize the contents of public records, which speak for themselves. To
13 the extent the foregoing does not answer any allegation of fact in paragraph 114, the City denies
14 each and every allegation stated therein.

15 115. Answering paragraph 115, the City denies each and every allegation stated therein.

16 116. Answering paragraph 116, insofar as the allegations therein contain
17 characterizations of the Ordinance or Resolution, the allegations stated therein are legal
18 contentions, for which no response is required, and seek to characterize the contents of public
19 records, which speak for themselves. To the extent the foregoing does not answer any allegation
20 of fact in paragraph 116, the City denies each and every allegation stated therein.

21 117. Answering paragraph 117, the City basis denies each and every allegation stated
22 therein.

23 118. Answering the first sentence of paragraph 118, the City denies each and every
24 allegation stated therein. Answering the remaining allegations of paragraph 118, insofar as the
25 allegations therein contain characterizations of public records, the allegations stated therein seek
26 to characterize the contents of public records, which speak for themselves. To the extent the
27 foregoing does not answer any allegation of fact in paragraph 118, the City denies each and every
28 allegation stated therein.

119. Answering paragraph 119, the City admits that the Ordinance includes limited exemptions and, except as expressly admitted, denies each and every allegation stated therein.

120. Answering paragraph 120 (including the subparagraphs), the City denies each and every allegation stated therein.

121. Answering paragraph 121, the City denies each and every allegation stated therein.

122. Answering paragraph 122, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated therein.

123. Answering paragraph 123, the City denies each and every allegation stated therein.

124. Answering paragraph 124, the City denies each and every allegation stated therein.

CLAIMS FOR RELIEF

FIRST CLAIM

Unconstitutionality Under the Commerce Clause

125. The City hereby reincorporates each and every answer contained in paragraphs 1 through 124, above, as though fully set forth herein.

126. Answering the first sentence of paragraph 126, the allegations stated therein seek to characterize the contents of public records, which speak for themselves. Answering the last sentence of paragraph 126 and any allegation of fact in the first sentence of paragraph 126, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated therein. Answering second sentence of paragraph 126, the City admits the allegations stated therein. Answering any remaining allegations of fact in paragraph 126, and except as expressly admitted, the City denies each and every allegation stated therein.

127. Answering paragraph 127, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated therein.

128. Answering paragraph 128, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated

1 therein.

2 129. Answering paragraph 129, the City denies each and every allegation stated therein.

3 130. Answering paragraph 130, the City denies each and every allegation stated therein.

4 131. Answering paragraph 131, the City denies each and every allegation stated therein.

5 132. Answering paragraph 132, the City denies each and every allegation stated therein.

6 133. Answering paragraph 133, the City denies each and every allegation stated therein.

7 134. Answering paragraph 134, the allegations stated therein seek to characterize
8 Plaintiff's case, to which no response is required. To the extent the foregoing does not answer
9 any allegation of fact in paragraph 134, the City denies each and every allegation stated therein.

10 **SECOND CLAIM**

11 **Preemption Under the ICCTA, the Hazardous Materials Transportation Act, and the** 12 **Shipping Act of 1984**

13 135. The City hereby reincorporates each and every answer contained in paragraphs 1
14 through 124, above, as though fully set forth herein.

15 136. Answering paragraph 136, the City denies each and every allegation stated therein.

16 137. Answering paragraph 137, the City denies each and every allegation stated therein.

17 138. Answering paragraph 138, the City denies each and every allegation stated therein.

18 139. Answering paragraph 139, the allegations stated therein are legal contentions and
19 conclusions of law to which no response is required. To the extent the foregoing does not answer
20 any allegation of fact in paragraph 139, the City denies each and every allegation stated therein.

21 140. Answering paragraph 140, that the allegations stated therein are conclusions of law
22 to which no response is required. To the extent the foregoing does not answer any allegation of
23 fact in paragraph 140, the City denies each and every allegation stated therein.

24 141. Answering paragraph 141, the City denies each and every allegation stated therein.

25 142. Answering paragraph 142, the City denies each and every allegation stated therein.

26 143. Answering paragraph 143, the City denies each and every allegation stated therein.

27 144. Answering paragraph 144, the allegations stated therein are conclusions of law to
28 which no response is required. To the extent the foregoing does not answer any allegation of fact

1 in paragraph 144, the City denies each and every allegation stated therein.

2 145. Answering paragraph 145, the allegations stated therein are legal contentions and
3 conclusions of law to which no response is required. To the extent the foregoing does not answer
4 any allegation of fact in paragraph 145, the City denies each and every allegation stated therein.

5 146. Answering paragraph 146, the allegations stated therein are conclusions of law to
6 which no response is required. To the extent the foregoing does not answer any allegation of fact
7 in paragraph 146, the City denies each and every allegation stated therein.

8 147. Answering paragraph 147, the allegations stated therein are conclusions of law to
9 which no response is required. To the extent the foregoing does not answer any allegation of fact
10 in paragraph 147, the City denies each and every allegation stated therein.

11 148. Answering paragraph 148, the allegations stated therein are conclusions of law to
12 which no response is required. To the extent the foregoing does not answer any allegation of fact
13 in paragraph 148, the City denies each and every allegation stated therein.

14 149. Answering paragraph 149, the allegations stated therein are conclusions of law to
15 which no response is required. To the extent the foregoing does not answer any allegation of fact
16 in paragraph 149, the City denies each and every allegation stated therein.

17 150. Answering the first sentence of paragraph 150, insofar as the allegations therein
18 contain characterizations of the Ordinance or Resolution, the allegations stated therein are legal
19 contentions and legal conclusions for which no response is required, and seek to characterize the
20 contents of public records, which speak for themselves. Answering the remaining allegations of
21 paragraph 150, the City denies each and every allegation stated therein.

22 151. Answering the first sentence of paragraph 151, insofar as the allegations therein
23 contain characterizations of the Ordinance or Resolution, the allegations stated therein are legal
24 contentions and legal conclusions, for which no response is required, and seek to characterize the
25 contents of public records, which speak for themselves. To the extent the foregoing does not
26 answer any allegation of fact in paragraph 151, the City denies each and every allegation stated
27 therein.

28 152. Answering paragraph 152, the City denies each and every allegation stated therein.

153. Answering paragraph 153, the allegations stated therein are legal contentions and conclusions of law to which no response is required. To the extent the foregoing does not answer any allegation of fact in paragraph 153, the City denies each and every allegation stated therein.

154. Answering the first sentence of paragraph 154, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated therein. Answering the remaining allegations of paragraph 154, the City denies each and every allegation stated therein.

155. Answering paragraph 155, the allegations stated therein are legal contentions and conclusions of law to which no response is required. To the extent the foregoing does not answer any allegation of fact in paragraph 155, the City denies each and every allegation stated therein.

156. Answering paragraph 156, the City denies each and every allegation stated therein.

157. Answering paragraph 157, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated therein.

158. Answering paragraph 158, the City denies each and every allegation stated therein.

159. Answering paragraph 159, the City denies each and every allegation stated therein.

160. Answering paragraph 160, the allegations stated therein seek to characterize Plaintiff's case, to which no response is required. To the extent the foregoing does not answer any allegation of fact in paragraph 160, the City lacks sufficient information or knowledge to answer the allegations stated therein, and on that basis denies each and every allegation stated therein.

THIRD CLAIM

Breach of Contract

161. The City hereby reincorporates each and every answer contained in paragraphs 1 through 124, above, as though fully set forth herein.

162. Answering paragraph 162, the allegations stated therein are legal contentions and conclusions of law to which no response is required. To the extent the foregoing does not answer any allegation of fact in paragraph 162, the City denies each and every allegation stated therein.

163. Answering paragraph 163, the City denies each and every allegation stated therein.

164. Answering paragraph 164, the City denies each and every allegation stated therein.

165. Answering paragraph 165, the City denies each and every allegation stated therein.

166. Answering paragraph 166, the City denies each and every allegation stated therein.

167. Answering paragraph 167, the City denies each and every allegation stated therein.

PLAINTIFF'S PRAYER FOR RELIEF

168. The remainder of Plaintiff's Complaint consists of the prayer for relief, to which no response is required. To the extent a response may be deemed required, the City denies that Plaintiff is entitled to the relief requested in Paragraphs A through D, or to any relief of any kind.

GENERAL DENIAL

169. The City denies each and every allegation of Plaintiff's Complaint not expressly admitted or qualified herein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Lack of Standing)

170. Plaintiff lacks Article III standing to bring this lawsuit. Plaintiff also lacks standing to pursue some or all of its claims under the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101–16101; the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101–5127; and the Shipping Act of 1984, 46 U.S.C. §§ 40101–41309.

SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations)

171. Plaintiff has failed to meet the applicable statute of limitations to pursue some or all of its claims under California Government Code section 65009(c)(1).

THIRD AFFIRMATIVE DEFENSE

(Failure to State a Claim)

172. The Complaint fails to allege a claim for which relief may be granted.

FOURTH AFFIRMATIVE DEFENSE

(City Excused from Performing)

173. The City's performance of its obligations under the Development Agreement have been excused, in whole or in part, by the acts and/or omissions of Plaintiff and/or third parties.

FIFTH AFFIRMATIVE DEFENSE

(Plaintiff's Failure to Perform)

174. The City of Oakland's performance of its obligations under the Development Agreement was conditioned, in whole or in part, upon the satisfactory performance of Plaintiff's obligations under the Development Agreement, which Plaintiff failed to perform.

SIXTH AFFIRMATIVE DEFENSE

(Exhaustion of Administrative Remedies)

175. Plaintiff's Complaint contains no allegations that establish that plaintiff has exhausted the administrative remedies provided by California law for persons aggrieved or claiming to be aggrieved by administrative action. Accordingly, this action is barred.

SEVENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

176. As a result of the acts and omissions in the matter relevant to the Complaint, Plaintiff has unclean hands and is therefore barred from asserting any claims against the City.

EIGHTH AFFIRMATIVE DEFENSE

(Waiver)

177. Any breach of the Development Agreement is barred, in whole or in part, by Plaintiff's conduct, representations, omissions, or acceptance, and Plaintiff has waived, relinquished, and/or abandoned any claim for relief against the City.

NINTH AFFIRMATIVE DEFENSE

(Frustration of Purpose)

178. As a result of Plaintiff's conduct, and through no fault of the City, the purposes recognized by both Plaintiff and the City as the basis for the Development Agreement have been fundamentally frustrated and defeated. Accordingly, Plaintiff's claim is without merit.

TENTH AFFIRMATIVE DEFENSE

(Prevention of Performance)

179. Plaintiff breached the Development Agreement with the City by failing timely, fully, and adequately to perform the terms and conditions therein, thereby preventing the City's performance and discharging any obligation on the part of the City.

ELEVENTH AFFIRMATIVE DEFENSE

(Condition Precedent)

180. Plaintiff failed to satisfy all conditions contained in the Development Agreement precedent to the commencement of litigation, including in Article VIII thereof. .

PRAYER

WHEREFORE, the City of Oakland prays for relief as follows:

- A. That Plaintiff take nothing by its complaint in this action;
- B. That the Court deny Plaintiff's prayer for relief;
- C. That judgment be entered on all claims for Defendant City of Oakland;
- D. That the Court award the City any and all other relief to which it is justly entitled.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the City hereby demands a jury on all issues triable by a jury.

Dated: June 27, 2017

BURKE, WILLIAMS & SORENSEN, LLP

By: /s/ Kevin D. Siegel
Kevin D. Siegel
Gregory R. Aker
Christopher M. Long
Attorneys for Defendant
CITY OF OAKLAND

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Robert P. Feldman (Bar No. 69602)

bobfeldman@quinnemanuel.com

David Myre (Bar No. 304600)

davidmyre@quinnemanuel.com

Eliyahu Ness (Bar No. 311054)

eliness@quinnemanuel.com

555 Twin Dolphin Drive, 5th Floor

Redwood Shores, California 94065-2139

Telephone: (650) 801-5000

Facsimile: (650) 801-5100

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Meredith M. Shaw (Bar No. 284089)

meredithshaw@quinnemanuel.com

50 California Street, 22nd Floor

San Francisco, CA 94111

Telephone: (415) 875-6600

Attorneys for Plaintiff

Oakland Bulk & Oversized Terminal, LLC

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

FIRST AMENDED COMPLAINT

Plaintiff Oakland Bulk & Oversized Terminal, LLC (“OBOT” or “Plaintiff”) alleges as follows:

NATURE OF THE ACTION

1
2 1. Plaintiff OBOT brings this action to correct the Oakland City Council's
3 unconstitutional abuse of its power.

4 2. OBOT seeks declaratory and injunctive relief against the enforcement
5 of Oakland Ordinance No. 13385 (the "Ordinance") and Resolution No. 86234 (the
6 "Resolution"), which prohibit the transportation and export of coal and petroleum
7 coke ("petcoke") to and through OBOT's rail and marine terminal currently in
8 development on city land at the port of Oakland. The Ordinance and Resolution are
9 unconstitutional under the Commerce Clause of the United States Constitution and
10 preempted by United States statutes, including the Interstate Commerce
11 Commission Termination Act, the Hazardous Materials Transportation Act, and the
12 Shipping Act of 1984.

13 3. In agreements including a Development Agreement dated July 16,
14 2013, Oakland granted OBOT the right and obligation to re-develop land at the
15 former Oakland Army Base. This includes the right to develop a rail and marine
16 terminal on that portion of the former Oakland Army Base commonly known as the
17 West Gateway (the "Terminal"). The Terminal would transfer shipments of bulk
18 commodities from rail carriers to ships for export to foreign countries through the
19 deep water port at the former Oakland Army Base. Bulk commodities are non-
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1 containerized materials such as coal, iron ore, soda ash, copper, grain, limestone,
2 petroleum, cement and gravel.¹

3 4. Bulk commodities will be delivered to the Port of Oakland rail yard by
4 Class I rail carriers. To carry the bulk commodities from the rail yard to the
5 Terminal, OBOT is constructing a rail line and will operate a rail carrier. This rail
6 carrier is known as Oakland Global Rail Enterprise, LLC (“OGRE”), an affiliate of
7 OBOT.

8 5. OBOT is currently negotiating with Terminals and Logistics Solutions,
9 LLC (“TLS”) with respect to the financing, construction, and operation of the
10 Terminal. The TLS transaction would result in transportation of various bulk
11 commodities to and through the Terminal. One bulk commodity that TLS may
12 handle is coal, which would be shipped by rail from Utah to the Terminal for export
13 by ship.

14 6. As set forth more fully herein, coal and petcoke provide a substantial
15 amount of this nation’s energy needs, are transported by rail throughout the United
16 States and are exported in large quantities to other countries.

17 7. In recent years, environmental groups have increased their opposition
18 to coal and petcoke because of their impact on global climate change when burned
19 for fuel. The Terminal will not burn coal; rather, coal will be transported to the
20 Terminal by rail and loaded onto ships for export without any burning of coal.

21 ¹ The Cambridge Business English Dictionary defines “bulk goods” as “goods such as coal,
22 grains, oil, or chemicals that are not packaged in any type of container and are stored, transported,
23 and sold in large quantities.” (<http://dictionary.cambridge.org/us/dictionary/english/bulk-goods>,
24 last visited December 7, 2016; *see also* <http://dictionary.reference.com/browse/bulk>, last visited
December 7, 2016 (“bulk” defined as “goods or cargo not in packages or boxes, usually
transported in large volume, as grain, coal, or petroleum”).

1 Nevertheless, facing pressures from environmental interest groups opposed to the
2 use of coal globally, the Oakland City Council embarked on a campaign to ban the
3 transport and export of coal and petcoke to and through Oakland—and specifically
4 at the Terminal.

5 8. The campaign culminated in 2016, with Oakland’s passing of the
6 Ordinance and Resolution. The Ordinance and Resolution impose a complete ban
7 on the transportation and export of coal and petcoke to and through the Terminal.

8 9. The purpose and effect of the Ordinance and Resolution are to regulate
9 the transport and export of coal and petcoke.

10 10. The justifications for the ban imposed by the Ordinance and Resolution
11 and the purported benefits of the Ordinance and Resolution are illusory. The
12 Ordinance and Resolution impose a burden on interstate and foreign commerce, are
13 clearly excessive in relation to the purported local benefits, are not based on
14 evidence of a substantial danger to residents of Oakland and neighbors or users of
15 the Terminal, and there are less restrictive measures that can and do control the
16 purported health effects that are the purported basis of the Ordinance and
17 Resolution.

18 11. Accordingly, the Ordinance and Resolution violate the Commerce
19 Clause of the United States Constitution, and are preempted by federal statutes
20 including the Interstate Commerce Commission Termination Act, which vests the
21 exclusive power to regulate rail transportation in the Surface and Transportation
22 Board of the United States (not the City of Oakland); the Hazardous Materials
23 Transportation Act, which vests the United States Secretary of Transportation (not
24

1 the City of Oakland) with the authority to determine what materials warrant
2 “hazardous” designations and restrictions or prohibitions in interstate and intrastate
3 transportation; and the Shipping Act of 1984, which prohibits discrimination in
4 shipping of the kind required by the Ordinance. Because the Ordinance and
5 Resolution violate these federal laws, as described below the Ordinance and
6 Resolution also breach the Development Agreement.

7 12. The passage of the Ordinance and Resolution have materially and
8 substantially harmed OBOT, including by diminishing the value of OBOT’s rights
9 pursuant to the Development Agreement and diminishing the value of its investment
10 in the West Gateway, imposing on OBOT substantial out-of-pocket costs to mitigate
11 the harm from Oakland’s unconstitutional exercise of its power, and interfering with
12 OBOT’s ability to attract partners and investments for the West Gateway project.

13 13. OBOT thus respectfully seeks declaratory, injunctive, and any other
14 appropriate relief against the application of the Ordinance and Resolution to the
15 construction and operation of the Terminal.

16 **PARTIES**

17 14. Plaintiff OBOT is a California limited liability company with a
18 principal place of business located at 300 Frank H. Ogawa Plaza, Suite 340,
19 Oakland, CA 94612.

20 15. Defendant City of Oakland is a public entity and California charter city
21 located in Alameda County, California (hereinafter, “Oakland” or the “City”).
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1 **FACTUAL BACKGROUND**

2 21. From 1944 to 1999, the waterfront area just south of the eastern
3 entrance to the San Francisco-Oakland Bay Bridge was a U.S. Army facility known
4 as the “Oakland Army Base”. The Oakland Army Base was a major generator of
5 jobs and other economic benefits for the West Oakland region before its September
6 30, 1999 closure pursuant to the U.S. Department of Defense’s Base Realignment
7 and Closure Commission. Following its closure, approximately 200 acres of the
8 Oakland U.S. Army Base were transferred to the adjacent Port of Oakland, while the
9 remaining 170 acres known as the “Gateway Development Area” were transferred
10 to the City of Oakland.

11 22. Facing the loss of local jobs and other economic benefits from the
12 closure of the Oakland Army Base, the City adopted a “Redevelopment Plan for the
13 Oakland Army Base Development Project” to facilitate the “redevelopment,
14 rehabilitation, and revitalization” of the Gateway Development Area (as amended,
15 the “Redevelopment Plan”). Its “major goals” included, among other things, the
16 “strengthening of the economic base of the community by the construction and
17 installation of infrastructure” to “stimulate new development, employment, and
18 social and economic growth”. To achieve its goals the Redevelopment Plan did not
19 present “specific proposals,” but instead “present[ed] a process and a basic
20 framework” within which the City could “fashion, develop, and proceed with . . .
21 specific plans, projects and solutions”. The Redevelopment Plan granted the City
22 authority to sell or lease real property in the Gateway Development Area for
23 “redevelopment of [the] land by private enterprise”.
24

1 23. In 2008, after numerous proposed projects for redevelopment of the
2 Oakland Army Base failed, the City issued a Request for Qualifications seeking
3 plans from private developers to “transform the [Gateway Development Area] into a
4 mixed use commercial and/or industrial development”.

5 24. Thirteen developers submitted proposals, including California Capital
6 & Investment Group, Inc. (“CCIG”). CCIG is the sole member of OBOT.

7 25. At all times, CCIG and then OBOT clearly communicated to the City,
8 including in project documentation, its plan to build a rail and marine terminal for
9 bulk and oversized cargo at the West Gateway. The City was aware that coal was
10 one of the bulk commodities that could be transported through the Terminal.

11 26. For example, in October 2011 a potential sublessee of the Terminal,
12 Kinder Morgan, gave a presentation to City officials that discussed how coal
13 constituted 34% of the “bulk tonnage” Kinder Morgan shipped. In June 2012,
14 CCIG provided to city officials a video that included a depiction of coal shipments
15 from a similar terminal in Long Beach, California. In January 2013, Port of
16 Oakland officials exchanged emails about their discussion with Oakland City
17 officials regarding the possibility for coal shipments at the Oakland Army Base.
18 Finally, a May 2013 study commissioned by the Port of Oakland included coal in its
19 “suggested list of commodities” that could be shipped from the Oakland Army Base.

20 27. After dozens of duly noticed public hearings, two written agreements
21 were executed with the City: (1) the Lease Disposition and Development
22 Agreement (as amended, the “LDDA”) and (2) the Development Agreement
23
24

1 Regarding The Property And Project Known As The “Gateway
2 Development/Oakland Global”, effective July 16, 2013 (as amended, the “DA”).

3 28. The LDDA was originally entered into by the City, the Oakland
4 Redevelopment Successor Agency (“ORSA”) and Prologis CCIG Oakland Global,
5 LLC (“Prologis/CCIG”). Prologis/CCIG is a joint venture between an affiliate of
6 Prologis, Inc. and CCIG. On or about June 13, 2014, City, Prologis/CCIG and
7 OBOT entered into that certain Partial Assignment and Assumption (West Gateway)
8 of the Lease Disposition and Development Agreement (the “WGW Partial
9 Assignment”) whereby OBOT succeeded to all of Prologis/CCIG’s rights and
10 obligations under the LDDA with respect to the West Gateway.

11 29. The DA was originally entered into between the City and
12 Prologis/CCIG. Pursuant to Section 10.1 of the DA, Prologis/CCIG’s rights and
13 obligations under the DA with respect to the West Gateway were automatically
14 assigned to OBOT upon the execution of the WGW Partial Assignment by the City,
15 Prologis/CCIG and OBOT confirming OBOT as a permitted assignee under the
16 LDDA with respect to the West Gateway.

17 30. Neither the LDDA nor the DA impose any restrictions preventing the
18 transport of coal or petcoke through the Terminal. Neither agreement limit the type
19 of bulk commodities that could be exported from the Terminal. As an Assistant
20 City Administrator stated in a February 3, 2016 “Status Report On Coal”:

21 In 2013, the City Council adopted a Development Agreement (DA) for the
22 Bulk Commodities Terminal at the Army Base West Gateway Parcel. This
23 agreement vested rights to the developer (CCIG) to operate the facility
24

1 under the current set of laws at the time of adoption, with limited
2 exceptions. *No specific restriction or prohibition on coal was made part of*
3 *that agreement.* There is a narrow exception related to health and/or safety
4 (Section 3.4.2 of the DA). (emphasis added).

5
6 31. In particular, Section 3.4 of the DA specified that only “Existing City
7 Regulations” as of the adoption of the DA would “govern the development of the
8 Project and all Subsequent Approvals with respect to the development of the Project
9 on the Project Site”. The only exception to this express contractual promise is
10 Section 3.4.2 of the DA: the City could apply health and safety regulations adopted
11 after July 16, 2013, to the Terminal only if (a) the application of any such health and
12 safety regulation is “otherwise permissible pursuant to Laws”—“Laws” being
13 defined to include the “Constitution of the United States, and any codes, statutes,
14 regulations, or executive mandates thereunder”; and (b) the “City determines based
15 on substantial evidence and after a public hearing that a failure to do so would place
16 existing or future occupants or users of the Project, adjacent neighbors, or any
17 portion thereof, or all of them, in a condition substantially dangerous to their health
18 or safety”.²

19 32. Following the execution of the DA, OBOT invested years of effort and
20 millions of dollars in planning the development of the Terminal.

21 33. For example, OBOT has spent millions of dollars and thousands of
22 man-hours removing existing structures at the project site, building the

23 ² Certain other narrow exceptions exist which allow the City to apply new regulations to the
24 project, but none of those exceptions applies here.

1 infrastructure required to support the anticipated Terminal (including the rail line to
2 the Terminal), and implementing environmental safeguards for use both during
3 construction and future operations at the Terminal. To date, OBOT and its affiliates
4 have invested well in excess of \$10 million on these development efforts.

5 34. As part of the development process, OBOT began to search for a
6 company to construct and operate the Terminal. In the spring of 2014, OBOT
7 entered negotiations with TLS.

8 35. The negotiations eventually resulted in a November 2014 Exclusive
9 Negotiation Agreement and Sublease Option between OBOT and TLS (the
10 “Sublease Option”). The Sublease Option granted TLS an exclusive option to
11 sublease and operate the Terminal for a sixty-six (66) year period. Consistent with
12 the City-approved DA and industry practice for such facilities, the Sublease Option
13 did not restrict the shipment of coal or any other commodity to and through the
14 Terminal.

15 36. Beginning in 2014, facing political pressure including from
16 environmental groups Oakland City Council members decided to prohibit the
17 transportation and shipment of coal and petcoke to and through the Terminal before
18 reviewing the evidence of its local health and safety impacts—or lack thereof—or
19 holding a genuine public hearing. This is reflected in statements and events that
20 took place after the execution of the DA and before the purported public hearings
21 held in September 2015, and June 2016, including but not limited to the following:

- 22 a. On June 17, 2014—two years before the Ordinance and Resolution of
23 2016 were adopted—the Oakland City Council unanimously passed
24

1 Resolution No. 85054, a “Resolution to Oppose Transportation of
2 Hazardous Fossil Fuel Materials, Including Crude Oil, Coal, and
3 Petroleum Coke, Along California Waterways, through Densely Populated
4 areas, through the City of Oakland”. This resolution, which recited the
5 Council’s opposition to the transportation of commodities including coal
6 and petcoke through Oakland was introduced by Councilmembers Kalb,
7 Gibson, McElhaney and Kaplan. Councilmembers Brooks, Gallo, Gibson,
8 McElhaney, Kalb, Kaplan, Reid, Schaaf and then-President Kernighan
9 voted in favor of the resolution. On information and belief, there was not
10 even the semblance of study or a public hearing before this resolution was
11 passed.

- 12 b. On or about May 4, 2015—one year before the Ordinance and Resolution
13 of 2016 were adopted—Oakland Councilwoman Lynette Gibson
14 McElhaney released a signed press release entitled “OAKLAND SAYS
15 ‘NO!’ TO COAL SHIPMENTS AT THE OAKLAND ARMY BASE”.
16 Therein, Councilwoman McElhaney stated: “Lynette Gibson McElhaney,
17 President of the Oakland City Council, is unequivocal in her opposition to
18 coal being exported from City-owned lands, ‘. . . [I]t is not the type of
19 economic development that we want - no thank you!’” Councilwoman
20 McElhaney continued: “The Oakland City Council, and the Port Board of
21 Commissioners have already taken stances against coal exports,
22 specifically: • In February of 2014, the Board of Port Commissioners
23 rejected a proposal to ship coal from one of their terminals. • In June of
24

2014, Councilmember McElhaney and her colleagues passed a resolution opposing the transport of coal, oil, petcoke (a byproduct of the oil refining process) and other hazardous materials by railways and waterways within the City”.

- c. On or about May 14, 2015, Councilmember Abel J. Guillen posted on social media (under his Instagram moniker, “babocinco”) a photograph of a large banner stating: “NO COAL IN OAKLAND” with the caption: “No Coal in #Oakland! #savetheplanet #savetheearth #environment1st #environmentaljustice”.



- d. On May 11, 2015, Oakland Mayor Libby Schaaf wrote to CCIG CEO, Phil Tagami: “I was extremely disappointed to once again hear Jerry Bridges [President of TLS] mention the possibility of shipping coal into Oakland at the Oakland Dialogue breakfast. Stop it immediately. You have been awarded the privilege and opportunity of a lifetime to develop this unique piece of land. You must respect the owner and public’s decree that we

1 will not have coal shipped through our city. . . . Please declare definitively
2 that you will respect the policy of the City of Oakland and you will not
3 allow coal to come through Oakland. If you don't do that soon, we will all
4 have to expend time and energy in a public battle”

5
6 37. After the foregoing events and statements, the City Council began the
7 process of holding a series of sham public hearings on an ordinance to ban coal and
8 petcoke from Oakland. The first such hearing took place in September, 2015.

9 38. Among the parties who contributed to the September 2015 hearing was
10 the Bay Area Air Quality Management District (“BAAQMD”). BAAQMD
11 regulates non-vehicular sources of emissions into the air in the Bay Area. At the
12 September 2015 hearing, BAAQMD’s representative did not support a ban on coal
13 shipments but rather adopted a “neutral position”.

14 39. BAAQMD encouraged the City Council “to implement all feasible
15 mitigations” such as covering rail cars and conveyors involved in transporting coal.
16 BAAQMD did not provide any evidence that coal or petcoke shipments posed a
17 substantial health or safety danger or that a total ban was required for health and
18 safety.

19 40. On May 3, 2016, the Oakland City Council passed a resolution
20 acknowledging that analysis and review of the potential impacts of coal and petcoke
21 required “multi-disciplined expertise” and “specialized and additional expertise”
22 that the City Council and its staff did not have.

23 41. Accordingly, the City Council retained private consultant
24 Environmental Science Associates (“ESA”) to selectively review the record

1 compiled to date and to create findings that would appear to support a finding of
2 “health and/or safety impacts” of transporting bituminous coal, fuel oils, gasoline,
3 crude oil and petcoke through the Terminal.

4 42. The retention of ESA and the subsequent public hearing to review the
5 ESA Report were a sham—an attempt by the City Council to give the appearance of
6 weighing the evidence concerning coal and petcoke, even though the City Council
7 had already decided to ban the transport of coal and petcoke through the Terminal.

8 43. As Councilmember Kalb stated at the May 3 hearing, the retention of
9 ESA was part of a “multi-pronged effort” in which ESA would work with City Staff
10 and a staff person whom Kalb had hired on a temporary basis “to get us to a place
11 hopefully by the end of June where we’d be able to take appropriate action and have
12 the ability under the rules and under the provision of the development agreement to
13 take serious action”.

14 44. Councilmember Noel Gallo was even more direct at the May 3 hearing:
15 he expressed concern that the retention of ESA would further delay the vote on
16 banning coal and said that he was “ready to vote no on the coal”.

17 45. On or about Thursday, June 23, 2016, ESA issued its “Report on the
18 Health and/or Safety Impacts Associated with the Transport, Storage, and/or
19 Handling of Coal and/or petcoke in Oakland, Including at the Proposed Oakland
20 Bulk and Oversized Terminal in the West Gateway Area of the Former Oakland
21 Army Base” (the “ESA Report”).

22 46. On Friday, June 24, 2016, the City for the first time publicly released
23 proposed drafts of the Ordinance and Resolution. At the same time the City also
24

1 released an Agenda Report prepared by City staff (the “Staff Report”) that
2 recommended the adoption of the Ordinance and Resolution and which was
3 purportedly based on an evaluation of the ESA Report completed one day earlier
4 and of public letters and opinions submitted to the City regarding coal and petcoke,
5 including other reports purporting to analyze those submissions.

6 47. On June 27, 2016, three days after the ESA Report was issued to the
7 City (including two weekend days) the City Council held a hearing and voted to ban
8 coal and petcoke in the Ordinance and Resolution. On information and belief, no
9 city councilmember fully analyzed and understood the 163 page ESA report in that
10 amount of time, and no city councilmember asked any questions of ESA at the June
11 27 hearing.

12 48. The ESA Report separated its findings with respect to the potential
13 “health effects” of coal, “safety effects” of coal and “climate effects” of coal. With
14 respect to the purported “health effects” of transporting coal, the ESA Report merely
15 concluded that the rail transportation and storage and handling of coal, taken
16 together, “**could** impact the health of adjacent neighbors from the expected increase
17 into the ambient air in the form of total suspended particulates and fine particulates
18 (TSP, PM₁₀, and PM_{2.5})” (emphasis added).

19 49. Even these speculations by ESA about what “could” happen are
20 unsupported. Nothing in the ESA Report or any other report or submission
21 purportedly evaluated by the City Council and its staff provides a basis for a ban on
22 coal or petcoke by the City of Oakland.

1 50. The ESA Report relies principally on estimates of particulate matter
2 (“PM”) emissions resulting from the transportation of coal and petcoke. PM_{10} and
3 $PM_{2.5}$ are standard metrics for measuring PM found in the air. PM is not unique to
4 coal and petcoke: a large number of other sources produce PM including, for
5 example, windblown soil, vehicle exhaust, grain storage, and woodburning
6 fireplaces.

7 51. Thus, any activity—including shipping commodities other than coal
8 or petcoke to and through the Terminal—could increase the levels of PM in the air.

9 52. Neither the ESA Report nor any other report or submission purportedly
10 evaluated by the City Council or its staff addresses whether coal and petcoke release
11 more PM than other bulk commodities that might be shipped through the Terminal.

12 53. The ESA Report divided its emission estimates between “Rail
13 Transport” (the period when the coal would be in transit in a rail car) and “OBOT
14 Operations” (the period when the coal would be unloaded, stored, transferred and
15 transloaded into ships after arriving at the Terminal). These estimates are contained
16 in Table 5.7 of the ESA Report:

TABLE 5-7
SUMMARY OF EMISSIONS ESTIMATES FROM RAIL TRANSPORT, STAGING/SPUR TRAVEL, UNLOADING, STORAGE, TRANSFER AND SHIP LOADING OF COAL AT OBOT

Fugitive Coal Dust Emissions Source	tons/yr			lbs/day		
	TSP	PM ₁₀	PM _{2.5}	TSP	PM ₁₀	PM _{2.5}
Rail Transport*						
BAAQMD	2,102	988	148	12,012	5,646	847
Oakland	82	38	6	468	220	33
So Emeryville	35	17	3	203	95	14
San Leandro	98	46	7	562	264	40
Staging at Port Railyard, Rail Spur Trip to OBOT	156	78	18	889	445	67
SUBTOTAL - Oakland	238	116	18	1,357	665	100
OBOT Operations						
Unloading	11.9	5.7	0.9	66.0	31.2	4.7
Storage	3.2	1.5	0.2	17.7	8.4	1.3
Transfer	10.4	4.9	0.7	57.6	27.2	4.1
Transloading	11.9	5.7	0.9	66.0	31.2	4.7
SUBTOTAL	37.5	17.7	2.7	207.3	98.1	14.8
PROJECT TOTAL - Oakland	276	134	21	1,564	763	115
* Uncontrolled air emissions of fugitive dust from open coal filled rail cars. .						

54. ESA's estimates of "TSP" are irrelevant for all practical purposes: TSP is not regulated, and measurements of TSP are not relied upon in assessments of air quality, not even in the ESA Report.

55. ESA's estimates of PM₁₀ and PM_{2.5} emissions from the unloading, storage, transfer and/or transloading of coal at the "OBOT Operations" were not supported by evidence.

56. The Terminal and its emission controls have not yet been fully designed, much less constructed. Accordingly, it is impossible to specify the precise amount of possible emissions that might be associated with the proposed Terminal.

57. Nonetheless, ESA did not provide a range of estimated potential emissions from the Terminal but instead purported to estimate the precise level of emissions.

1 58. ESA provided no detail or back up or any indication of the numerical
2 inputs it used to reach the values in Table 5-7.

3 59. On information and belief, no set of inputs grounded in fact would
4 support the values set forth in Table 5-7 of the ESA Report.

5 60. ESA does not appear to have taken into account in Table 5-7 the
6 emission levels of two terminals in California that transport coal or petcoke.

7 61. The terminal at the Port of Pittsburg is a multiple commodity terminal,
8 which stores and ships petcoke. ESA does not appear to have taken into account the
9 Pittsburg terminal's emission values in the values it reported in Table 5-7 of the
10 ESA Report. ESA did not explain this omission.

11 62. The terminal at the Port of Long Beach is a multiple commodity
12 terminal, which stores and ships coal and petcoke. ESA does not appear to have
13 taken into account the Long Beach terminal's emission values in the values it
14 reported in Table 5-7 of the ESA Report. ESA did not explain this omission.

15 63. Consistent with the proposed design of the Terminal, the Pittsburg
16 terminal and the Long Beach terminal are either totally enclosed or partially
17 enclosed and otherwise covered. The reported emissions for these facilities are far
18 lower than the values predicted by ESA for the Terminal.

19 64. On information and belief, the Pittsburg terminal and the Long Beach
20 terminal operate pursuant to permits from their respective Air Quality Management
21 Districts. These Districts regulate air quality pursuant to delegation from the State
22 of California.

23
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1 65. On information and belief, the Pittsburg terminal publicly reported
2 emissions of 0.1 tons a year of PM₁₀ and 0.1 tons a year of PM_{2.5}; these emissions
3 are based on a total throughput of 500,000 tons of petcoke per year.

4 66. On information and belief, the Long Beach terminal publicly reported
5 emissions of 0.8 tons per year of PM₁₀ and 0.2 tons per year of PM_{2.5}; these
6 emissions are based on a total throughput of approximately 1.7 million tons of coal
7 per year.

8 67. The emissions rates in paragraphs 65 through 66 reflect emissions rates
9 at similar enclosed and/or covered terminals, and are well below the emissions rate
10 assumed in the ESA Report.

11 68. The ESA Report does not contain any explanation about why the
12 enclosures and/or covers of the Pittsburg or Long Beach terminals would not work
13 at the Terminal. Neither the ESA Report nor any other report or submission
14 purportedly evaluated by the City Council or its staff contains any explanation about
15 why they did not assume emissions rates comparable to the Pittsburg and Long
16 Beach terminals.

17 69. The EPA has delegated certain regulatory authority regarding air
18 quality to the states. The State of California has delegated regulatory responsibility
19 for air pollution from non-vehicular sources to Air Quality Management Districts.
20 In the nine county Bay Area, this regulatory body is BAAQMD.

21 70. The ESA Report acknowledges that the “Bay Area Air Quality
22 Management District (BAAQMD)” is “the regional agency responsible for air
23 pollution control in San Francisco Air Basin (Bay Area) “
24

1 71. No BAAQMD rule or regulation requires a ban on the transportation of
2 coal or the proposed activities at the Terminal.

3 72. For any new source of emissions in the Bay Area, BAAQMD has
4 established thresholds over which it considers an increase in emissions “significant”.
5 With respect to PM₁₀, BAAQMD considers a new source of emissions significant if
6 it emits over 15 tons of PM₁₀ per year. With respect to PM_{2.5}, BAAQMD considers
7 a new source of emissions significant if it emits over 10 tons of PM_{2.5} per year.

8 73. On information and belief, the increase in PM emissions from the
9 operations at the Terminal, whether or not coal and petcoke were permitted, would
10 be approximately ten times less than what BAAQMD considers significant.

11 74. Pursuant to BAAQMD Regulations, the Terminal would be required to
12 obtain an operational permit. The permit would be conditioned on installation of
13 Best Available Control Technology (BACT). On information and belief, BACT
14 includes control measures such as enclosures, baghouses, wind screens, spillage
15 control for conveyors, and water sprays.

16 75. Storage domes and enclosed conveyors are currently used in coal and
17 petcoke facilities, including in the Bay Area. The ESA Report so states and
18 recognizes these mitigation measures would be regarded by BAAQMD as “Best
19 Available Control Technology”. ESA does not state that it took these measures into
20 account in calculating the values in Table 5-7. On information and belief, ESA did
21 not do so.

22 76. The installation of BACT will ensure that PM emissions at the
23 Terminal are negligible.
24

1 77. On or about October 5, 2015, BAAQMD wrote to the City Council:
2 “Air District staff is available to meet with City staff and assist in the evaluation of
3 Terminal Logistics Solutions’ proposed mitigation measures and discuss additional
4 measures. As Air District staff stated at the Sept. 21 hearing, potential air quality
5 emissions and impacts to public health from the proposed Project include fugitive
6 dust and equipment engine emissions. Dust emissions can be reduced through
7 aggressive containment of all aspects of material handling – rail cars, conveyers,
8 storage piles, etc.” Such containment is planned for the Terminal and related
9 activities. On information and belief, ESA did not take these containment measures
10 into account in Table 5.7 and did not address or explain why it rejected BAAQMD’s
11 views on these containment measures.

12 78. On information and belief, neither the ESA Report nor any other report
13 or submission purportedly evaluated by the City Council or its staff addresses or
14 explains why BAAQMD’s permit requirements and the installation of BACT would
15 be insufficient.

16 79. The ESA Report failed to address that the South Coast Air Quality
17 Management District (SCAQMD) adopted a regulation known as Rule 1158 at least
18 in part to regulate the Long Beach terminal. Nothing in the ESA Report or any
19 other report or submission purportedly evaluated by the City Council or its staff
20 addresses, much less establishes, that there is any substantial danger to neighbors or
21 users of the Long Beach terminal as it is operating today. Nothing in the ESA
22 Report or other evidence addresses why the Terminal, if the requirements of Rule
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1 1158 were applied to it, would result in any substantial danger to neighbors or users
2 of the Terminal or other residents of Oakland.

3 80. The Pittsburg and Long Beach terminals are not the only facilities in
4 California that handle coal or petcoke. As the ESA Report acknowledges, “In the
5 San Francisco Bay area all of the five refineries produce petcoke” which is a
6 “commonly exported commodity”. The ESA Report contains no indication of the
7 emissions levels from these facilities. The ESA Report contains no indication of
8 any adverse health consequences from these facilities.

9 81. As set forth herein, the City is prohibited by the United States
10 Constitution and federal law from regulating rail transportation.

11 82. Even if the City could lawfully regulate rail transportation, ESA’s
12 estimates for PM emissions from Rail Transport were explicitly based on an
13 assumption of “uncontrolled air emissions of fugitive dust from open coal filled rail
14 cars”. There was no basis for this assumption.

15 83. In fact, potential coal dust emissions from rail cars transporting coal to
16 the Terminal could be controlled by measures such as rail car covers and/or
17 surfactants (spray-on adhesive coating that is routinely employed in rail transport for
18 the purpose of preventing fugitive dust releases). ESA cited no evidence that such
19 measures would not work.

20 84. Further, on information and belief, even with respect to uncovered rail
21 cars the rate of coal dust emissions decreases rapidly as the rail car begins to travel.
22 As a result, PM emissions from a rail car travelling through Oakland would be
23 significantly less than any such emissions at the departure point.
24

1 85. On information and belief, ESA relied upon numerical values
2 concerning emission rates for uncovered rail cars at the departure point and assumed
3 that rate would be constant along the entire trip. The currently projected starting
4 point for coal shipments to the Terminal is Utah—almost a thousand miles from
5 Oakland. There was no basis for the ESA Report or any other report or submission
6 purportedly evaluated by the City Council or its staff to use emissions rates at the
7 departure point in Utah to predict emissions from trains moving in Oakland.

8 86. Once operational, commodities will arrive at the Terminal from the
9 interstate rail system as follows:

- 10 a. “Class I” rail carriers will transport commodities to the Port of Oakland
11 Rail Yard.
- 12 b. Once the commodities arrive at the Rail Yard, the Class I rail carriers
13 will transport the commodities from the Rail Yard to the Terminal via the
14 rail carrier known as OGRE.
- 15 c. The rail cars that OGRE will move from the Rail Yard to the Terminal
16 belong to the Class I rail carriers.
- 17 d. OGRE will be paid by the Class I rail carriers to move these rail cars.
- 18 e. At any time, the Class I carriers will be entitled to undertake the Rail
19 Yard to Terminal transportation directly.

20 87. Once commodities arrive at the Terminal, they will be transloaded from
21 the rail carrier through the Terminal to ships for shipment to other states or export to
22 foreign countries. Transloading is an integral part of the interstate rail system. It
23 includes handling the commodities, loading and unloading them, possibly storing
24 them temporarily, and transferring them from the rail carrier through the terminal to
the ships.

1 88. With respect to the “safety effects” of coal and petcoke, the ESA
2 Report asserted merely that fires have occurred at coal piles and in rail cars of
3 unspecified contents in unspecified conditions, and that coal fires can present a
4 danger to persons in close proximity to them, such as firefighters. The ESA Report
5 identified no evidence, however, that a coal fire is likely to occur at the Terminal or
6 in rail cars carrying coal to or through the Terminal in Oakland.

7 89. The ESA Report provided no evidence of a coal fire ever occurring at
8 any of the coal rail terminals cited in the Report.

9 90. In particular, neither the ESA Report nor any other report or
10 submission purportedly evaluated by the City Council or its staff contains any
11 evidence that there has been a fire at the Long Beach Terminal or the Pittsburg
12 terminal, which use covers and/or enclosures.

13 91. ESA did not consider any evidence regarding mitigation measures for
14 fire safety.

15 92. With respect to the climate effects of coal and petcoke, the ESA Report
16 commented on greenhouse gases solely because it was mentioned by public
17 commenters during the public hearing process: “Because numerous public
18 commenters noted the contribution of the greenhouse gas emissions of coal when
19 combusted by the end user overseas, this study also includes a review of those
20 comments”.

21 93. The ESA Report states that air pollutants emitted from the use of coal
22 and petcoke overseas may be carried over the ocean to Oakland. On information
23
24

1 and belief, because of the relevant meteorological conditions, there will be no or
2 negligible air quality impact to Oakland from the burning of coal overseas.

3 94. The ESA Report states that the coal shipped through the Terminal and
4 combusted overseas could increase greenhouse gas levels globally. On information
5 and belief, the size of any increase in greenhouse gasses from the use of the
6 quantities of coal that would be exported through the Terminal would be on the
7 order of 0.01 percent (one one-hundredth of one percent) of the global total.

8 95. The ESA Report concludes that the resulting incremental rise in sea
9 level “would be experienced locally in Oakland”. Neither the ESA Report nor any
10 other report or submission purportedly evaluated by the City Council or its staff
11 contain any substantial evidence to support this conclusion. The size of the increase
12 in global greenhouse gas levels, as alleged in the previous paragraph, would not be
13 perceptible in Oakland.

14 96. Apart from the ESA Report, the Staff Report (on which the Ordinance
15 and Resolution purport to rely) purports to have evaluated a report by Zoe Chafe
16 regarding the transportation of coal and petcoke (the “Chafe Report”).

17 97. In or around November 2015, City Councilmember Kalb issued a
18 solicitation and proposed scope of work entitled “Evaluation of Health and Safety
19 Impacts of the Proposed Bulk Coal Terminal on the Former Oakland Army Base
20 Adjacent to the Port of Oakland”.

21 98. Councilmember Kalb’s solicitation resulted in the retention of Zoe
22 Chafe to prepare a report that purported to review the evidence regarding coal and
23 petcoke.
24

1 99. As the November 2015 solicitation suggested, the retention of Chafe
2 was an attempt to by the City Council to give the appearance of weighing the
3 evidence concerning coal and petcoke, even though the City Council had already
4 decided to ban the transport of coal and petcoke to and through the Terminal
5 irrespective of the evidence.

6 100. That solicitation made clear that a balanced and objective review of the
7 evidence was not expected. The solicitation stated that the person to be retained
8 would review the record from the September 2015 hearing on coal and petcoke and
9 produce a document that would contain, if applicable, “a series of findings that can
10 be used to support the application of public health or safety regulations pursuant to
11 section 3.4.2 of the development agreement”.

12 101. While Chafe was preparing her Report, and shortly before the Oakland
13 City Council passed the resolution to retain ESA on May 3, 2016, Vice Mayor and
14 City Councilmember Anne Campbell Washington received an email from her chief
15 of staff that provided a path to the adoption of the Ordinance and Resolution.
16 Among other things, the email stated that “The only way to vote on June 21 [to ban
17 coal and petcoke] is if ESA process is dispensed altogether. We can rely on the
18 report that Zoe Chafe is preparing and that independent public health panel will
19 prepare”.

20 102. The email to Councilmember Campbell was written on April 30, 2016;
21 the Chafe Report was not completed until June 22, 2016. The fact that the City
22 Council and its staff believed that it could “rely” on the Chafe Report before it was
23 completed reflects that the Report was not an objective review of the evidence.
24

1 103. The Chafe Report is not supported by substantial evidence.

2 104. For example, with respect to purported health effects, the Chafe Report
3 states that the Terminal presents a health risk because “[t]here is no safe level of
4 exposure to PM_{2.5}” and the Terminal will release PM_{2.5}. As set forth in paragraph
5 51 above, **any** operations at the Terminal or West Gateway would and currently do
6 release PM_{2.5}, whether or not involving coal or petcoke.

7 105. The Chafe Report states that emissions from the burning of coal may
8 cause cancer. As set forth in paragraph 7 above, there will be no burning of coal in
9 connection with the Terminal.

10 106. Chafe’s assertion that coal fires may expose people to carcinogenic
11 toxins is based on studies regarding prolonged exposure to fumes from cooking food
12 using solid fuels such as coal. These conditions are inapplicable to people in the
13 vicinity of the Terminal, even assuming a coal fire occurred at some point.

14 107. Chafe’s assertions regarding the health effects of coal on workers at the
15 Terminal assume that conditions at the Terminal would be the same as those in a
16 coal mine. There is no basis for this incorrect assumption.

17 108. The conditions at the Terminal, like the conditions at the Pittsburg and
18 Long Beach terminals, would not be similar to coal mines in any material respect.

19 109. Workers at the Terminal will be equipped with protective equipment as
20 required by the National Institute for Occupational Safety and Health including
21 personal respiratory protection. Chafe assumes, without evidentiary support, that
22 the protective equipment would not work. Neither the Chafe Report nor any other
23 report or submission purportedly evaluated by the City Council or its staff cites any
24

1 evidence that workers at the Long Beach and Pittsburg terminals do not use
2 protective equipment or are otherwise exposed to health risks.

3 110. Chafe asserts that PM will be released from the Terminal by “Rail cars
4 being transported through Oakland”, “Rail cars in terminal (bottom-dump)”, “Open
5 rail cars” and “Open storage areas”.

6 111. There will be no “Open rail cars” and no “Open storage areas” at the
7 Terminal, and any dust emitted from the “bottom-dump” railcars would be
8 contained within the fully enclosed Terminal.

9 112. With respect to coal fires and explosions, Chafe asserts that “even if
10 safety protocols are followed” the transportation of coal to and through the Terminal
11 presents a “substantial risk” of “substantial damage from fires and explosions”.
12 Chafe did not cite any evidence regarding mitigation measures for fire safety or
13 attempt to explain why those mitigation measures would not work.

14 113. In particular, the Chafe Report contains no evidence that there has been
15 a fire at the Long Beach or Pittsburg terminals, which use covers and/or enclosures
16 and employ fire mitigation measures.

17 114. The assertion in the Chafe Report and in other reports and submissions
18 purportedly evaluated by the City Council or its staff that coal poses a substantial
19 risk of fire/explosion during transport, including by spontaneous combustion,
20 despite all safety precautions, contradicts the Secretary of Transportation’s
21 designation of coal as safe for transportation.

1 115. Chafe's conclusions regarding the global climate effects of coal
2 exported from the Terminal are not supported by evidence for the same reasons
3 alleged in paragraphs 94 through 95 above.

4 116. The purpose, intent and effect of the Ordinance and Resolution is to
5 regulate the transportation by rail and by ship of coal and petcoke.

6 117. By completely banning coal and petcoke activities at the Terminal, the
7 Ordinance and Resolution make it impossible to ship or transport coal to or through
8 Oakland for export.

9 118. The fact that the Oakland City Council's intent was to prohibit rail
10 transportation and shipping of coal and petcoke is reflected in the ESA Report and
11 other reports and submissions purportedly evaluated by the City Council or its staff.
12 In particular, ESA's estimated emissions of both PM₁₀ and PM_{2.5} from the "OBOT
13 Operations" are only 13% of ESA's estimated total emissions for "all activities
14 associated with OBOT for the export of coal" (*i.e.*, from "Rail Transport" and
15 "OBOT Operations" combined). Other reports purportedly evaluated by the City
16 Council or its staff similarly relied principally upon the estimates of PM emissions
17 from coal and petcoke associated with rail transport and not from operations at the
18 Terminal.

19 119. The fact that the Oakland City Council's intent was to prohibit rail
20 transportation and shipping of coal and petcoke is also reflected by the exemptions
21 from the scope of the Ordinance and Resolution of local coal and petcoke operations
22 unrelated to transportation: specifically exempted from the ban are (a) non-
23 commercial facilities located in Oakland, and (b) commercial manufacturing
24

1 facilities located in Oakland where coal and petcoke are consumed on-site. The
2 ESA Report states that these activities emit pollutants that can have impacts on
3 health and on the environment and provides no basis for distinguishing between
4 these activities and transportation activities.

5 120. Oakland City Councilmembers expressly stated that they enacted the
6 Ordinance and Resolution precisely to prevent the rail transportation and shipping of
7 coal and petcoke to and through Oakland. For example:

- 8 a. On June 28, 2016, shortly after the votes on Ordinance No. 13385 and
9 Resolution No. 86234, Councilmember Abel Guillen posted a link to an
10 article on social media declaring: “Oakland bans *coal shipments*”;
11 b. In a July 31, 2016 email, Councilmember Rebecca Kaplan sought
12 donations for her re-election campaign by touting her role in “banning the
13 *shipment* and storage of coal”;
14 c. In an August 23, 2016 post, Councilmember Lynette Gibson McElhaney,
15 discussing her bid for re-election, similarly emphasized that during her
16 time on the City Council, Oakland “**Banned *coal exports*”.

17 121. The statements by these City Councilmembers, and others, reflect
18 reality: If the Ordinance remains in place, no rail carrier will ship coal to Oakland
19 for export because there would be no way to move the coal from the rail carrier to
20 the ships. Since no rail carrier could bring coal to Oakland, ships likewise could not
21 transport coal for export.

22 122. The exclusive Sublease Option OBOT negotiated with TLS, as
23 described in paragraph 35 above, was set to earn both OBOT and the City of
24 Oakland millions of dollars over the 66-year life of the sublease. The transaction
was based, in part, on TLS’s expectation that it could select the bulk commodities to
be shipped to and through the Terminal without restriction.

1 123. The passage of the Ordinance and Resolution significantly diminished
2 the value of the Sublease Option, causing TLS not to exercise its option and instead
3 to seek to renegotiate the payment terms of the proposed sublease at substantially
4 less advantageous terms for OBOT.

5 124. Accordingly, the passage of the Ordinance and Resolution have
6 materially and substantially harmed OBOT, including by diminishing the value of
7 OBOT's rights pursuant to the DA and diminishing the value of its investment in the
8 West Gateway, imposing on OBOT substantial out-of-pocket costs to mitigate the
9 harm from Oakland's unconstitutional exercise of its power, and interfering with
10 OBOT's ability to attract partners and investments for the West Gateway project, all
11 of which threaten the viability of the Terminal.

12 **CLAIMS FOR RELIEF**

13 **FIRST CLAIM**

14 **Unconstitutionality Under the Commerce Clause**

15 125. OBOT realleges and reincorporates by reference the allegations set
16 forth in paragraphs 1 through 124, above.

17 126. According to the U.S. Energy Information Administration (the "EIA"),
18 more than one billion short tons of coal were produced by U.S. coal mines in
19 aggregate in 2014. The U.S. is a substantial user of coal, both for electric power and
20 a variety of other commercial, institutional, and industrial purposes. For example, in
21 2015 more than 1.7 billion short tons of coal were used nationwide.

22 127. On information and belief, coal is mined in 25 states of the United
23 States (but not California), and nearly 70% of coal delivered in the United States is
24

1 transported by rail for at least some portion of its journey. The Department of
2 Transportation's "Freight Facts and Figures" show that as of 2013, coal remained
3 the sixth most shipped commodity by weight in the U.S., with more than 1.2 billion
4 tons transported that year.

5 128. The United States is also a large beneficiary of international trade in
6 coal, reportedly exporting approximately 75 million short tons of coal in 2015 alone.
7 On information and belief, more coal is exported from the West Coast of the United
8 States than any other non-containerized commodity.

9 129. The proper and efficient functioning of the system for transportation of
10 commodities including coal and petcoke by rail requires a uniform transportation
11 infrastructure and regulations throughout the country and would be defeated by a
12 patchwork of local regulations.

13 130. The Ordinance and Resolution significantly impair the federal interest
14 in an efficient and uniform system of transportation of commodities in interstate and
15 foreign commerce by effectively prohibiting all shipments of coal and petcoke to
16 and through the Terminal. The loading, unloading, transloading, transferring,
17 storage and/or other handling of coal and petcoke are necessary and inextricable
18 parts of that uniform system of interstate shipment of coal and petcoke by rail and
19 export by ship—particularly at a rail-to-ship terminal, where the primary function is
20 to transfer bulk material such as coal and petcoke from rail to ship for international
21 export.

22 131. The Ordinance, as applied to the Terminal through the Resolution,
23 imposes burdens on interstate commerce that are impermissible under the
24

1 Commerce Clause. U.S. Const. art. I, § 8, cl. 3. The Ordinance burdens out-of-state
2 miners, shippers, customers and carriers of coal and petcoke while protecting in-
3 state interests by banning the transportation of coal and petcoke through the
4 Terminal and simultaneously exempting from the ban local operations within
5 Oakland that handle, store, and/or consume coal and petcoke.

6 132. The justifications for the ban imposed by the Ordinance and Resolution
7 and the purported benefits of the Ordinance and Resolution are illusory. The
8 Ordinance and Resolution impose a burden on interstate and foreign commerce, are
9 clearly excessive in relation to the purported local benefits, are not based on
10 evidence of a substantial danger to residents of Oakland and neighbors or users of
11 the Terminal, and there are less restrictive measures that can and do control any
12 fugitive dust emissions from the activities banned by the Ordinance and Resolution.

13 133. As described herein, the passage of the Ordinance and Resolution have
14 materially and substantially harmed OBOT, including by diminishing the value of
15 OBOT's rights pursuant to the DA and diminishing the value of its investment in the
16 West Gateway, imposing on OBOT substantial out-of-pocket costs to mitigate the
17 harm from Oakland's unconstitutional exercise of its power, and interfering with
18 OBOT's ability to attract partners and investments for the West Gateway project.

19 134. OBOT therefore seeks declaratory and injunctive relief finding that the
20 Ordinance and Resolution are unconstitutional under the Commerce Clause of the
21 United States Constitution.

SECOND CLAIM

**Preemption Under the ICCTA, the Hazardous Materials
Transportation Act, and the Shipping Act of 1984**

135. OBOT realleges and reincorporates by reference the allegations set forth in paragraphs 1 through 124, above.

136. The Ordinance, as applied to the Terminal through the Resolution, is preempted by federal law.

137. The Ordinance and Resolution are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), which vests the exclusive power to regulate rail transportation in the Surface and Transportation Board of the United States; the Hazardous Materials Transportation Act (“HMTA”), which vests the United States Secretary of Transportation with the authority to determine what materials warrant “hazardous” designations and restrictions or prohibitions in interstate and intrastate transportation; and the Shipping Act of 1984 which prohibits unreasonable discrimination against shippers, including by refusing to provide terminal services for reasons unrelated to transportation conditions.

138. The ICCTA, 49 U.S.C. 10501 *et seq.*, preempts the Ordinance and Resolution.

139. The ICCTA vests the Surface and Transportation Board (“STB”) with exclusive jurisdiction over “transportation by rail carriers” and the operation of “spur, industrial, team, switching or side tracks, or facilities”. 49 U.S.C. § 10501(b).

140. The ICCTA further provides that the remedies provided under ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law”. 49 U.S.C. § 10501(b)

1 141. As set forth herein, the ICCTA preempts the Ordinance and Resolution
2 because they impermissibly regulate services related to the movement of property
3 by rail, including receipt, storage, handling, and interchange of property at the
4 Terminal.

5 142. The Ordinance and Resolution unjustifiably restrict and foreclose the
6 foregoing activities by banning the loading, unloading, transloading, transferring,
7 storage and/or other handling of coal or petcoke at the Terminal.

8 143. The HMTA, 49 U.S.C. §§ 5101 *et seq.*, preempts the Ordinance and
9 Resolution.

10 144. The HMTA vests the United States Secretary of Transportation
11 (“Secretary”) with the exclusive authority to determine what materials warrant (and
12 do not warrant) “hazardous material” designations and restrictions or prohibitions in
13 interstate and intrastate transportation.

14 145. 49 U.S.C. § 5103 states that the Secretary shall designate materials as
15 hazardous when the Secretary determines that transporting the material in commerce
16 in a particular amount and form may pose an unreasonable risk to health and safety
17 or property.

18 146. 49 U.S.C. § 5125 preempts states and political subdivisions of states
19 from enacting any law or regulation that is an obstacle to accomplishing and
20 carrying out the HMTA or regulations thereunder.

21 147. 49 U.S.C. § 5125 further preempts any regulation that is “not
22 substantively the same” as any provision of the HMTA or regulations promulgated
23 under its authority with respect to “the *designation*, description, and classification of
24

1 hazardous material” and “the packing, repacking, *handling*, labeling, marking, and
2 placarding of hazardous material”. (emphasis added).

3 148. The Secretary has not designated or classified coal as a hazardous
4 material that must be prohibited from interstate or intrastate transport. The
5 Secretary has designated coal, along with other flammable solids like paper, wood,
6 and straw as materials that may require certain packaging, labelling and stowage
7 restrictions when shipped by marine vessel, but which do not present an
8 unreasonable risk of harm to health and safety when transported by rail and through
9 terminals.

10 149. The Secretary has designated “Coke, Hot” as a hazardous material
11 forbidden from transport, 49 CFR 172.101, but otherwise has designated petcoke as
12 a material that is safe to transport in interstate (and intrastate) commerce without
13 unreasonable risk of harm to health or safety.

14 150. In adopting the Ordinance and Resolution, Oakland has designated coal
15 and petcoke as materials that must be banned from transportation through the
16 Terminal because the City has determined that they pose a substantial risk to health
17 and safety. By designating coal and petcoke as materials that present an
18 unreasonable risk to health and safety when transported in interstate commerce to
19 and through the Terminal, the Ordinance and Resolution usurp the exclusive
20 authority granted to the Secretary and are an obstacle to accomplishing and carrying
21 out the HMTA’s goals of national uniform standards regarding the designation and
22 transportation of dangerous materials, and the HTMA’s purpose of avoiding a
23 patchwork of state and local regulations.
24

1 151. The Ordinance and Resolution are substantively different than the
2 HMTA and regulations thereunder as to at least the designation, classification and/or
3 handling of coal and petcoke.

4 152. The Shipping Act of 1984, 46 U.S.C. §§ 40101, *et seq.*, preempts
5 and/or otherwise prohibits the Ordinance and Resolution.

6 153. The Shipping Act provides that a “marine terminal operator may not—
7 (1) agree with another marine terminal operator or with a common carrier to
8 boycott, or unreasonably discriminate in the provision of terminal services to, a
9 common carrier or ocean tramp; (2) give any undue or unreasonable preference or
10 advantage or impose any undue or unreasonable prejudice or disadvantage with
11 respect to any person; or (3) unreasonably refuse to deal or negotiate.” 46 U.S.C.
12 § 41106.

13 154. The operator of the Terminal will be a marine terminal operator. The
14 Ordinance and Resolution preclude the operator of the Terminal from dealing with
15 and providing terminal related services to shippers of coal and petcoke.

16 155. It is unreasonable to refuse to provide terminal services for reasons
17 unrelated to transportation conditions. Transportation conditions include the
18 transportation needs of the cargo, competition from other carriers, insufficient cargo
19 to warrant service at a particular port, or conditions at a port or other facility that are
20 beyond the carrier’s control. Transportation conditions do not include local
21 regulations based on public policy.
22
23
24

1 156. Based on the City's public policy against coal and petcoke, the
2 Ordinance and Resolution require that operators of the Terminal refuse to provide
3 terminal services to shippers of coal and petcoke.

4 157. As described herein, transportation conditions cannot justify this
5 discrimination against shippers that deal in coal and petcoke.

6 158. The justifications for the ban imposed by the Ordinance and Resolution
7 and the purported benefits of the Ordinance and Resolution are illusory. The
8 Ordinance and Resolution impose a burden on interstate and foreign commerce, are
9 clearly excessive in relation to the purported local benefits, are not based on
10 evidence of a substantial danger to residents of Oakland and neighbors or users of
11 the Terminal, and there are less restrictive measures that can and do control any
12 fugitive dust emissions from the activities banned by the Ordinance and Resolution.

13 159. As described herein, the passage of the Ordinance and Resolution have
14 materially and substantially harmed OBOT, including by diminishing the value of
15 OBOT's rights pursuant to the DA and diminishing the value of its investment in the
16 West Gateway, imposing on OBOT substantial out-of-pocket costs to mitigate the
17 harm from Oakland's unconstitutional exercise of its power, and interfering with
18 OBOT's ability to attract partners and investments for the West Gateway project.

19 160. Based on the foregoing, OBOT seeks declaratory and injunctive relief
20 finding that the Ordinance and Resolution, at least as applied to the Terminal, are
21 preempted by federal law.

THIRD CLAIM
Breach of Contract

161. OBOT realleges and reincorporates by reference the allegations set forth in paragraphs 1 through 124, above.

162. In the DA, Oakland granted OBOT the vested right to develop and use (and/or sublease) the West Gateway property for a bulk commodities terminal subject to regulations existing as of the effective date of the DA, July 16, 2013.

163. The adoption and enforcement of the Ordinance and Resolution breach the DA because section 3.4.2 of the DA permits the City to apply a health and safety regulation adopted after July 16, 2013, to the Terminal only if (a) the application of any such health and safety regulation is “otherwise permissible pursuant to Laws” (“Laws” being defined to include the Constitution of the United States, and any codes, statutes, regulations, or executive mandates thereunder), and (b) the regulation is based on substantial evidence of a substantial danger to health and safety.

164. As set forth herein, the Ordinance and Resolution violate the United States Constitution and federal law.

165. As set forth herein, the Ordinance and Resolution are not based on substantial evidence.

166. The justifications for the ban imposed by the Ordinance and Resolution and the purported benefits of the Ordinance and Resolution are illusory. The Ordinance and Resolution impose a burden on interstate and foreign commerce, are clearly excessive in relation to the purported local benefits, are not based on evidence of a substantial danger to residents of Oakland and neighbors or users of

1 the Terminal, and there are less restrictive measures that can and do control any
 2 fugitive dust emissions from the activities banned by the Ordinance and Resolution.

3 167. As described herein, the passage of the Ordinance and Resolution have
 4 materially and substantially harmed OBOT, including by diminishing the value of
 5 OBOT's rights pursuant to the DA and diminishing the value of its investment in the
 6 West Gateway, imposing on OBOT substantial out-of-pocket costs to mitigate the
 7 harm from Oakland's unconstitutional exercise of its power, and interfering with
 8 OBOT's ability to attract partners and investments for the West Gateway project.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, OBOT respectfully prays that this Court:

11 A. Issue a declaratory judgment, pursuant to 28 U.S.C. § 2201, 42 U.S.C.
 12 § 1983, and/or Rule 57 of the Federal Rules of Civil Procedure, that:

- 13 i. the Commerce Clause of the United States Constitution prohibits
 14 Oakland from applying the Ordinance and Resolution to OBOT or
 15 the Terminal;
- 16 ii. the ICCTA preempts Oakland from applying the Ordinance and
 17 Resolution to OBOT or the Terminal;
- 18 iii. the HMTA preempts Oakland from applying the Ordinance and
 19 Resolution to OBOT or the Terminal;
- 20 iv. the Shipping Act of 1984 preempts and/or otherwise prohibits
 21 Oakland from applying the Ordinance and Resolution to OBOT or
 22 the Terminal; and

1 v. Section 3.4 of the DA prohibits Oakland from applying the
2 Ordinance and Resolution to OBOT or the Terminal.

3 B. Issue a permanent injunction, pursuant to 28 U.S.C. § 1651, 42 U.S.C.
4 § 1983, and/or Rule 65 of the Federal Rules of Civil Procedure, enjoining Oakland
5 from applying or enforcing the Ordinance and Resolution to OBOT or the Terminal;

6 C. Award reasonable attorneys' fees and costs; and

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

13
14 Dated: June 14, 2017 Respectfully submitted,

15 QUINN EMANUEL URQUHART &
16 SULLIVAN, LLP

17 By: /s/ Robert P. Feldman
18 Robert P. Feldman

19 *Attorneys for Plaintiff OBOT*
20
21
22
23
24

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

OAKLAND BULK & OVERSIZED)	
TERMINAL, LLC,)	
)	
Plaintiff,)	
)	
VS.	)	NO. C 16-07014 VC
)	
CITY OF OAKLAND,)	
)	
Defendant.)	
)	

San Francisco, California
Thursday, April 20, 2017

**TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING**

APPEARANCES:

For Plaintiff Oakland Bulk & Oversized Terminal, LLC:
Quinn Emanuel Urquhart Sullivan LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
(650) 801-5069
(650) 801-5100 (fax)
BY: **ROBERT P. FELDMAN**
ELIYAHU NESS

For Plaintiff Oakland Bulk & Oversized Terminal, LLC:
Quinn Emanuel Urquhart Sullivan LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
(415) 875-6421
BY: **MEREDITH MCCHESNEY SHAW**

Transcribed By Lydia Zinn, Official Reporter, USDC, CSR #9223

APPEARANCES :

For Defendant City of Oakland:

Burke, Williams & Sorensen, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612
(510) 273-8780
(510) 839-9104 (fax)

BY: **KEVIN DRAKE SIEGEL**
GREGORY AKER

For Proposed Intervenor Sierra Club:

Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5636
(510) 208-3140 (fax)

BY: **JESSICA LYNN YARNALL LOARIE**

For Proposed Intervenor Earthjustice; San Francisco Baykeeper:

Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2000

BY: **COLIN CASEY O'BRIEN**
ADRIENNE L. BLOCH
HEATHER MUDFORD LEWIS

ALSO PRESENT: PHIL TAGAMI, MARK MC CLURE

1 **MR. SIEGEL:** Yes.

2 **THE COURT:** We have to defer to the City Council on
3 the interpretation of the contract?

4 **MR. SIEGEL:** If they have a reasonable
5 interpretation, I think that deference is due, yes, because of
6 a couple of reasons.

7 **THE COURT:** What case do you have that says that if
8 the City Council decides that a development agreement should be
9 interpreted one way, and the developer argues that it should be
10 interpreted the other way, that the City Council's
11 interpretation of the development agreement is entitled to
12 deference?

13 **MR. SIEGEL:** So three principles, and some cases, as
14 well.

15 And the first principle, of course, is the language. The
16 very language of the contract, itself, I think, speaks to that.

17 We also have the public-trust-doctrine cases that we've
18 described; that, while the development of a bulk-goods terminal
19 is generally a public-trust use because shipping is considered
20 within the public-trust purposes, we're putting a finer look at
21 this, because the question comes to -- as to a particular
22 product.

23 **THE COURT:** I just think those are summary-judgment
24 arguments.

25 **MR. SIEGEL:** All right. Well, I --

1 **THE COURT:** Let me ask you one other question.

2 **MR. SIEGEL:** Okay.

3 **THE COURT:** I was kind of expecting you to -- I might
4 have expected you to argue in your papers, and come in here and
5 argue -- you didn't make this argument in your papers, I don't
6 believe, but I might have expected you to focus on Government
7 Code Section 65866 -- right? -- which is part of the
8 developer-agreement statute, which says that *unless otherwise*
9 *provided by the development agreement, rules, regulations, and*
10 *official policies governing permitted uses of the land*
11 *governing density and governing design improvement and*
12 *construction standards and specifications applicable to*
13 *development of the property subject to a development*
14 *agreement shall be those rules, regulations, and official*
15 *policies in force at the time of execution of the agreement.*

16 And what I was kind of expecting to you say is that this
17 Ordinance does not meet that definition in that statute; and
18 therefore the City, in the Development Agreement, did not have
19 the authority to contract away -- assuming the Development
20 Agreement did, in fact, bar the City from adopting an ordinance
21 like the one at issue in this case, the City didn't have the
22 authority to contract away its ability to do that in the
23 Developer Agreement, because the statute doesn't apply to it.

24 **MR. SIEGEL:** I think we did make that argument,
25 perhaps not clearly enough to -- to -- to get your attention

1 sufficiently. Page 8 of our moving papers quotes that section.

2 **THE COURT:** Yeah, I know, but you don't -- I don't --
3 the argument would be to the extent the Development Agreement
4 purports to preclude the City from adopting an ordinance like
5 the one that was adopted, that part of the Development
6 Agreement is invalid --

7 **MR. SIEGEL:** I see what you're saying.

8 **THE COURT:** -- because it's contrary to the
9 definition, because the Ordinance that we adopted is
10 contrary -- goes beyond the definitions set forth in this
11 statute. And you did not make that argument.

12 **MR. SIEGEL:** I did not make that. I made a cousin of
13 that argument, I think.

14 **THE COURT:** A distant cousin, perhaps.

15 **MR. SIEGEL:** Well, a first cousin, maybe.

16 The point I was making --

17 If you look at page 8 of our opening papers, and then
18 we -- we -- if you come back to the reply brief --

19 **THE COURT:** Regardless of whether you made the
20 argument, what do you think about that argument?

21 **MR. SIEGEL:** Okay. So -- well, can I make the first
22 argument that I was making? And then I'll get into that --

23 **THE COURT:** Go ahead.

24 **MR. SIEGEL:** -- because we did consider that, and I
25 didn't feel that that was a necessary argument to make, because

1 that's really an alternative of the argument that we did
2 actually advance, which was that that's what the
3 development-agreement statute involves.

4 We have, of course, reserved police powers, and cannot
5 contract away the police powers.

6 And so if you read those two doctrines together, our
7 interpretation of the Development Agreement is that we did not
8 contract away our police powers, because it's limited to the --
9 the rights that were actually expressly stated therein. And we
10 did not vest any right to any particular use of a bulk-goods
11 terminal with respect to any particular commodities. And
12 the -- the Ordinance that was adopted wasn't a zoning
13 regulation. And so by doing that, we --

14 **THE COURT:** So how would you characterize the
15 Ordinance?

16 **MR. SIEGEL:** So it's a health and safety regulation
17 associated with the storage and handling of particularly
18 dangerous and dirty and -- materials that can cause problems.

19 Zoning ordinances, of course, do have a health and safety
20 component; but this is not, in and of itself, a zoning
21 ordinance, just like all sorts of --

22 I mean, ordinances that regulate what vendors may sell on
23 the street, and ordinances that regulate what food products may
24 be sold -- those are all health and safety ordinances. Those
25 are not zoning ordinances. Zoning and land-use ordinances go

1 to the use of land. This Ordinance doesn't go to zoning and
2 land-use issues. It goes to the storage and handling of a
3 particularly dangerous substance for --

4 **THE COURT:** But isn't it -- isn't the Ordinance --
5 does the Ordinance apply to any -- I mean, is there anybody
6 else in Oakland to whom this Ordinance would apply, other than
7 OBOT?

8 **MR. SIEGEL:** At the present moment, none that I'm
9 aware of; but there could be down the road, of course, others
10 that would come forward. So it's prospective in nature, and
11 would continue to apply; but I'm not aware of any other
12 terminal or bulk-goods materials-processing facility to which
13 it would apply right now. So --

14 **THE COURT:** Okay. So it was -- so it was --

15 And can you explain that a little more? You're not aware.
16 In other words, there is no other facility in Oakland that
17 meets the definition of the entity to which this Ordinance
18 applies?

19 **MR. SIEGEL:** I understand that is correct.

20 **THE COURT:** There's only one piece of land to which
21 this Ordinance applies?

22 **MR. SIEGEL:** Well, it applies to all land within the
23 City of Oakland, anybody that would be doing something similar;
24 but there's no current facility, other than the proposed OBOT
25 facility, that would be subject to it at this moment. Those

1 would all be prospective and potential proposals.

2 **THE COURT:** Okay.

3 **MR. SIEGEL:** And, I mean, I would have to confer with
4 my clients to confirm that those are the actual facts; but that
5 is my understanding. Having, you know, worked on this matter,
6 those are the facts; but of course, I can't testify as to the
7 truth, but I think that's the truth.

8 **THE COURT:** So then going back to Government Code
9 Section 65866, you know, since there is one piece of land at
10 this point to which this -- there's one facility in Oakland to
11 which this Ordinance applies, and there's one facility in
12 Oakland to which this Ordinance was targeted, wouldn't it be
13 considered a regulation governing permitted uses of the land?

14 **MR. SIEGEL:** I -- I think that, no, because it's
15 governing -- it's -- that is in the context of land uses and
16 zoning, where it's, *Can we do housing? Can we do commercial*
17 *facilities? Can we do industrial facilities, if we do?* And
18 along those lines. And I understand that that would be the
19 scope of the land-use regulations.

20 When you start talking about a particular commodity, and
21 can you store it in there, that is not a land-use issue. That
22 is a Health and Safety Code issue. And that's why it's not in
23 zoning ordinances, which is Title 17. It is in Title 8.
24 And -- but --

25 **THE COURT:** Well, I mean, they can put it wherever

1 they want. They can codify the Ordinance wherever they want
2 to.

3 **MR. SIEGEL:** Yes. And I do not want to make a
4 form-over-substance argument, but I still think it's
5 illustrative of the City's understanding and thinking of this
6 as not falling within zoning and land-use regulations, that it
7 is not that. A bulk-goods facility is still permitted. It's
8 still a permitted land use, but certain goods cannot be stored
9 and handled there.

10 But if it is a zoning regulation or land-use regulation
11 such that it's subject to the Government Code section we've
12 been talking about, well, then I think there is a
13 statute-of-limitations issue.

14 **THE COURT:** Is every land-use regulation a zoning
15 regulation?

16 **MR. SIEGEL:** I'm not -- I don't know.

17 **THE COURT:** Well, that's very important --

18 **MR. SIEGEL:** Yes.

19 **THE COURT:** -- to your statute-of-limitations
20 argument; isn't it?

21 **MR. SIEGEL:** Well, I think that those can be
22 considered synonyms, yes.

23 **THE COURT:** Does the case law support your argument
24 that those are synonyms? Any land-use regulation is also a
25 zoning regulation?

CERTIFICATE OF REPORTER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U. S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

Lydia Zinn

April 21, 2017

Signature of Transcriber

Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

)	
	)	Case Number: 3:16-CV-7014-VC
Oakland Bulk & Oversized Terminal, LLC)	
Plaintiff,	)	JOINT CASE MANAGEMENT
	)	STATEMENT FOR APRIL 20, 2017 CMC &
	)	[PROPOSED] ORDER
)	
vs.)	
)	
City of Oakland)	
)	
Defendant.)	
)	
)	

Pursuant to Rules 16 and 26 of the FRCP, Civil Local Rule 16-9, and the Standing Order for All Judges of the Northern District of California – Contents of the Joint Case Management Statement, Plaintiff Oakland Bulk & Oversized Terminal, LLC (“OBOT”) and Defendant City of Oakland (the “City”) submit this Joint Case Management Statement and Proposed Order for the Case Management Conference set for April 20, 2017, at 10:00 A.M.

1. Jurisdiction & Service: Service was effected on the City on December 9, 2016 (D.E. 10), and no other parties remain to be served. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and 28 U.S.C. § 1367, and venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(b)(2).

2. Facts: In 2013, the City and OBOT’s predecessor-in-interest entered into a statutory Development Agreement (“DA”), pursuant to which OBOT was granted certain rights and obligations to re-develop land at the former Oakland Army Base. Among other things, this included rights with respect to a “ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo” at a portion of the former Oakland Army Base known as the “West Gateway” (the “Terminal”). DA Exhibit D-2, § C(1). The DA includes certain provisions addressing, *inter alia*, (1) the scope of OBOT’s right to rely on “Existing City Regulations” and “City Approvals,” and (2) the applicability of other “City

1 and trial, so that the issues can be meaningfully addressed at the April 20, 2017 case
2 management conference. The parties met and conferred concerning the joint portions of this
3 CMC Statement on the afternoon of April 12, 2017. At that time, OBOT confirmed that it would
4 be updating its Separate Statements. Given that a party cannot edit the "Separate Statement" of
5 its adversary, OBOT offered to insert the City's Separate Statement(s) after receiving at a
6 specified time (proposing 5:30pm on the day of filing, April 13, 2017), and to file the combined
7 statement immediately thereafter without making any revisions to OBOT's separate statements
8 based on the City's separate statement(s). On April 13, 2017, the City declined that offer and
9 requested to see OBOT's separate statements in advance of filing. Although unnecessary,
10 OBOT provided its separate statements to the City as a courtesy as soon as they were
11 completed.

12 *Separate Statement by the City*

13 The City does not concur with OBOT's contentions regarding discovery and anticipates
14 that discovery motions will be required.

15 Regarding the federal question claims, the City proposes that following resolution of the
16 motions to dismiss the first and third claims for relief, it complete preparation of the legislative
17 record for the challenges to the Ordinance and Resolution (see draft index for the record attached
18 as Exh. A), in lieu of discovery. At most, the only potential non-expert discovery should be
19 related to compilation of the legislative record, most if not all of which is already publicly
20 available at the City's document-management website.

21 Regarding the state law breach of contract claim, the Court should grant the City's
22 motion to dismiss the breach of contract claim, obviating any discovery. Alternatively,
23 discovery should be limited to the public record with respect to the City Council's approval of
24 the Development Agreement and any related agreements.

25 As noted above, the City has objected to OBOT's inclusion of extensive points and
26 authorities regarding the anticipated discovery disputes. By email at 2:52 pm on April 13 (the
27 due date for this joint CMC Statement), OBOT provided a revised joint CMC Statement that set
28 forth extensive points and authorities (see pp. 6-11 for OBOT's discussion following its list of

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

2 Robert P. Feldman (Bar No. 69602)

3 bobjeldman@quinnemanuel.com

4 David Myre (Bar No. 304600)

5 davidmyre@quinnemanuel.com

6 555 Twin Dolphin Drive, 5th Floor

Redwood Shores, California 94065-2139

Telephone: (650) 801-5000

Facsimile: (650) 801-5100

7 QUINN EMANUEL URQUHART & SULLIVAN, LLP

8 Meredith M. Shaw (Bar No. 284089)

9 meredithshaw@quinnemanuel.com

10 50 California Street, 22nd Floor

San Francisco, CA 94111

Telephone: (415) 875-6600

11 *Attorneys for Plaintiff*

Oakland Bulk & Oversized Terminal, LLC

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 OAKLAND DIVISION

15 OAKLAND BULK & OVERSIZED
16 TERMINAL, LLC

17 Plaintiff,

18 vs.

19 CITY OF OAKLAND,

20 Defendant.

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

**PLAINTIFF OAKLAND BULK &
OVERSIZED TERMINAL, LLC'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
SIERRA CLUB'S AND SAN FRANCISCO
BAYKEEPER'S MOTION TO
INTERVENE AND REQUEST TO FILE
RULE 12(b)(6) MOTION TO DISMISS**

Date: April 20, 2017

Time: 10 a.m.

Ctrm.: No. 4, 17th Floor

Honorable Vince Chabria

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1 Plaintiff Oakland Bulk & Oversized Terminal, LLC (“OBOT”) hereby submits this
 2 Opposition to Sierra Club’s and San Francisco Baykeeper’s (“Proposed Intervenor’s”) Motion to
 3 Intervene and Request to File Rule 12(b)(6) Motion to Dismiss (“Motion”).

4 **I. INTRODUCTION**

5 Sierra Club and San Francisco Baykeeper seek to inject themselves into a dispute between
 6 Plaintiff OBOT and Defendant City of Oakland (the “City”) by intervening in this action as
 7 defendants. Any interests these Proposed Intervenor’s might have in the outcome of this litigation
 8 are more than adequately protected by the City, and their motion should be denied.

9 OBOT brought this action against the City in 2016 because the City passed an ordinance
 10 and resolution banning the shipment of coal and petroleum coke (“pet coke”) through OBOT’s
 11 ship-to-rail terminal for non-containerized bulk goods. That ordinance and resolution are not
 12 only unconstitutional as applied to OBOT, but, by passing them, the City breached a contract
 13 between OBOT and the City in which the City granted OBOT a vested right to use land at the
 14 former Oakland Army Base for a ship-to-rail terminal for non-containerized bulk goods (such as
 15 coal and pet coke) subject only to regulations existing three years earlier when the contract was
 16 entered into. OBOT accordingly filed this action against the City asserting claims for
 17 unconstitutionality under the dormant commerce clause, preemption and breach of contract.

18 The Sierra Club and San Francisco Baykeeper now seek to become defendants in this
 19 lawsuit despite the fact that they neither passed the ordinance and resolution nor have any power
 20 to repeal them, and are not parties to the contract between OBOT and the City. These Proposed
 21 Intervenor’s simply seek to have the Court uphold the City’s ordinance and resolution banning the
 22 transportation of coal and pet coke through OBOT’s terminal just as the City—the existing
 23 defendant in this lawsuit—currently does. Any interests Proposed Intervenor’s might have in the
 24 outcome of this litigation between OBOT and the City, therefore, are more than adequately
 25 represented by the City, and there is no need, and indeed no grounds, for their burdensome and
 26 costly intervention.

27 In the Ninth Circuit, “[w]here ‘the government is acting on behalf of a constituency it
 28 represents,’ as it is here, th[e] court assumes that the government will adequately represent that

1 constituency.” *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007). Moreover, “[w]here
 2 an applicant for intervention and an existing party ‘have the same ultimate objective,’ a
 3 presumption of adequacy of representation arises.” *N.W. Forest Resource Council v. Glickman*,
 4 82 F.3d 825, 838 (9th Cir. 1996). “In the absence of a very compelling showing to the contrary,”
 5 therefore, “it will be presumed that a state adequately represents its citizens when the applicant
 6 shares the same interests.” *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (internal
 7 quotation marks and citation omitted). Indeed, where, as here, there is no suggestion that the
 8 government is “unwilling or unable to defend” a challenged statute or proposition, intervention is
 9 improper. *Gonzalez*, 485 F.3d at 1052; *see also League of United Latin Am. Citizens v. Wilson*,
 10 131 F.3d 1297, 1306-07 (9th Cir. 1997); *Prete v. Bradbury*, 438 F.3d at 958-59.

11 Sierra Club and San Francisco Baykeeper successfully lobbied the Oakland City Council
 12 to pass the ordinance and resolution banning the shipment of coal and pet coke through OBOT’s
 13 terminal (the “Ordinance” and “Resolution”). Over OBOT’s opposition to that Ordinance and
 14 Resolution, the Oakland City Council passed them unanimously, has repeatedly refused to repeal
 15 them, and is defending them in this action. Proposed Intervenors have not made any showing, let
 16 alone a very compelling showing, that the City will not aggressively defend the Ordinance and
 17 Resolution that OBOT challenges and Proposed Intervenors support. Further, neither of the
 18 Proposed Intervenors is a party to the contract that is the subject of the breach of contract claim in
 19 this case. And Proposed Intervenors need not join this litigation as full parties to support the
 20 City’s defense of the Ordinance and Resolution. They could easily provide evidence, advice,
 21 funds or myriad other forms of assistance to the City without inflicting the burdens inherent in
 22 doubling the number of parties to this lawsuit.

23 In sum, any interests Proposed Intervenors might have in the future of the City’s Ordinance
 24 and Resolution banning the shipment of coal and pet coke through OBOT’s terminal is fully
 25 covered by the City who is defending them in this action. The intervention of these lobbyists will
 26 thus serve only to inflict unnecessary motion practice, discovery and attendant costs upon the
 27 Court and OBOT. Intervention should be denied.

II. LEGAL STANDARD

Proposed Intervenor correctly quote the four-prong test for intervention set forth in Federal Rule of Civil Procedure 24(a):

(1) the motion must be timely; (2) the applicant must claim a ‘significantly protectable’ interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action.

Fed. R. Civ. P. 24(a) (quoted in Mot. at 5). Proposed Intervenor fail, however, to acknowledge their burden in this case to make a “very compelling showing” to satisfy the fourth prong of that test concerning the adequacy of protection of the proposed intervenor’s interests.

“Where ‘the government is acting on behalf of a constituency it represents,’” the Ninth Circuit “assumes that the government will adequately represent that constituency.” *Gonzalez v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (“There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents.”); *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (same). In addition, where “an applicant for intervention and an existing party ‘have the same *ultimate objective*’”—such as having a statute upheld as constitutional—“‘a presumption of adequacy of representation arises.’” *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1306-07 (9th Cir. 1997) (quoting *N.W. Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)); *see also Arakaki*, 324 F.3d at 1086; *Prete*, 438 F.3d at 956.

To overcome this presumption that a government party adequately represents its citizens where it seeks to uphold the statute the proposed intervenor supports, the proposed intervenor must make a “very compelling showing” that the government will not represent its interests. *Arakaki*, 324 F.3d at 1086 (“In the absence of a ‘very compelling showing to the contrary,’ it will be presumed that a state adequately represents its citizens when the applicant shares the same interest.”) (quoting 7C Wright, Miller & Kane, § 1909, at 332); *Gonzalez*, 485 F.3d at 1052 (“In order to overcome this presumption, the would-be intervenor must make a very compelling showing that the government will not adequately represent its interests.”) (internal quotation

marks and citation omitted); *Prete*, 438 F.3d at 956 (“In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interests.”) (internal quotation marks and citation omitted).

Where the proposed intervenor cannot show that the government is unwilling or unable to defend a challenged statute or proposition, therefore, it is error to grant intervention. *Prete*, 438 F.3d at 958-59 (error to grant intervention where government was able to mount an effective defense of the validity of ballot measure); *see also Gonzalez*, 485 F.3d at 1052 (intervention properly denied where no suggestion that the government defendants were unwilling or unable to defend statute); *Wilson*, 131 F.3d at 1305-07 (intervention properly denied where government defendants “vigorously defended” enacted proposition).

III. PROPOSED INTERVENORS HAVE FAILED TO MAKE THE “VERY COMPELLING SHOWING” OF INADEQUATE REPRESENTATION REQUIRED TO OBTAIN INTERVENTION AS OF RIGHT

Proposed Intervenors do not and cannot make a “very compelling showing” that any interests they might have in the outcome of this litigation between OBOT and the City are not adequately protected by the City.

A. A Presumption Exists that the City Adequately Represents Proposed Intervenors’ Interests

A presumption exists that the City adequately represents the Proposed Intervenors’ claimed interests in this dispute because the City represents the Proposed Intervenors’ members as constituents, and Proposed Intervenors share the same ultimate objective as the City to uphold the Ordinance and Resolution. *See, e.g., Gonzalez*, 485 F.3d at 1052; *Arakaki*, 324 F.3d at 1086; *Prete*, 438 F.3d at 956; *Wilson*, 131 F.3d at 1306-07; *Glickman*, 82 F.3d at 838 (9th Cir. 1996).

1. The City Represents Proposed Intervenors’ Members As Constituents

To support their claimed interests in this dispute, Proposed Intervenors assert that they “are precisely those individuals whom the [Oakland] Ordinance and Resolution were designed to protect,” and thus “have a protectable interest in this case because their members are the ‘intended beneficiaries’” of the Ordinance and Resolution including “residents of Oakland.” (Mot. at 8-9.) Proposed Intervenors further base their claimed interests on their work “to secure the passage of

1 the [Oakland] Ordinance and Resolution” based on their claimed interest “to ensure that
 2 communities in Oakland will be protected from the adverse health impacts of coal storage and
 3 handling facilities.” (*Id.* at 7:17-21.)¹ Like the members of the public interest groups that
 4 supported the challenged ballot measures at issue in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir.
 5 2006) and *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), Proposed Intervenor’s members
 6 claim to be constituents of the existing government defendant here.

7 2. The Proposed Intervenor and City Defendant Have the Same “Ultimate
 8 Objective” of Upholding the Ordinance and Resolution

9 Proposed Intervenor also undisputedly share the “same ultimate objective” as the City in
 10 this lawsuit. *See, e.g., Glickman*, 82 F.3d at 838; *Wilson*, 131 F.3d at 1306-07; *Arakaki*, 324 F.3d
 11 at 1086; *Prete*, 438 F.3d at 956. The Proposed Intervenor’s goal is to have the Oakland City
 12 Ordinance and Resolution upheld. (Mot. at 1, 7-9.) That is precisely the City’s goal. (*See* Joint
 13 Case Mgmt. Statement, Dkt. No. 36) Where, as here, the government defendant’s goal is to
 14 uphold the same measure the proposed intervenor seeks to uphold, a presumption of adequate
 15 representation exists. *E.g., Wilson*, 131 F.3d at 1305 (presumption of adequate representation
 16 arose because proposed intervenor’s “‘ultimate objective’ (*i.e.*, to ensure that Proposition 187
 17 [was] upheld as constitutional on the merits) [was] identical to that of the current state defendants
 18 in the litigation”); *Prete*, 438 F.3d at 957 (presumption of adequate representation arose because
 19 the existing defendant and proposed intervenor shared the “ultimate objective” of “upholding the
 20 validity of Measure 26”). Indeed, the Ninth Circuit’s statement in *Prete* could have been written
 21 for this case: “Here, the ultimate objective for both defendant and intervenor-defendants is
 22 upholding the validity of [the challenged measure]. Thus, a presumption arises that defendant is
 23 adequately representing intervenor-defendants’ interests.” 438 F.3d at 957.

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 28 ¹ As set forth in OBOT’s Complaint, such “adverse health impacts of coal storage and
 handling facilities” do not exist here.

1 **B. Proposed Intervenor Do Not and Cannot Make the “Very Compelling**
 2 **Showing” to Overcome the Presumption of Adequate Representation by the**
 3 **City**

4 Proposed Intervenor do not, because they cannot, make the “very compelling showing”
 5 necessary to overcome the presumption that the existing City defendant adequately represents their
 6 interests in upholding the City’s Ordinance and Resolution. *See, e.g., Gonzalez*, 485 F.3d at
 7 1052; *Prete*, 438 F.3d at 956; *Arakaki*, 324 F.3d at 1086.

8 1. Proposed Intervenor Cannot Make a Compelling Showing of Inadequate
 9 Representation Where the Government Defendant Is Willing and Able to
 10 Defend Its Own Ordinance

11 Where, as here, the existing government defendant is willing and able to defend against a
 12 challenge to its own ordinance, intervention of a public interest group seeking to defend the same
 13 ordinance is improper. In *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), for example, the
 14 Oregon AFL-CIO, a labor organization, moved to intervene as a defendant in an action brought
 15 against the Oregon secretary of state challenging the constitutionality of an approved Oregon
 16 ballot measure (“Measure 26”). The Ninth Circuit held that the district court erred by granting
 17 the motion. The Ninth Circuit underscored that “there is no evidence in the record that defendant
 18 is unable to mount an effective defense of Measure 26” and “[a]lthough intervenor-defendants
 19 may have some specialized knowledge” in subject matter relevant to the litigation, the Secretary of
 20 State “presumably [was] sufficiently acquainted” with the subject matter as well and “could
 21 acquire additional specialized knowledge through discovery (*e.g.*, by calling upon intervenor-
 22 defendants to supply evidence).” *Id.* at 957-58.

23 In *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), an advocacy group called “Yes on
 24 Proposition 200” moved to intervene as a defendant in an action against the State of Arizona and
 25 its officials challenging the constitutionality of Proposition 200, a voter identification law. *Id.* at
 26 1046, 1052. The proposed intervenor (“Yes on Proposition 200”) had “put forth significant effort
 27 to ensure the passage of Proposition 200.” *Id.* at 1051. The district court nonetheless denied
 28 intervention on the basis that the government adequately represented the proposed intervenor’s
 29 interest in upholding the constitutionality of the Proposition, and the Ninth Circuit affirmed:
 30 “Nothing in the record before us suggests that defendants are unwilling or unable to defend

1 Proposition 200. . . . The district court applied the correct precedent and did not err in denying
 2 Yes on Proposition 200's motion to intervene as of right." *Id.* at 1052.

3 In *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997), the
 4 Alan C. Nelson Foundation of Americans for Responsible Immigration ("ACNFARI") moved to
 5 intervene as a defendant in an action against the governor of California and other State officials
 6 challenging the constitutionality of California Proposition 187. ACNFARI argued that "its
 7 members had participated in the drafting and sponsorship of Proposition 187 and that, as a result,
 8 ACNFARI had a strong interest in the viability and constitutionality of the initiative." *Id.* at 1301
 9 (internal quotation marks omitted). The district court still denied the motion and the Ninth
 10 Circuit affirmed, concluding: "In sum, there simply is no reason to believe . . . that [the
 11 government defendants] cannot be counted on to argue vehemently in favor of the constitutionality
 12 of Proposition 187." *Id.* at 1306 (internal quotation marks, interlineations and citation omitted).

13 2. The City Is Willing and Able to Defend the Ordinance and Resolution
 14 Banning the Shipment of Coal and Pet Coke Through the Terminal

15 Here, Proposed Intervenors similarly cannot show that the City is unwilling or unable to
 16 defend its own Ordinance and Resolution. Proposed Intervenors have provided no evidence that
 17 the City has the slightest reservation about "argu[ing] vehemently," *see id.*, to uphold its
 18 Ordinance and Resolution. In fact, all evidence is directly to the contrary The City Council
 19 voted unanimously to pass the Ordinance and Resolution. (Ordinance, Dkt. No. 20-2 at 14.) The
 20 City Council expended hundreds of thousands of dollars in support of its efforts to pass the
 21 Ordinance and Resolution. (*See, e.g.*, Ex. A (City Resolution No. 86162).)² City Council
 22 members even publicly declared their active support for banning the shipment of coal through the
 23 OBOT terminal long *before* passing the Ordinance and Resolution. For example, City
 24 Councilwoman Lynette Gibson-McElhaney signed a press release entitled "OAKLAND SAYS
 25 'NO!' TO COAL SHIPMENTS AT THE OAKLAND ARMY BASE" and stating: "Lynette
 26 Gibson McElhaney, President of the Oakland City Council, is unequivocal in her opposition to

27 _____
 28 ² All cited alphabetical exhibits (*e.g.*, "Ex. A") are attached to the March 2, 2017
 Declaration of Eliyahu Ness ("Ness Decl."), filed concurrently herewith.

1 coal being exported from City-owned lands, ‘. . . [I]t is not the type of economic development
 2 that we want - no thank you!.’” (Ex. B.) City Councilmember Abel J. Guillen posted on social
 3 media (under his Instagram moniker, “babocinco”) a photograph of a large banner stating: “NO
 4 COAL IN OAKLAND.” (Ex. C.) Further, Oakland Mayor Libby Schaaf wrote an email to
 5 OBOT representative Phil Tagami regarding OBOT’s plans to ship coal through the OBOT
 6 terminal, stating “Stop it immediately. . . . You must respect the owner and public’s decree that
 7 we will not have coal shipped through our city. . . .” (Ex. D.)

8 In this litigation, the City has declared its intent to defend the Ordinance and Resolution
 9 vigorously (*see* Joint Case Mgmt. Statement, Dkt. No. 36) and—at this early stage of the
 10 litigation—has filed a motion to dismiss, Dkt. No. 19. There is simply no reason to doubt the
 11 City’s intention to pursue this case vigorously. In fact, the City has taken the step of retaining
 12 outside counsel to litigate this case alongside the City Attorney’s office, reflecting the City’s
 13 determination to mount a vigorous defense. Accordingly, there is every reason to think that the
 14 City is willing and able to defend the Ordinance and Resolution.

15 (a) The City’s Litigation Strategy Not to File a Baseless Motion
 16 Proposed Intervenors Seek to File Does Not Support Intervention

17 Proposed Intervenors’ argument that the City’s motion to dismiss demonstrates that the
 18 “City may not be capable and willing to make” all of Proposed Intervenors’ arguments because the
 19 City’s motion to dismiss and Proposed Intervenors’ motion to dismiss “assert separate grounds for
 20 dismissal” is unavailing. (*See* Mot. at 12:23.) “Where parties share the same ultimate objective,
 21 differences in litigation strategy do not normally justify intervention.” *Arakaki*, 324 F.3d at 1086;
 22 *see also Glickman*, 82 F.3d at 838 (history of taking different positions in litigation strategy
 23 insufficient to warrant intervention); *Wilson*, 131 F.3d at 1305-07 (“disagreement over litigation
 24 strategy or legal tactics” insufficient to warrant intervention). Indeed, given the questionable
 25 nature of Proposed Intervenors’ proposed motion to dismiss, it is not surprising that the City did
 26 not to pursue the Proposed Intervenors’ litigation strategy.³ The City’s decision not to file an

27
 28 ³ Proposed Intervenors request permission to file a Rule 12(b)(6) motion with respect to the
 Complaint’s first claim for unconstitutionality under the dormant commerce clause. (Notice of

1 unusual motion does not mean that the City will not make any and all colorable arguments
 2 Proposed Intervenor's could make in defense of the City's Ordinance and Resolution—and nothing
 3 prevents Intervenor's from suggesting them to the City for the City's consideration.

4 (b) Proposed Intervenor's Resolved (and Tangential) Litigation with the
 5 City Does Not Support Intervention

6 Proposed Intervenor's already resolved and plainly tangential litigation with the City is
 7 also of no moment. The 2015 action Proposed Intervenor's point to (Mot. at 3, 13) is *not* evidence
 8 of a dispute between the City and Proposed intervenors concerning support of the 2016 Ordinance
 9 and Resolution. Rather, according to Proposed Intervenor's, that litigation concerned whether the
 10 City should conduct additional review (in 2015) concerning potential environmental impacts of
 11 OBOT's constructing and operating a coal and pet coke terminal. (*Id.* at 13.) The Proposed
 12 Intervenor's were forced to voluntarily dismiss that litigation less than two months after filing it
 13 because of their own misunderstanding of the City's position. (*Id.* at 3.) Indeed, as set forth
 14 above, the City and the Proposed Intervenor's are perfectly aligned in their resolve to defend the
 15 Ordinance and Resolution that are the subject of this litigation. (Section III.A.2., *supra.*)

16 The Proposed Intervenor's reliance upon *Citizens for Balanced Use v. Montana Wilderness*
 17 *Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011), *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392,
 18 1398 (9th Cir. 1995), and *Fresno Cty. v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980) is therefore
 19 unavailing. In each of those cases, the proposed intervenors were forced to sue the existing
 20 defendants to compel them to pass the very measures the existing defendants were then being
 21 compelled—reluctantly—to defend. In *Citizens for Balanced Use*, moreover, the existing
 22 defendants and proposed intervenor were still adverse to each other in that initial litigation (on
 23 appeal). 647 F.3d at 899. The court accordingly found that the existing defendants and proposed

24 Mot.; *see also* Dkt. No. 30.) Their proposed Rule 12(b)(6) motion, however, does not actually
 25 seek dismissal of the claim, and appear to concede that the complaint does, in fact, state a claim
 26 for unconstitutionality under the dormant commerce clause. (*See* Dkt. No. 30 at 5-6.) The
 27 Proposed Intervenor's proposed motion seeks only to “dismiss” certain “theories” supporting that
 28 claim (*Id.* at 5:23.)—which is not permitted by Rule 12(b)(6). *In re Netopia, Inc., Sec. Litig.*,
 2005 WL 3445631, at *3 (N.D. Cal. 2005) (Whyte, J.) (“Fed.R.Civ.P. 12(b)(6)'s language ‘failure
 to state a claim’ means the rule should not be used on subparts of claims; a cause of action either
 fails totally or remains in the complaint under Fed.R.Civ.P. 12(b)(6).”)

intervenors had “distinct interests and objectives” such that defendants did not adequately represent the intervenors’ interests. *Id.* In *Idaho Farm Bureau*, the court explained that the defendant “was unlikely to make strong arguments in support of its own actions considering that it proceeded to make a decision largely to fulfill the settlement agreement in the suit [the proposed intervenor] filed.” 58 F.3d at 1398. Similarly, in *Andrus*, the court found “reason to doubt that the [defendant] will fully protect [the intervenor’s] interest . . . in light of the fact that the [defendant] began its rulemaking only reluctantly after [the intervenor] brought a law suit against it.” 622 F.2d at 439. Moreover, both *Idaho Farm Bureau* and *Andrus* were decided before the Ninth Circuit adopted the “very compelling showing” standard, and thus were held to a lesser standard to prove inadequate representation than applies to Proposed Intervenors here.

3. The City's Additional Interests Do Not Prevent It From Adequately Representing Proposed Intervenor's Interests in Defending the Ordinance and Resolution

Finally, the City's additional interests in matters unrelated to the ban on shipment of coal and pet coke through OBOT's terminal demonstrably do not prevent the City from protecting any interest Proposed Intervenors might have in the Ordinance and Resolution. Indeed, the very fact that the City Council passed the Ordinance and Resolution instituting the ban demonstrates that the City Council's additional interests do not prevent the City from supporting it.⁴ To the extent the City has an obligation to "balance broad public interests and represent all of its constituents" (Mot. at 12), that obligation would be nothing new. There is no evidence to suggest that such a need to balance broad public interests would now suddenly prevent the City from defending the Ordinance and Resolution it decided to pass and has undertaken to defend in this litigation.⁵

⁴ Moreover, Proposed Intervenor also have broader interests than simply “environmental protection and health.” (*See* Mot. at 12:16-17.) Proposed Intervenor base their claimed interests in this dispute between OBOT and Oakland on their members who reside and work in Oakland. (*Id.* at 9:12.) Those members, too, presumably have interests concerning “finances,” “housing” and other issues. (*See* Mot. at 12.) Neither the additional interests of the City nor of the Proposed Intervenor have prevented either from supporting the 2016 Ordinance and Resolution banning the shipment of coal and coke through OBOT’s ship-to-rail terminal.

⁵ Proposed Intervenor's invocation of *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009), *In re Sierra Club*, 945 F.2d 776 (4th Cir. 1991) and *Californians for Safe & Competitive Dump Truck Transp. v. Mendoca*, 152 F.3d 1184, 1190 (9th Cir. 1998) cannot

In sum, Proposed Intervenorors have made no showing, let alone a “very compelling showing,” that the City is unwilling or unable to mount a defense of the Ordinance and Resolution the City passed and continues to support. There are accordingly no grounds to grant intervention as of right pursuant to Federal Rule of Civil Procedure 24(a).

IV. THE DELAY AND PREJUDICE OF ADDING THESE UNNECESSARY PARTIES REQUIRES DENIAL OF PROPOSED INTERVENORS’ REQUEST FOR PERMISSIVE INTERVENTION

Proposed Intervenorors’ request for permissive intervention should also be denied.

A court *may* grant intervention under Federal Rule of Civil Procedure 24(b) if the applicant “shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant’s claim or defense, and the main action, have a question of law or a question of fact in common.” *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002) *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Orange v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986). By definition, no party has a right to intervene pursuant to Rule 24(b), and where, as here, a party’s interests are adequately represented, it is proper to deny permissive intervention. *People of State of California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986).

In assessing a request for permissive intervention, the court *must* “consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Perry*, 587 F.3d at 955 (quoting Fed. R. Civ. P. 24(b)(3)). Intervention is properly denied where

save their claim of “inadequate representation.” None of these cases applies the presumption of adequate representation and “very compelling showing” standard applicable here. (Section II., *supra*.) Indeed, the statement from *WildEarth Guardians*, a Tenth Circuit case, that Proposed Intervenorors quote in their Motion (at 12:4-6) is directly at odds with the Ninth Circuit’s rule that “[w]here ‘the government is acting on behalf of a constituency it represents,’” the court “assumes that the government will adequately represent that constituency.” *Gonzalez*, 485 F.3d at 1052; *see also Arakaki*, 324 F.3d at 1078; *Prete*, 438 F.3d at 956. Moreover, in *WildEarth*, the defendant acknowledged that it represented different interests than the Proposed Intervenor. 573 F.3d at 997. And in *Sierra Club*, the Fourth Circuit observed that the intervenor and defendant had already taken different positions on the application of the regulation at issue. 945 F.2d at 781, n. 9.

(1) such delay or prejudice could result, and/or (2) the intervenor's interests are adequately represented by other parties. *Id.* at 955; *see also Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977). In *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009), for example, the Ninth Circuit held that the district court had properly denied permissive intervention where intervention "might very well delay the proceedings, as each group would need to conduct discovery on substantially similar issues" and the parties in the litigation were already "capable of developing a complete factual record encompassing [proposed intervenor's] interests." *Id.* "It was well within the district court's discretion to find that the delay occasioned by intervention outweighed the value added by the [intervenor's] participation in the suit." *Id.* at 956.

Here, as in *Perry*, Proposed Intervenors interests will be adequately represented (*see* Section III.B., *supra*) and the addition of Proposed Intervenors will only lead to unnecessary delay and prejudice to OBOT. Additional parties mean additional motions, additional discovery disputes, additional discovery costs and additional time and money required by the parties and the Court to address them. Moreover, if it were ever to be necessary, the Proposed Intervenors can support the City's efforts to defend the Ordinance and Resolution without intervening—by providing, for example, any evidence they may have. *See, e.g., Prete* at 958. Intervention will thus achieve nothing but additional expense and delay. Indeed, Proposed Intervenors' Motion to Intervene illustrates the point. Rather than focusing on the dispute between the real parties in interest, OBOT has had to expend substantial resources to address this motion brought by non-parties whose interests in the outcome of this litigation, if any, are fully protected by the party that passed the offending legislation.

In this case in particular, delay alone is substantially prejudicial to OBOT. As OBOT explained in the Joint Case Management Statement, each day that goes by without a resolution of OBOT's claims is costly. (Dkt. No. 36 at 8:17-22.) The existence of the Ordinance and Resolution cast a cloud of uncertainty over the ongoing terminal project, impeding OBOT's ability to conclude commercial transactions while it continues to incur substantial development costs.

Proposed Intervenors' request for permissive intervention should also be denied.

1 **V. CONCLUSION**

2 Any interests Proposed Intervenors might have in defending the 2016 Coal and Pet Coke
 3 Ordinance and Resolution that the City of Oakland passed are more than adequately represented
 4 by the City of Oakland—the existing, and appropriate, defendant in this case. The intervention of
 5 Proposed Intervenors as full parties will result in nothing but unnecessary delay and costs, and
 6 thus prejudice to OBOT. Plaintiff OBOT thus respectfully requests that the Proposed
 7 Intervenors’ Motion be denied in its entirety, and this case be permitted to proceed expeditiously
 8 between the legitimate parties to this dispute.

9 Dated: March 2, 2017

Respectfully submitted,

10 QUINN EMANUEL URQUHART & SULLIVAN, LLP

11 By: /s/ Robert P. Feldman

12 Robert P. Feldman

13 Attorney for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

)	
	)	Case Number: 3:16-CV-7014-VC
Oakland Bulk & Oversized Terminal, LLC)	
Plaintiff,	)	JOINT CASE MANAGEMENT
	)	STATEMENT & [PROPOSED] ORDER
)	
vs.)	
)	
City of Oakland)	
)	
Defendant.)	
)	
)	

Pursuant to Rules 16 and 26 of the FRCP, Civil Local Rule 16-9, and the Standing Order for All Judges of the Northern District of California – Contents of the Joint Case Management Statement, Plaintiff Oakland Bulk & Oversized Terminal, LLC (“OBOT”) and Defendant City of Oakland (the “City”) jointly submit this Joint Case Management Statement and Proposed Order.

1. Jurisdiction & Service: Service was effected on the City on December 9, 2016 (D.E. 10), and no other parties remain to be served. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and 28 U.S.C. § 1367, and venue is proper pursuant to 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(b)(2).

2. Facts: In 2013, the City and OBOT’s predecessor-in-interest entered into a statutory Development Agreement (“DA”), pursuant to which OBOT was granted certain rights and obligations to re-develop land at the former Oakland Army Base. Among other things, this included rights with respect to a “ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo” at a portion of the former Oakland Army Base known as the “West Gateway” (the “Terminal”). DA Exhibit D-2, § C(1). The DA includes certain provisions addressing, *inter alia*, (1) the scope of OBOT’s right to rely on “Existing City Regulations” and “City Approvals,” and (2) the applicability of other “City Regulations,” as those terms are defined in the DA, in connection with this project. *See* DA § 3.

1 unloading, transloading, transferring, storage and/or other handling of coal and
2 petcoke play in the system of interstate shipment of coal and petcoke by rail and
export by ship, including for international export.

3 OBOT does not propose any limitations or modifications to the discovery rules at this
4 time, however the parties reserve the right to request any such limitations or modifications.
5 Finally, as noted above a dispute exists regarding whether the regular rules of civil discovery
6 apply to the constitutional and contract claims in this case. Contrary to the City's position that it
7 can avoid discovery by providing only the legislative record for the Ordinance and Resolution,
8 discovery and proof at trial is required (1) regarding the purpose, objective, and circumstances
9 surrounding the adoption of the Ordinance and Resolution, and their application to OBOT's
10 specific project; (2) regarding the purported expert consultants on which the City supposedly
11 relied, including the circumstances surrounding the City's procurement of the purported expert
12 consultants; and (3) regarding contract interpretation issues under the DA and whether the City's
13 actions constituted a breach of that contract.

14 Separate Statement by the City: The City does not concur with OBOT's contentions regarding
15 discovery and anticipates that discovery motions will be required.

16 Regarding the federal question claims, the City proposes that following resolution of the
17 motions to dismiss the first and third claims for relief, it prepare the legislative record for the
18 subject actions, in lieu of discovery. At most, the only potential non-expert discovery should be
19 related to compilation of the legislative record, most if not all of which is already publicly
20 available at the City's document-management website.

21 Regarding the state law breach of contract claim, the Court should grant the City's
22 motion to dismiss the breach of contract claim, obviating any discovery. Alternatively,
23 discovery should be limited to the public record with respect to the City Council's approval of
24 the Development Agreement and any related agreements.

25 **9. Class Actions:** This is not a class action.

26 **10. Related Cases:** There are no related cases.