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

OAKLAND BULK & OVERSIZED TERMINAL, LLC, Plaintiff, v. CITY OF OAKLAND, Defendant, and SIERRA CLUB and SAN FRANCISCO BAYKEEPER, Proposed Defendant-Intervenors.	Case No. 16-cv-7014-VC **SIERRA CLUB'S AND SAN FRANCISCO BAYKEEPER'S NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM IN SUPPORT** Hearing: Apr. 20, 2017 Time: 10:00 a.m. Judge: Hon. Vince Chhabria Place: Courtroom 4, 17th Floor Action Filed: Dec. 7, 2016

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NOTICE

TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

PLEASE TAKE NOTICE, pursuant to Civil Local Rule 7-2, that on April 20, 2017, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince Chhabria, at the United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, Sierra Club and San Francisco Baykeeper, by counsel, will move the Court for an order dismissing two Commerce Clause claims filed by Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT").

MOTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Sierra Club and San Francisco Baykeeper respectfully move to dismiss two of the claims embedded within OBOT's First Claim for Relief, namely, that Oakland Ordinance No. 13385 and Resolution No. 86234 violate the Commerce Clause of the U.S. Constitution by (1) discriminating against out-of-state interests in favor of local ones; and (2) imposing an undue burden on interstate commerce. (Proposed) Defendant-Intervenors make this motion on the ground that as a matter of law, the facts alleged in the Complaint, judicially noticeable facts, and the plain language of the Ordinance and Resolution do not support viable claims by OBOT. Accordingly, this Motion seeks an order dismissing with prejudice the Commerce Clause discrimination and undue burden claims alleged within OBOT's First Claim for Relief.

This motion is supported by the accompanying Memorandum, the accompanying Request for Judicial Notice and exhibits, and such oral argument as the Court may allow.

WHEREFORE, Sierra Club and San Francisco Baykeeper pray that the Court grant the instant motion, and thereby dismiss with prejudice the Commerce Clause discrimination and undue burden claims alleged within OBOT's First Claim for Relief.

DATED: February 16, 2017

/s/ Colin O'Brien
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MEMORANDUM IN SUPPORT

I. PREFATORY STATEMENT

This motion to dismiss, filed pursuant to Federal Rule of Civil Procedure 12(b)(6), addresses Plaintiff Oakland Bulk & Oversized Terminal, LLC's ("OBOT") claims that a local health and safety ordinance and companion resolution adopted in Oakland, California violates the Commerce Clause of the United States Constitution—due to alleged discrimination and an alleged undue burden on interstate commerce. (Proposed) Defendant-Intervenors Sierra Club and San Francisco Baykeeper ("Environmental Intervenors") believe it would be useful for the Court to have some background on this dispute beyond the bare facts necessary to decide this motion.

In 2013, OBOT and Defendant City of Oakland (the "City") executed a "Development Agreement" granting OBOT certain rights to develop a rail and marine terminal (the "Terminal") on a portion of the former Oakland Army Base, now owned by the City; the Terminal's function would be to "transfer shipments of bulk commodities from rail carriers to ships for export to foreign countries." Compl. (ECF #6) ¶ 3.

Following execution of the Development Agreement, local groups became concerned that the Terminal would be used to store or handle coal. On or around January 23, 2014, several local civic and environmental groups, including Environmental Intervenors, met with representatives of California Capital & Investment Group, Inc. ("CCIG") (OBOT's parent entity, Compl. (ECF #6) ¶ 24) and Phil Tagami, President and CEO of CCIG, to discuss whether coal would be stored or handled at the Terminal. Yarnall Loarie Decl. (ECF #28-5), Ex. 7 ¶¶ 43, 50.[1] Mr. Tagami reassured community members that coal would not be a part of the Terminal's operations, that he did not want to ship coal, and instead was focused on commodities like iron ore, copper concentrate, potash and distilled grain. *Id.* ¶ 50. Mr. Tagami provided further assurance on or around January 24, 2014, posting on Facebook that: "Oakland Bulk and Oversized Terminal (OBOT) a CCIG controlled company, is saying NO to coal as a [sic] export product. . . . We share this one planet and the only path to clean the air is to at some point stop polluting it." *Id.* ¶ 51.

[1] The declarations of Jessica Yarnall Loarie (ECF #28-5) and Sejal Choksi-Chugh (ECF #28-1) cited herein were filed with Environmental Intervenors' Motion to Intervene (ECF #28).

Despite these public pledges, on April 7, 2015, the people of Oakland learned from a Utah newspaper article that the Utah Permanent Community Impact Fund Board had approved a $53 million loan to four Utah counties—Sevier, Sanpete, Carbon, and Emery—to allow them to purchase an interest in the Terminal. Choksi-Chugh Decl. (ECF #28-1) ¶ 10; *id.*, Ex. 1 at 2. The economic development director of Sevier County, who was quoted in the newspaper article, declared this financing and reservation of shipping capacity would be used to "find[ ] a new home for Utah's products—and in our neighborhood, that means coal." Choksi-Chugh Decl. (ECF #28-1), Ex. 1 at 2. Environmental Intervenors later learned through public records requests that the coal funding deal was intentionally kept secret. An email dated April 8, 2015 from an advisor to representatives of the four Utah counties stated: "We've had an unfortunate article appear on the terminal project . . . If anything needs to be said, the script was to downplay coal and discuss bulk products and a bulk terminal. . . . Phil Tagami had been pleased at the low profile that was bumping along to date on the terminal and it looked for a few days like it would just roll into production with no serious discussion." Yarnall Loarie Decl. (ECF #28-5), Ex. 7 ¶ 53.

After learning that Mr. Tagami, CCIG, and its affiliated entities had been actively misleading the public about its intentions, the citizens of Oakland demanded that their elected representatives protect them from the health and safety risks presented by the handling and storage of coal at the Terminal. This in turn led to the actions that are the subject of OBOT's complaint.

II. STATEMENT OF ISSUES

OBOT filed this case on December 7, 2016, alleging that Oakland City Ordinance No. 13385, together with City Council Resolution No. 83264 (collectively, "the Ordinance"): violates the Commerce Clause on three independent grounds; is preempted by three different federal statutes; and constitutes a breach of the Development Agreement. Compl. (ECF #6) ¶¶ 125–67.

This motion exclusively addresses two of OBOT's three Commerce Clause claims: whether the Ordinance (1) violates the Commerce Clause by discriminating against out-of-state interests in favor of local ones, or (2) violates the Commerce Clause by imposing an "undue burden" on interstate commerce. As set forth below, OBOT has failed to state a claim upon which relief can be granted with respect to either of these claims.

III. STATEMENT OF FACTS

On July 19, 2016, the Oakland City Council enacted Ordinance No. 13385, establishing "a citywide ban on the storage, loading, unloading, stockpiling, transloading and handling" of coal and coke (a byproduct of refining crude oil, sometimes alternatively called "petcoke") by any "Bulk Material Facility." Def.'s Req. for Judicial Notice ("Def.'s RJN"), Ex. B (ECF #20-2) at 4, 14 (describing Ordinance in § 8.60.010 and indicating date of enactment).

The Ordinance's definition of "Bulk Material Facility" includes facilities like the Terminal where coal or coke may be stored or handled. Def.'s RJN, Ex. B (ECF #20-2) at 9 (defining "Coal or Coke Bulk Material Facility" within § 8.60.030(A)(4)).

The stated purpose of the Ordinance's ban on such facilities is:

> to protect and promote the health, safety and/or general welfare of its citizens, residents, workers, employers and and/or visitors . . . by eliminating any risk of release into the environment (including without limitation airborne particulate[s] or release into soil or water or onto persons) from storage, loading, unloading, stockpiling, transloading and handling of Coal and Coke[.]

Def.'s RJN, Ex. B (ECF #20-2) at 4 (stating Ordinance's "Purpose" in § 8.60.010).

The Ordinance's preamble directly addresses the Terminal, stating the Terminal's developers "are currently pursuing plans to ship, transport, store, load, unload, stockpile, transload and/or handle . . . and have disclosed plans to receive and/or ship coal and coke through the Terminal." Def.'s RJN, Ex. B (ECF #20-2) at 1. The preamble also identifies negative health and environmental impacts attributed to facilities that store or handle coal and coke, such as the proposed Terminal. The preamble expresses concern over "fugitive coal dust" emissions, which are considered "a source of particulate matter that is dangerous to breathe . . . and which results in dangerous health and safety conditions . . . in and near facilities such as the proposed Terminal." *Id.* at 2. The City Council's action to limit particulate matter pollution is not surprising, as it "is associated with a range of adverse health effects such as coughing; shortness of breath; aggravation of existing respiratory conditions like asthma and chronic bronchitis; increased susceptibility to respiratory infections; and heightened risk of premature death." *Am. Trucking Ass'ns v. Envtl. Prot. Agency*, 283 F.3d 355, 359 (D.C. Cir. 2002).

1 According to the City Council, the Terminal's location in West Oakland presents heightened
2 health risks because:

3 > (1) the California Environmental Protection Agency . . . has identified the community
4 > of West Oakland as a disadvantaged community disproportionally burdened by, and vulnerable to, multiple sources of pollution; and (2) the Bay Area Air Quality
5 > Management District . . . designated West Oakland as a CARE ("Community Air Risk Evaluation") program community, i.e., one of the geographic areas within the
6 > Air District with high concentrations of air pollution and populations most vulnerable to health impacts from air pollutants (particularly toxic air contaminants . . . and fine
7 > particulate matter . . .).

8 Def.'s RJN, Ex. B (ECF #20-2) at 2. The City Council also noted that the people of West Oakland
9 already "suffer disproportionally from the effects of nearby industrial activity (e.g., increased asthma
10 and cancer rates)" and therefore "would be uniquely and adversely affected" by the Terminal's coal
11 and/or coke operations. *Id.* at 3.

12 OBOT criticizes the studies the City Council relied upon in enacting the Ordinance. Compl.
13 (ECF #6) ¶¶ 48–68, 78–95, 99–115. But OBOT does not allege that the amount of particulate matter
14 pollution emitted at the Terminal would *not* be harmful to human health and, in fact, acknowledges
15 "[t]here is no safe level of exposure to [fine particulate matter pollution]." Compl. (ECF #6) ¶ 104;
16 *see also Uprose v. Power Auth. of State of N.Y.*, 729 N.Y.S.2d 42, 45 (App. Div. 2001) ("Particulate
17 matter is a nonthreshold pollutant, which means that there is some possibility of an adverse health
18 impact from particulate matter at any concentration.").

19 While the Ordinance bans coal and petcoke activities at the Terminal, Compl. (ECF #6)
20 ¶ 117, certain other facilities within Oakland are exempted from the ban. Specifically exempted from
21 the ban are (a) non-commercial facilities located in Oakland and (b) commercial manufacturing
22 facilities located in Oakland where coal or petcoke are consumed on-site. *Id.* ¶ 119; *see also* Def.'s
23 RJN, Ex. B (ECF #20-2) at 10 (describing exemptions in § 8.60.040(C)).

24 As a consequence of the Ordinance and its prohibition against coal storage and handling at
25 the Terminal, the City may lose millions of dollars. Compl. (ECF #6) ¶ 122. The Ordinance also may
26 cost OBOT millions of dollars and diminish OBOT's ability to negotiate favorable leasing terms for
27 the Terminal. *Id.* ¶¶ 12, 122–24, 133, 159, 167. OBOT is a California limited liability corporation,
28 with its principal place of business in Oakland. *Id.* ¶ 14.

Terminals at other ports in California outside of Oakland currently store and ship more than 2 million tons of coal and coke annually. Compl. (ECF #6) ¶¶ 65, 66. For example, the terminal at the Port of Long Beach stores and ships both coal and petcoke, including approximately 1.7 million tons of coal per year. *Id*. ¶¶ 62, 66. Likewise, the terminal at the Port of Pittsburgh stores and ships petcoke in the amount of 500,000 tons annually. *Id*. ¶¶ 61, 65.

IV. STANDARD OF REVIEW

"To survive a motion to dismiss [under Federal Rule of Civil Procedure 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Compton v. Countrywide Fin. Corp.*, 761 F.3d 1046, 1054 (9th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "'[L]abels and conclusions' or 'a formulaic recitation of the elements of a cause of action' do not suffice." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (modification in original)). Further, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d. 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

V. ARGUMENT

OBOT makes three independent claims as to how the Ordinance violates the Commerce Clause: It allegedly discriminates against various out-of-state interests in favor of local ones, Compl. (ECF #6) ¶ 131; its economic impact allegedly imposes an undue burden on interstate commerce, *id*. ¶ 132; and its ban on coal and coke operations at the Terminal allegedly impairs a federal interest in national uniformity for rail and marine terminal operations, *id*. ¶¶ 129, 130. While none of OBOT's alleged theories state a Commerce Clause violation, this motion addresses only the first two of these claims—discrimination and undue burden—but not the specific form of an undue burden claim arising out of the alleged need for "national uniformity." Because that latter claim is intimately tied

up with OBOT's separate claims that the Ordinance is preempted by federal transportation statutes, Environmental Intervenors will address those claims at the appropriate time.[2]

A. The Ordinance does not discriminate against out-of-state interests.

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. This affirmative grant of power does not explicitly control the several states, but it "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). This additional, negative aspect of the Commerce Clause is commonly discussed as the "dormant Commerce Clause." *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

The core purpose of the dormant Commerce Clause doctrine is to prevent states or local governments from enacting legislation that discriminates against out-of-state interests in favor of in-state ones. "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)); *see also S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001) ("The 'central rationale' of the dormant Commerce Clause 'is to prohibit state or municipal laws whose object is local economic protectionism.'") (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)). The Supreme Court's *Oregon Waste Systems* decision is a classic example of such prohibited economic protectionism. There, the State of Oregon imposed an $0.85/ton fee on landfill operators for disposing of waste generated in-state, but a $2.25 fee on out-of-state waste. 511 U.S. at 96. The Court held that it was "obvious" that this fee structure was

[2] Asserting the Ordinance is an obstacle to "national uniform standards," Compl. (ECF #6) ¶ 150, OBOT alleges in its Second Claim for Relief that the Ordinance is preempted by the Hazardous Materials Transportation Act, the Interstate Commerce Commission Termination Act, and the Shipping Act of 1984. *Id.* ¶¶ 136–60.

discriminatory and violated the dormant Commerce Clause since the only determinant of which fee applied was the waste's state of origin. *Id*. at 99.

OBOT attempts to raise a specter of protectionism, claiming the Ordinance burdens "out-of-state miners, shippers, customers and carriers of coal and petcoke while protecting in-state interests by banning the transportation of coal and petcoke through the Terminal and simultaneously exempting from the ban local operations within Oakland that handle, store, and/or consume coal and petcoke." Compl. (ECF #6) ¶ 131. According to OBOT, "exempted from the [Ordinance's] ban are (a) noncommercial facilities located in Oakland, and (b) commercial manufacturing facilities located in Oakland where coal and petcoke are consumed on-site." *Id.* ¶ 119.[3]

Thus the first fatal flaw in OBOT's theory: OBOT does not—and cannot—allege that any of the local exempted facilities actually *compete* with the "out-of-state miners, shippers, customers and carriers of coal and petcoke" or otherwise derive commercial advantage from the Ordinance in any way. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). As the Court explained:

> [w]hen the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the . . . regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.

Id. at 299.

In *Tracy*, the Court held that natural gas "bundled with [] services and protections" and sold to local consumers by local utilities was a different product from—and therefore did not compete with— "unbundled" natural gas sold by independent marketers to high-volume industrial buyers. *Id.* at 297–303. "Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by

[3] OBOT does not use the word "discrimination" but its juxtaposition of the Ordinance's "burden" on out-of-state interests "while protecting instate interests," Compl. (ECF #6) ¶ 132, is the language of a dormant Commerce Clause discrimination claim, and Environmental Intervenors treat it accordingly.

1 express discrimination against interstate commerce or undue burden upon it, to which the dormant
2 Commerce Clause may apply." *Id.* at 300; *see also Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961)
3 (holding that higher tax imposed on salmon frozen for sale to out-of-state canneries was not
4 discriminatory because that salmon did not compete with the lower-taxed salmon frozen for local
5 sale).

6 Here, OBOT has failed to identify companies that are "similarly situated for constitutional
7 purposes." *Tracy*, 519 U.S. at 299. OBOT alleges only that the exempted local commercial facilities
8 "handle, store, and/or consume" coal or petcoke. Compl. (ECF #6) ¶ 131. Because OBOT does not
9 allege that any of these local facilities mine, transport, or sell coal or petcoke, OBOT does not claim
10 that they are competing against out-of-state miners, transporters, or sellers. Thus OBOT does not
11 allege that the Ordinance benefits the exempted interests in any way. Just as in *Tracy*, "the different
12 entities serve different markets, and would continue to do so even if the supposedly discriminatory
13 burden were removed." 519 U.S. at 299.

14 Nor does OBOT allege any facts—or even describe—how the Ordinance discriminates
15 against out-of-state "customers" of coal and petcoke, the one group OBOT lists that is at least
16 theoretically similar to the exempted entities. Compl. (ECF #6) ¶ 131. Environmental Intervenors are
17 at a complete loss to imagine how the Ordinance works to the detriment of out-of-state purchasers.
18 In any event, OBOT's one-sentence allegation of harm to "out-of-state . . . customers" necessarily
19 fails because such a bare, formulaic conclusion is insufficient to survive a motion to dismiss. *See*
20 *Compton*, 761 F.3d at 1054.

21 The second fatal flaw in OBOT's discrimination claim is that the only facts OBOT alleges as
22 to the Ordinance's economic impact are that OBOT—a California corporation, Compl. (ECF #6)
23 ¶ 14—and the City of Oakland will lose money as a result: "The exclusive Sublease Option OBOT
24 negotiated with TLS [Terminal Logistics Solutions, LLC] . . . *was set to earn both OBOT and the*
25 *City of Oakland millions of dollars over the 66-year life of the sublease*." Compl. (ECF #6) ¶ 122
26 (emphasis added). In other words, OBOT's only factual allegation about the Ordinance's adverse
27 economic impact is that they will be felt entirely in-state and will, incidentally, cost *the Defendant*
28 "millions of dollars." There can be no discrimination against out-of-state interests when the only

adverse economic impacts OBOT pleads will be felt *entirely within the state*. Indeed, even the Terminal operator, TLS, is a California corporation. Compl. (ECF #6) ¶¶ 34, 35; Envtl. Intervenors' RJN, Bloch Decl., Ex. 2.

"The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981). "[W]here such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444, n.18 (1978). In this case, it is not a purpose of the dormant Commerce Clause to protect a local company *and the Defendant* from the Defendant's own actions. That, presumably, is the job of the citizens of Oakland.

In Commerce Clause cases, "[t]he burden to show discrimination rests on the party challenging the validity of the statute." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). OBOT's own complaint establishes that it will not be able to meet that burden as to its discrimination claim.

B. The Ordinance does not unduly burden interstate commerce.

Even if a state or local law does not discriminate against out-of-state interests in favor of local ones, it may still violate the dormant Commerce Clause if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Davis*, 553 U.S. at 338–39 (modification in original) (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)). This is frequently referred to as the "*Pike*" test after *Pike v. Bruce Church*, 397 U.S. 137 (1970). Hence OBOT's allegation that the "Ordinance and Resolution impose a burden on interstate and foreign commerce [and] are clearly excessive in relation to the purported local benefits." Compl. (ECF #6) ¶ 132.

The flaw with this claim is that OBOT confuses market-level burdens on the free flow of goods in interstate commerce with burdens on a particular company; the dormant Commerce Clause is concerned only with the former, not the latter. "We stress[] that the Commerce Clause 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'"

Clover Leaf Creamery, 449 U.S. at 474 (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127–28 (1978)). In *Clover Leaf Creamery*, the Court held that a state law banning the retail sale of milk in non-returnable, non-refillable plastic containers did not impose an undue burden on interstate commerce because "[m]ilk products may continue to move freely across the Minnesota border." *Id.* at 472.

While the Ordinance imposes a ban on the handling and storage of coal and petcoke at the Terminal, OBOT not only fails to allege any facts as to its impact on the interstate markets for coal or petcoke, but OBOT's complaint convincingly demonstrates that the Ordinance has no such impact.

In discussing the Terminal's environmental impact, OBOT compares it to the coal and petcoke shipping operations at the Pittsburg, CA and Long Beach, CA ports. OBOT asserts that "[t]he terminal at the Port of Pittsburg is a multiple commodity terminal, which stores and ships petcoke," Compl. (ECF #6) ¶ 61, and "[t]he terminal at the Port of Long Beach is a multiple commodity terminal, which stores and ships coal and petcoke." *Id.* ¶ 62. OBOT also explains the Pittsburg terminal handles "500,000 tons of petcoke per year," *id.* ¶ 65, and the Long Beach terminal handles "approximately 1.7 million tons of coal per year." *Id.* ¶ 66. OBOT further describes the overall market, alleging the U.S. exported "approximately 75 million short tons of coal in 2015 alone," and "more coal is exported from the West Coast of the United States than any other non-containerized commodity." *Id.* ¶ 128. These factual allegations doom its claim that the Ordinance unduly burdens the existing, high-volume interstate flow of coal.

In *Exxon Corp. v Governor of Maryland*, 437 U.S. 117 (1978), the Supreme Court reviewed a Maryland law banning any producer or refiner of petroleum products from owning retail gasoline stations in the state. *Id.* at 120–21. In rejecting Exxon's claim that this imposed an undue burden on interstate commerce because some refiners would stop selling gasoline in Maryland, the Court reiterated that the dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127–28. The fact that the statute would cause some companies to stop doing business in the state was irrelevant:

> Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another.

Id. at 127.

In *National Ass'n of Optometrists v. Harris*, 682 F.3d 1144 (9th Cir. 2012), the Ninth Circuit addressed a California statute that barred opticians from offering prescription glasses at locations that also provided eye examinations. *Id.* at 1145–46. Plaintiffs, who were out-of-state corporations that owned eyewear stores (staffed by opticians), claimed that this would unduly burden interstate commerce because eyewear sales would shift from their stores to local ophthalmologists and optometrists. *Id.* at 1145, 1151. Relying on *Exxon*, the Court of Appeals explained why, even if this were to occur, it did not constitute a "burden on interstate commerce" because "The [*Exxon*] Court focused its concern on the free flow of petroleum into the state, not on who ultimately profited." *Id.* at 1152. The Ninth Circuit explained:

> The *Exxon* Court determined that the challenged statute had no impact on the interstate flow of goods, pointing out that the sales by independent retailers (who necessarily obtained their petroleum products from outside Maryland) were just as much a part of the flow of interstate commerce as sales made by the stations operated by interstate refiners. . . . Thus, in deciding whether there was a non-discriminatory burden on interstate commerce and a violation of the dormant Commerce Clause, the *Exxon* Court's decision turned on the interstate *flow of goods*, not on where the retailers were incorporated, what the out-of-state market shares of sales and profits were, or whether competition would be affected by the statute.

Id. at 1153 (emphasis in original). In short, if a regulation does not "impair the free flow of materials and products across state borders, there is not a significant burden on interstate commerce." *Id.* at 1154–55.

That is precisely the situation here. Not only does OBOT fail to allege any facts showing that the Ordinance impairs the flow of coal or petcoke across state borders, but OBOT itself points out that the U.S. exports tens of millions of tons of coal, that coal is the largest bulk commodity shipped from West Coast ports, and that just the two California ports of Pittsburg and Long Beach ship more than 2.2 million tons of coal and petcoke a year. Compl. (ECF #6) ¶¶ 61, 62, 65, 66, 128.

In addition to OBOT's own allegations, other judicially noticeable facts demonstrate that the Ordinance will not affect U.S. coal exports, which the U.S. Energy Information Administration ("EIA") reports have decreased steadily over each of the last five years, from 126 million short tons in 2012, to 118 million tons in 2013, to 97 million tons in 2014, 74 million tons in 2015, and only 41 million tons through the first 9 months of 2016. Envtl. Intervenors' RJN, Bloch Decl., Ex. 1 at Table ES-1. Extrapolating from the first 9 months of 2016 to an annual total of 55 million tons means that U.S. coal exports *have dropped by more than 50% over the last five years*. Thus OBOT has not only failed to allege any facts showing that the Ordinance would in any way affect U.S. coal exports, but the state of U.S. coal exports shows that barring the Terminal from handling coal and petcoke will not affect the flow of coal exports in any way since they are already rapidly declining.

VI. CONCLUSION

For the reasons stated herein, OBOT's claims that the Ordinance discriminates in violation of the dormant Commerce Clause and creates an undue burden on interstate commerce in violation of the dormant Commerce clause must be dismissed.

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Respectfully submitted,

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