BNSF RAILWAY

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August 27, 2021

Via Certified Mail (9214 8901 9403 8347 7622 12)
Return Receipt Requested

RE: CLAIM FOR REFUND OF TAXES AND/OR PENALTIES PAID

Clerk of the Board of Supervisors
County of Contra Costa
651 Pine Street
1st Floor, Room 106
Martinez, CA 94553-1229

To Whom It May Concern:

Attached is a Claim for Refund of Property Tax Payments in accordance with the provisions of Chapter 5, Article I, of the California Revenue and Taxation Code (commencing with Section 5096). I am (we are) herewith filing this claim with the Board of Supervisors of the County of Contra Costa and ask that a refund of taxes and/or penalties be made for the amounts in the attached Claim for Refund of Tax Payment(s).

Should you have any questions concerning this matter, please contact me directly at (817) 352-3418.

Sincerely,

Alan M. Annis
Director of Taxes

enclosure

COUNTY OF CONTRA COSTA
CLAIM FOR REFUND OF TAX PAYMENT(S)

Claimant's Name: First: BNSF Railway Company Last:
Mailing Address: P. O. Box 961089 City: Fort Worth
State: Texas Zip: 76161-0089 Contact No.: (817) 352-3418

Account Number: 804
Property Address: Unitary Property in SBE TRA 000-002 City: N/A Zip: N/A

In accordance with the provisions of Chapter 5, Article I, of the California Revenue and Taxation Code (commencing with Section 5096), I am (we are) herewith filing this claim with the Board of Supervisors of the County of Contra Costa, and ask that a refund of taxes and/or penalties be made for the following amounts:

Fiscal Year(s) Refund is Claimed	Date(s) Taxes Paid	Amount of Tax Claim	Amount of Penalty Claim	Total Amount
2018-19	12/03/2018 & 04/01/2019	$397,402.79		$397,402.79

I (we) claim that the whole assessment (part of the assessment) for the year(s) as shown is (are) void for the following reasons (use attachments if necessary):
See Attached Exhibit A.

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that the taxes and/or penalties sought to be refunded were paid within four years prior to the filing of this claim; that the amounts herein claimed are correct; and no part thereof has been refunded to the claimant or to any other person for claimant's benefit; and if acting on behalf of a legal entity, I am duly authorized to act on behalf and that the title shown below is true and correct.

Date: Aug. 25, 2021 Signature: Mark Lanciado Title: VP & General Tax Counsel

Exhibit A

BNSF Railway Company

Factual Reasons the Tax was Illegally Levied and Collected

The tax rates applied to the assessed value of BNSF Railway Company's ("BNSF") property exceed the tax rates applicable to other commercial and industrial property in the various taxing districts within this county. These excessive tax rates violate Section 306(1)(c) of the Railroad Revitalization and Regulatory Reform Act of 1976, codified at 49 U.S.C. Section 11501(b)(3), which prohibits state and local governments from levying or collecting any ad valorem property tax on railroad property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction. To the extent that the tax rates applied to the assessed values of BNSF's property exceed the tax rates as calculated pursuant to the decision of the Ninth Circuit Court of Appeals in Trailer Train Company v. State Board of Equalization, 697 F.2d 860 (9th Cir.), cert. denied, 464 U.S. 846 (1983), the levy and collection of the excessive taxes violated Section 306(1)(c). The United States District Court Northern District of California recently agreed with BNSF's position when United States District Judge Haywood S. Gilliam, Jr. granted BNSF Railway Company's Motion for Preliminary Injunction when he ordered that the Defendant counties "are hereby **ENJOINED** through the pendency of this litigation until entry of a final judgment from levying or collecting ad valorem property taxes from Plaintiff on its unitary property based on a tax rate higher than the annual average tax rate of general property taxation calculated and reported for each county by the California State Board of Equalization under Cal. Rev. & Tax Code §11403." A copy of Judge Gilliam, Jr.'s Order is attached.

Therefore, the excessive taxes were illegally levied and erroneously and illegally collected, entitling BNSF to a refund of the excessive taxes with interest, costs, and attorney's fees as allowed by law, pursuant to Cal. Rev. & Tax Code Section 5096 et seq. and any other applicable statute, rule, and regulation.

This refund claim is being filed with the Board of Supervisors and/or the Treasurer/Tax Collector. Please contact Alan Annis at (817) 352-3418 for any further information.

BNSF Railway Company
August 20, 2020

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY,

Plaintiff,

v.

ALAMEDA COUNTY, et al.,

Defendants.

Case No. 19-cv-07230-HSG

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 35

Pending before the Court is Plaintiff BNSF Railway Company's ("BNSF") motion for a preliminary injunction (Dkt. No. 35 ("Mot.")), for which briefing is complete. Dkt. Nos. 43 ("SD Opp."), 44 ("Counties' Opp."), 53 ("Reply"). BNSF requests a preliminary injunction against fifteen counties ("Defendants," or "Defendant Counties") under 49 U.S.C. § 11501(b)(3), which prohibits applying higher tax rates to railroad property. On March 12, 2020, the Court held a hearing on the motion. Dkt. No. 58. The Court **GRANTS** the motion for preliminary injunction.

I. BACKGROUND

A. The 4-R Act

The 4-R Act (now codified at 49 U.S.C. § 11501 ("Section 11501")) was passed in 1976 to "restore the financial stability of the railway system." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). This was, in part, because railroads "are easy prey for State and local tax assessors," as they are "nonvoting, often nonresident, targets for local taxation" that cannot easily remove themselves from the locality. *W. Air Lines, Inc. v. Board of Equalization of State of S.D.*, 480 U.S. 123, 131 (1987). Congress declared that state and local taxation schemes that discriminate against rail carriers "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11501(b). As relevant here, Section 11501(b)(3) bans discriminatory tax

rates, and provides that state and local governments may not "levy or collect an ad valorem tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." *Id.*

B. California Property Taxation

California's system of taxation is, in a word, complicated. California law imposes an ad valorem (*i.e.*, value-based) property tax on all property in the State, unless exempt, in proportion to its assessed value. Cal. Const. Art. XIII, § 1. Taxation is a three-step process. First, the value of taxable property is assessed. Next, the applicable tax rate is computed, typically expressed as a percentage of assessed value. Finally, the tax is levied and collected from the taxpayer.

Most property in California, including general "commercial and industrial property," is "locally assessed," meaning that county assessors determine the assessed value of the property for tax purposes. *See* Declaration of Alan M. Annis, Dkt. No. 35-1, ("Annis Decl.") ¶ 7. California classifies and taxes the bulk of property in the state as either "secured" or "unsecured." *See id.* ¶ 8. The "secured roll" consists of most state-assessed property and that portion of locally assessed property for which the taxes are secured by a lien on real property of a value sufficient to pay the taxes. *See* Cal. Rev. & Tax. Code § 109. The "unsecured roll" consists of all other property, such as personal property and possessory interests in tax-exempt land. *Id.*

Every year, each Defendant County's board of supervisors determines the tax rates to be applied in the county for locally assessed property and for unitary property, applying different statutory formulas. Cal. Rev. & Tax. Code § 2151. Defendants' respective auditors apply these applicable tax rates to the assessed value shown on the assessment rolls. Cal. Rev. & Tax. Code § 2152. Then, Defendants' respective tax collectors collect the taxes on unitary property at the unitary rate determined by each county. Cal. Rev. & Tax. Code §§ 2605, 2610.5. Locally assessed property, including commercial and industrial property, is assigned to a particular "Tax Rate Area" within each county, based on the property's location. *See* Annis Decl. ¶ 11.

For property on the secured tax roll, the annual ad valorem tax rate for each Tax Rate Area is established as (a) a 1% general tax levy, typically used to fund general government services, plus (b) an amount necessary to produce sufficient revenues to pay the interest and principal on

any voter-approved bonded indebtedness issued by the county or by the local agencies, school entities, and special districts serving that Tax Rate Area. Cal. Rev. & Tax. Code § 93 ("Section 93"), enacted per Cal. Const. Art. XIIIA, § 1 ("Proposition 13"). This latter portion of the Section 93 tax rate above the 1% base levy is known as the "debt service component." Under Proposition 13, real property must be valued at its 1975 fair market value (as shown on the 1975-76 assessment roll), or thereafter, the fair market value when purchased, newly constructed, or a change of ownership has occurred after the 1975 assessment (i.e., the occurrence of an "assessable event"). Cal. Const., art. XIII, § 2(a).

The debt service component is the sum of separately calculated rates for each local agency, school entity or special district with outstanding debt. To calculate the elements of the debt service component, the County first determines how much revenue it will need to make debt service payments for the upcoming year for the voter-approved debt of the local agency, school entity, or special district. *See* Cal. Gov. Code § 29100. Next, the County determines the portion of assessed property values on the secured roll subject to the voter-approved debt issued by the local agency, school entity or special district (i.e., the property located within the boundaries of each local entity). *Id.* The County then calculates the percentage of those total property values that will produce the necessary revenues to service the debt issued by that local entity, after allowances for delinquencies and annual changes to the roll, among other factors. *Id.* The debt service component in each Tax Rate Area is the sum of these calculated percentages for every local agency, school entity or special district serving that Tax Rate Area. The debt service component is combined with the 1% base levy to compute the total property tax rate in each Tax Rate Area for property on the secured roll.

The property tax rate for property on the unsecured roll is the secured roll tax rate for that Tax Rate Area for the previous year. Cal. Rev. & Tax. Code § 2905. This rule is consistent with the separate requirement that unsecured taxes are due each year before the County calculates the secured tax rate for that year. *See* Cal. Rev. & Tax. Code § 2922.

In contrast, the State Board assesses the value of certain utility and railroad property (including Plaintiff's property). Cal. Rev. & Tax. Code § 721. The State Board assesses

Plaintiff's property using the principle of unit valuation, under which all of a taxpayer's assets, wherever located, are valued as a unit, and that unitary value is then allocated among particular taxing jurisdictions. *See* Annis Decl. ¶ 6. State-assessed property that is valued under the principle of unit valuation is also referred to as "unitary property." *See* Cal. Rev. & Tax. Code §§ 723, 723.1. Unit taxation provides a way to value and tax property in businesses for which the component parts of the business are valuable when considered as a whole, but worth less when considered in isolation. *See ITT World Commc'ns, Inc. v. City & Cnty. of S.F.*, 37 Cal. 3d 859, 863 (Cal. 1985). For example, "ten miles of [railroad] track . . . 'would have a questionable value, other than as scrap, without the benefit of the rest of the system as a whole.'" *Am. Airlines, Inc. v. Cnty. of San Mateo*, 12 Cal. 4th 1110, 1126 (Cal. 1996) (internal citations and brackets omitted).

C. Taxation Applicable to Railways

Plaintiff's primary argument is that the tax rate applicable to its property is calculated under a different formula than the Section 93 tax rate for locally-assessed commercial and industrial property, resulting in a tax rate higher than the Section 93 tax rate. According to Plaintiff, first, under Cal. Rev & Tax. Code § 100.11, the value attributable to the state-assessed unitary property of a regulated railway company is generally allocated to a single countywide Tax Rate Area in each county in which the property is located. The "unitary" tax rate to be applied to these countywide tax rate areas is established in accordance with the formula in Cal. Rev. & Tax. Code § 100(b)(2) ("Section 100"). Cal. Rev. & Tax. Code § 100.11(a)(2)(B).

Section 100 (like Section 93) includes the base 1% tax levy. However, the additional unitary debt service component under Section 100 is calculated by taking the County's previous year's unitary debt service rate and multiplying it by the percentage change between the two preceding fiscal years in the County's ad valorem debt service levy for the secured roll (excluding unitary and operating nonunitary debt service levies). *See* Mot. at 8. Plaintiff contends that this formula has caused the Section 100 unitary tax rate to diverge from the Section 93 secured and unsecured tax rates. In particular, when a County's debt service needs increase, the secured and unsecured rates will not rise if property values also rise and keep pace with inflation. But under those same circumstances, the Section 100 unitary debt service rate will increase because it

depends on the absolute dollar amount of debt service.

The State Board calculates and publishes the annual "average rate of general property taxation" in each California county. Annis Decl. ¶¶ 24–26, 32. The State Board computes this average tax rate by dividing (a) the sum of the total ad valorem property tax levies in each county for each year, by (b) the total assessed value of all property in that county for that same year. *See* Cal. Rev. & Tax. Code § 11403. For the 2019-20 tax year, using the methods described above, Plaintiff contends that the Defendant Counties have levied property taxes at the unitary rate applicable in their respective assessment jurisdictions. Below are the alleged differences between the unitary rate applied to Plaintiff's property and the Section 11501 "benchmark rate":

County	2019-20 Plaintiff Unitary Rate	2019-20 Section 11501 Benchmark Rate
Alameda	2.5187%	1.241%
Contra Costa	1.6865%	1.148%
Fresno	1.370408%	1.181%
Kern	1.611299%	1.24%
Kings	1.326084%	1.087%
Madera	1.203169%	1.089%
Merced	1.4109014%	1.088%
Orange	1.28173%	1.064%
Plumas	1.11652%	1.089%
Riverside	1.76133%	1.164%
San Bernardino	1.3645%	1.144%
San Diego	1.62331%	1.142%
San Joaquin	1.6922%	1.145%
Stanislaus	1.38011%	1.103%
Tulare	1.4002%	1.113%

See Annis Decl. ¶33.[1]

[1] The average rate difference for the Defendant Counties for the 2019-2020 fiscal year is only 0.38%, while the median difference is 0.29%. Differences in prior years are generally even smaller. *See* Narciso Decl., ¶ 10 & Ex. 7. With these smaller differences, Defendants are correct that it is all the more important for Plaintiff to meet its burden of demonstrating that it has identified the tax rate applicable to the proper comparison class. However, most Defendants admit in their Answer (ECF No. 52 ¶ 34)—and San Diego states that it lacks sufficient information to

II. LEGAL STANDARD

The prohibition on tax rate discrimination is enforceable through an action for equitable relief in federal court. In enacting Section 11501, "Congress … believed that a federal court remedy for carriers subject to discriminatory taxation was necessary because state courts were not providing them with a plain, speedy, and efficient remedy." *Trailer Train Co. v. State Bd. Of Equalization*, 697 F.2d 860, 866 (9th Cir. 1983). Congress thus included in Section 11501 "a procedural component which authorizes victims of discrimination to seek injunctive relief in federal court." *Id.* This provision specifically empowers federal courts to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of [Section 11501]," notwithstanding 28 U.S.C. § 1341. *Id.* at 869 & n.16; *see* 49 U.S.C. § 11501(c).

Plaintiff contends that a preliminary injunction under Section 11501 is not governed by the traditional equitable criteria of likelihood of success, irreparable harm, balance of hardships, or public interest. *See* Mot. at 5 (citing *Trailer Train*, 697 F.2d at 869). Instead, because Section 11501 specifically contemplates interim equitable relief, a preliminary injunction must issue "[w]here the trial court finds reasonable cause to believe that a violation of Section [11501] has been, or is about to be, committed." *Burlington N. R. Co. v. Dep't. of Revenue of State of Wash.*, 934 F.2d 1064, 1074 (9th Cir. 1991); *BNSF Ry. v. Tenn. Dep't of Revenue*, 800 F.3d 262, 268 (6th Cir. 2015) ("[A] railroad seeking injunctive relief under the 4-R Act need only demonstrate that there is 'reasonable cause' to believe a violation of the 4-R Act has occurred or is about to occur.").

Defendants disagree, and contend that the Court should instead apply the traditional equitable criteria. Defendants believe that the Ninth Circuit's decisions in *Burlington* and *Trailer Train* (as well as other circuit court decisions) misapplied—or failed to apply—the Supreme Court's decision in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and instead incorrectly applied the Tenth Circuit's standard in *Atchison, T. & S.F. Railway Co. v. Lennen*, 640 F.2d 255,

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state (ECF No. 51 ¶ 10)—that the tax rates set forth in the chart are the tax rates levied on Plaintiff by the Defendant Counties, and the 2019-2020 tax rates the State Board calculates pursuant to Section 11403 of the Revenue and Taxation Code.

259-61 (10th Cir. 1981), the first instance in which the "reasonable cause" standard was applied to an alleged 4-R Act violation.

Notwithstanding any arguments Defendants may wish to preserve for potential *en banc* consideration on appeal, the Ninth Circuit has clearly decided this question. *See Burlington N.*, 934 F.2d at 1074 ("Issuance of preliminary injunctive relief in Section [11501] cases is not governed by the traditional equitable criteria applicable in actions between private litigants . . . ."); *Trailer Train*, 697 F.2d at 869 ("The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief. . . . Section [11501] clearly falls within this exception because its subsection (c) specifically authorizes a district court to grant injunctive relief to prevent a violation of the statute."). This Court is bound to apply that clear holding unless the "circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003). The Court finds that no intervening authority permits it to disregard the "reasonable cause" standard set out by the Ninth Circuit in *Burlington* and *Trailer Train*.[2] Accordingly, the Court applies that standard, and will issue a preliminary injunction if there is reasonable cause to believe that a violation of the 4-R Act has occurred, is occurring, or will occur.

III. ANALYSIS

A. Commercial and Industrial Property

The plain language of Section 11501(b)(3) prohibits levying "an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." Section 11501(a)(2) defines "assessment jurisdiction" as "a geographical area in a State used in determining the assessed value of property for ad valorem taxation." Section 11501(b)(3) recognizes that "tax-rate variation" is improper

[2] Defendants assert that *Trailer Train* neither cites nor acknowledges the Supreme Court's ruling in *Romero-Barcelo*, presumably (according to Defendants) because *Trailer Train* was argued and submitted on March 10, 1982, while *Romero-Barcelo* was not decided until April 27, 1982. *See* Counties' Opp. at 10 n. 3. However, *Trailer Train* was decided by the Ninth Circuit on January 25, 1983, more than seven months after *Romero-Barcelo*.

taxation of railroad property. *Trailer Train*, 697 F.2d at 865–66. The relevant section states:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them: * * * (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to **commercial and industrial property** in the same **assessment jurisdiction**.

49 U.S.C. § 11501 (emphasis added). Defendants, as counties of California, are legal subdivisions of the State of California, (Cal. Const. Art. XI, § 1), and thus are subject to Section 11501(b)(3). And Plaintiff's unitary property in California is "rail transportation property" within the meaning of Section 11501(b)(3) and is, therefore, entitled to the protection of the statute. *See* Declaration of Judy A. Cummings, Dkt. No. 35-2 ¶ 4.

The disputed element of Section 11501(b)(3) is the comparison to "the tax rate applicable to commercial and industrial property." *See* Mot. at 2. In order to prove a violation of Section 11501(b)(3), Plaintiff must demonstrate that Defendants are levying or collecting an ad valorem property tax at a rate that exceeds the rate applicable to commercial and industrial property located in the same assessment jurisdiction as Plaintiff's property. 49 U.S.C. § 11501(b)(3).

The Ninth Circuit established the framework for that comparison in *Trailer Train*. Plaintiffs there sued to enjoin the collection of a state tax on private railroad cars because the applicable tax rate was higher than the rate for commercial and industrial property under the then-adopted Proposition 13, such that the private railroad car tax "discriminated against owners of rail-transportation property" in violation of Section 11501(b)(3). 697 F.2d at 864. After recognizing the purpose of Section 11501 and affirming the district court's authority to enjoin violations of the statute, the Ninth Circuit turned to comparing the challenged tax rate to "the rate generally applicable to commercial and industrial property." *Id.* at 866-67.

The Ninth Circuit explained that this "task is complicated by the fact that," due to California's unique classification system (dividing property into secured and unsecured, as opposed to residential and commercial/industrial), "California has no specific tax rate for commercial and industrial property." *Id.* at 867. Because neither Section 11501, "nor its legislative history provides guidance as to what should be done when a specific rate generally

applicable to commercial and industrial property is not readily apparent," the Ninth Circuit articulated a framework with two alternative approaches for identifying "the tax rate generally applicable to commercial and industrial properties" specifically in California, and specifically under Section 11501. *Id.*

The first approach in that framework is to determine "the tax rate applicable" to whichever tax roll, either secured or unsecured, contains "the majority of [the] commercial and industrial property." *Id.* Determining which tax roll contains the majority of commercial and industrial property is (often) straightforward. The secured roll in each county contains the vast majority (consistently over 90%) of the assessed value and the taxes levied against all property in that county, and the secured roll, according to Plaintiff, almost certainly contains the majority of commercial and industrial property. *See* Annis Decl. ¶¶ 30–31.

However, the weakness of this approach is that "the tax rate applicable" to the property on the secured roll cannot be determined. Plaintiff contends that the property on the secured roll is spread among the hundreds or thousands of Tax Rate Areas in each Defendant County that each have their own tax rates. *See id.* ¶¶ 15, 31. Thus, Plaintiff contends that there is no identifiable "tax rate applicable" to property on the secured or unsecured roll of any of the Counties.

As a fallback, the Ninth Circuit in *Trailer Train* authorized a second approach. First, the Court is to determine the average tax rate for all property in the relevant county. *See Trailer Train*, 697 F.2d at 868 n.13 ("We thus, for reasons different from those articulated by the district court, conclude that the average rate for all property should be used when the rate generally applicable to commercial and industrial property cannot be determined.").

Plaintiff alleges that identifying the "average rate for all property" is possible because the State Board already calculates that rate—the annual "average tax rate of general property taxation" in each county. *See* Annis Decl. ¶ 24. By statute, the State Board calculates this average tax rate by dividing (a) the sum of all ad valorem property tax levies in a given county for a given year by (b) the sum of the assessed values of all property in that county for that same year. Cal. Rev. & Tax. Code § 11403. According to Plaintiff, the State Board-calculated rate for each county is the maximum rate the Defendants can apply to railroad property, meaning that taxing railroad

property at rates that are higher than the Section 11501 "Benchmark Rate" is a violation of Section 11501(b)(3).[3]

Defendants counter that the relevant assessment jurisdiction is the area of the entire State of California that contains the unitary property, and the tax rate applied to the railroad must be compared to the tax rate applied to other commercial and industrial property that is assessed as unitary property. Counties' Opp. at 19. Defendants further contend that, under Article XIII, Section 19 of the California Constitution, the assessment jurisdiction of the State includes the following types of property: "(1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity." *Id.* at 20.

Defendants, in theory, are contending that Section 100 (applicable to Plaintiff) does not differentiate in the way tax rates are applied among these commercial and industrial properties, because these nonrailroad companies do not have a different rate than Plaintiff. Put differently, all of the non-railroad commercial and industrial property that is assessed as "unitary property" for purposes of local property taxation is taxed pursuant to Section 100.

The Court finds Defendants' suggestion that it should compare Plaintiff's tax rate to the rates for a relatively narrow subset of other state-assessed utilities and other entities that pay the same unitary tax rate inconsistent with the 4-R Act. Section 11501(b)(3) calls for a broader comparison to the rate paid by "*commercial and industrial property* in the same assessment jurisdiction," where an "assessment jurisdiction" is "a geographical area *in a State*." 49 U.S.C. 11501(a)(2) (emphasis added). The "commercial and industrial property in" the "geographical area" of California clearly is not limited to state-assessed utilities or similar Section 19 property: it embraces all commercial and industrial taxpayers in the state. For the same reasons that there are not county-specific rates for commercial and industrial taxpayers in California, (Mot. 9-10, 14-15), there are also no statewide rates.

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[3] Plaintiff contends they will pay, for the 2019-20 tax year, a total of more than $3.2 million in taxes prohibited by Section 11501. *See* Annis Decl. ¶ 35.

Railroads, like other utilities such as pipelines and telecommunications companies, are "easy prey" in that they are "nonvoting, often nonresident" targets "who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Board of Equal.*, 480 U.S. 123, 131 (1987) (quotation marks omitted). The solution, Congress recognized early on, was to link railroads' fate with a mass of other taxpayers by insisting that "[rail] carriers are accorded equal tax treatment with other taxpayers." S. Rep. No. 87-445 at 466 (1961). Significantly, before the final version of Section 11501 was passed, a provision permitting comparisons solely against public utilities was introduced and rejected. *See Atchison, Topeka & Santa Fe Ry. Co. v. Ariz.*, 559 F. Supp. 1237, 1244 (D. Ariz. 1983) (citing S. Rep. No. 92-1085 (1972)). The upshot is that the comparison the Defendant Counties propose—between railroads and other state-assessed taxpayers subject to the same tax laws—does not comport with the statute Congress enacted.

Defendants appear to recognize that *Trailer Train* poses a challenge for their argument. They contend that the taxes at issue here are calculated at the local level and do not require use of a statewide general property tax rate, whereas *Trailer Train* involved the applicability of the 4-R Act to a statewide tax on plaintiffs' private railroad cars, and the effort to identify a comparison class for that statewide tax. 697 F.2d at 862.

But that is a distinction without a difference. The challenge in *Trailer Train*, as here, was determining which group of commercial and industrial property to use as a comparison class, given that commercial and industrial property appeared on both the secured and unsecured rolls. The Ninth Circuit held first that "[t]he tax rate applicable to the roll that contained the majority of the commercial and industrial property shall be deemed the rate generally applicable to commercial and industrial property and will serve as the base rate for comparison against the Companies' $10.68 rate." *Id.* at 867. The Ninth Circuit further reasoned that "[i]f the determination of which roll contained the majority of the state's commercial and industrial property in the 1978-79 fiscal year is not possible, the average tax rate for all property shall be used as the basis for comparison." *Id.*

Defendants characterize *Trailer Train* as hinging on its discussion of a uniform statewide tax versus local taxation of unitary property. But this ignores the Ninth Circuit's recognition that

there is no specific commercial and industrial rate for locally assessed property in California. Defendants contention that *Trailer Train* predates the legislation subjecting railroad property to unitary rates is irrelevant to the key question that *Trailer Train* resolves—how to determine the appropriate comparison rate for locally-assessed property—and California law on that point remains unchanged.

The Court finds that Defendants' proposed comparison is untethered from the statutory language and unsupported by Section 11501 jurisprudence. Indeed, under the Defendants' approach—under which railroads are only compared to taxpayers that are taxed like railroads—violations of Section 11501(b)(3) likely would be rare or nonexistent, and Congress would have accomplished very little. The statute's use of the term "assessment jurisdiction" demonstrates that Congress was concerned with the basic principle that like property should be treated alike. Because there is no specific commercial and industrial rate in the State of California, *Trailer Train* authorized the use of either the rate for the secured roll or the average rate for all property.

Accordingly, under the *Trailer Train* framework, Plaintiff has established reasonable cause that a violation of Section 11501(b)(3) has occurred or will occur if it is required to pay taxes at the rate Defendants claim applies for the 2019-20 tax year.

B. Discrimination and Justification

Defendants make a secondary argument that Plaintiff (and the railroad industry) lobbied to be taxed at the Section 100(b) rate that Plaintiff now alleges is unlawful. According to Defendants, the railroad industry wanted its taxes to be calculated under Section 100(b) because the railroads wanted to "reduce[ ] the administrative burden imposed on the Board of Equalization, county auditors and treasurers, and the railroads." *See* Declaration of Michael Narciso, Dkt. No. 44-4 Ex. 5 at pages 316-17 (ECF pagination).

Defendants cite to the railroad industry's arguments in favor of the current law, specifically the claim that "each year, the railroads, the State Board of Equalization (SBE) and individual taxing jurisdictions must undertake a painstaking and time consuming process in which they are forced to redraw hundreds of 'tax maps' and prepare a similar number of bills for each and every tax rate area where there are railroad tracks. . . . This year, for instance, Union Pacific Railroad

and BNSF Railway Company received more than 2,400 tax rate area changes and 2,850 operating tax bills from the tax districts." *Id.* Defendants point out that this legislation, by allowing the railroad to pay only on one tax rate area in each county, reduced the number of operating tax bills from 2,850 to approximately 61. *Id.*

Defendants thus argue that any discriminatory outcome for Plaintiff was a direct result of the railroad industry's lobbying efforts regarding which tax rates would apply to its members in California. Defendants use the legislative history to argue that Plaintiff should not be allowed to reap the benefits of its lobbying efforts, then pounce only once it perceives an advantage in invoking Section 11501. Defendants contend that Section 11501 is meant to address concerns about the railroads' political vulnerability and establishes a prohibition only as to *discriminatory* state taxation of railroad property. Thus, Defendants conclude, because the railroads in California wanted to be taxed pursuant to Section 100(b), and wanted to benefit themselves through reduced administrative burdens provides, this provides sufficient justification for any alleged tax disparity.

Whatever equitable force Defendants' argument might have in a vacuum, the Court finds it to be inconsistent with the relevant language in the statute. Section 11501(b)(3) does not use the word "discriminates." Rather, subsection (b)(3) forbids "[l]evy[ing] or collect[ing] an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction." 49 U.S.C. § 11501(b)(3). The statute does not require proof of discrimination, because Congress has already declared in the preface of Section 11501(b) that the imposition of such an ad valorem property tax rate disparity "unreasonably burden[s] and discriminate[s] against interstate commerce." 49 U.S.C. § 11501(b).

In arguing to the contrary, Defendants cite the Supreme Court's 2011 decision in *CSX Transportation, Inc. v. Alabama Department of Revenue*, 562 U.S. 277 (2011) ("*CSX I*"), which discussed the meaning of the word "discriminate" in Section 11501 and explained how a state might engage in illegal discrimination under Section 11501(b)(4). The Court stated that if a state charged "one group of taxpayers a 2% rate and another group a 4% rate," the State would be discriminating against the latter group, "assuming the groups are similarly situated and there is no

justification for the difference in treatment." *CSX I*, 562 U.S. at 287.

Four years later, the Court found such justification for a difference in treatment in *Alabama Department of Revenue v. CSX Transp., Inc.* ("*CSX II*"), 575 U.S. 21 (2015). At issue there was whether the 4-R Act prohibited Alabama from imposing a 4% tax on the diesel fuel used by railroads that it did not impose on the diesel fuel used by the railroads' competitors, given that Alabama also imposed comparable taxes on the competitors that it did not impose on railroads. *Id.* at 24, 30. The Court concluded that the 4-R Act did not prohibit such differential treatment because "an alternative, roughly equivalent tax is one possible justification that renders a tax disparity nondiscriminatory." *Id.* at 30-31.

The Court finds the *CSX* cases inapplicable. In both *CSX I* and *CSX II*, Section 11501(b)(3) was not at issue: the Court addressed Section (b)(4), which specifically prohibits a state from imposition "another tax that *discriminates* against a rail carrier …." *See* Section 11501(b)(4) (emphasis added). In *CSX I*, the "key question" was "whether a tax might be said to 'discriminate' against a railroad under subsection (b)(4)." 562 U.S. at 286. The Court held that subsection (b)(4) permits a justification defense because, as used in that subsection, the undefined term "discriminates" means a failure to treat similarly situated taxpayers the same without "justification for the difference in treatment." *Id.* at 287. Then, in *CSX II*, the Court held that the existence of an "alternative, roughly equivalent tax" (paid by the taxpayers to which the railroad is compared) is a possible justification under subsection (b)(4). 575 U.S. at 30-31. These discussions about when the catchall provision regarding "another tax that discriminates" might be triggered do not shed light on the issue presented in this case, because the face of the statute already reflects Congress' determination that the acts set out in subsection (b)(3) amount to *per se* discrimination against interstate commerce.

IV. CONCLUSION

Because Plaintiff has established reasonable cause that a violation of Section 11501(b)(3) has occurred or will occur, the motion for a preliminary injunction is **GRANTED.**

Defendants Alameda County, Contra Costa County, Fresno County, Kern County, Kings County, Madera County, Merced County, Orange County, Plumas County, Riverside County, San

Bernardino County, San Diego County, San Joaquin County, Stanislaus County, and Tulare County, California; their boards of supervisors, county auditors, tax collectors, agents, employees, and all those acting in concert or participating with them who receive actual notice of this order (the "Enjoined Parties") are hereby **ENJOINED** through the pendency of this litigation until entry of a final judgment from levying or collecting ad valorem property taxes from Plaintiff on its unitary property based on a tax rate higher than the annual average tax rate of general property taxation calculated and reported for each county by the California State Board of Equalization under Cal. Rev. & Tax Code §11403.

The Enjoined Parties are further enjoined through the pendency of this litigation until entry of a final judgment from taking any action to impose any interest or penalties, from taking any action to record or enforce a tax lien upon any property used or owned by Plaintiff, or from taking any other action authorized by state law for delinquent or unpaid taxes under California law.

Plaintiff will be required to post a bond under Federal Rule of Civil Procedure 65(c). The parties are directed to meet and confer and agree if possible by 5:00 p.m. Pacific Time on April 9, 2020 regarding the appropriate amount of the bond. *See* Opp. at 25 (seeking bond of "no less than $1.6 million in lost tax revenue"), Reply at 15 (acknowledging that Plaintiff will post a bond if ordered, without indicating its view as to the appropriate amount of the bond). By that time, the parties should either file an agreed-upon proposed bond order (which should be done if at all possible), or separate proposed forms of order (understanding that the Court is going to require a bond notwithstanding Plaintiff's argument that doing so is unnecessary).

Consistent with the discussion at the hearing, *see* Dkt. No. 61 at 41, the parties are also directed to meet and confer and submit a joint proposal by April 15, 2020 regarding the proposed timing of initial disclosures, discovery and other proceedings in light of this order.

IT IS SO ORDERED.

Dated: 4/8/2020

Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.
United States District Judge

CONTRA COSTA COUNTY

RUSSELL V. WATTS, *TREASURER-TAX COLLECTOR*

RAILROAD PROPERTIES

FISCAL YEAR JULY 1, 2018 TO JUNE 30, 2019

ASSESSED TO:

BNSF Railway Company
c/o Burlington Northern Santa Fe Tax Dept.
P. O. Box 961089
Fort Worth, TX 76161-0089

NOTICE DATE: **October 10, 2018**

ACCOUNT NUMBER: **804**

VALUATION			
Land	Improvements	Personal Property	Total Assessed Value
$36,509,160	$30,311,363	$15,816,780	$82,637,303
Assessed Value Tax Rate	Total Tax Due	First Installment	Second Installment
1.6269%	$1,344,426.28	$672,213.14	$672,213.14

This is your notice for **RAILROAD PROPERTY TAX** in Contra Costa County for the fiscal year 2018-2019, as reported by the State Board of Equalization. **Pursuant to Section 2503.2 of the Revenue & Taxation Code, all taxpayers making single or aggregate tax payment(s) of FIFTY THOUSAND DOLLARS ($50,000) or more are required to send payments via electronic funds transfer (EFT) or by wire.** If you have any questions, call (925) 957-2828 between 9:00 a.m. and 4:00 p.m. or write to: CCC Tax Collector, ATTN: Danielle Goodbar, 625 Court Street Rm. 100, Martinez, CA 94553-1231.

(KEEP THE TOP PORTION FOR YOUR RECORDS)

ACCOUNT NUMBER: 804	FISCAL YEAR: 2018 – 2019	ISSUE DATE: OCTOBER 10, 2018

MAKE CHECK PAYABLE TO:
CONTRA COSTA COUNTY
TAX COLLECTOR
P. O. BOX 631
MARTINEZ, CA 94553-0063

BNSF Railway Company

RAILROAD PROPERTIES
TAX BILL
(THIS STUB MUST ACCOMPANY PAYMENT)

2ND

INSTALLMENT

DUE BY FEB. 1, 2019	$672,213.14
DELINQUENT AFTER 5:00 P.M. APR. 10, 2019 (INCLUDES 10% PENALTY + $20 COST)	$739,454.45
TO PAY FULL TAX BY DEC. 10, 2018	$1,344,426.28

ACCOUNT NUMBER: 804	FISCAL YEAR: 2018 – 2019	ISSUE DATE: OCTOBER 10, 2018

MAKE CHECK PAYABLE TO:
CONTRA COSTA COUNTY
TAX COLLECTOR
P. O. BOX 631
MARTINEZ, CA 94553-0063

BNSF Railway Company

RAILROAD PROPERTIES
TAX BILL
(THIS STUB MUST ACCOMPANY PAYMENT)

1ST

INSTALLMENT

DUE BY NOV. 1, 2018	$672,213.14
DELINQUENT AFTER 5:00 P.M. DEC. 10, 2018 (INCLUDES 10% PENALTY)	$739,434.45

TO ENSURE PROPER POSTING & CREDIT OF PAYMENT, PLEASE SEND BACK COUPONS ALONG WITH YOUR PAYMENTS.

View Image: Image On-Demand

ITEM DETAILS

ACCOUNT NUMBER

1077654517

ACCOUNT NAME

BNSF RAILWAY COMPANY ACCOUNTS

POST DATE

12/13/2018

CCY

USD

AMOUNT

711,356.15

TRANSACTION TYPE

Checks/Debits

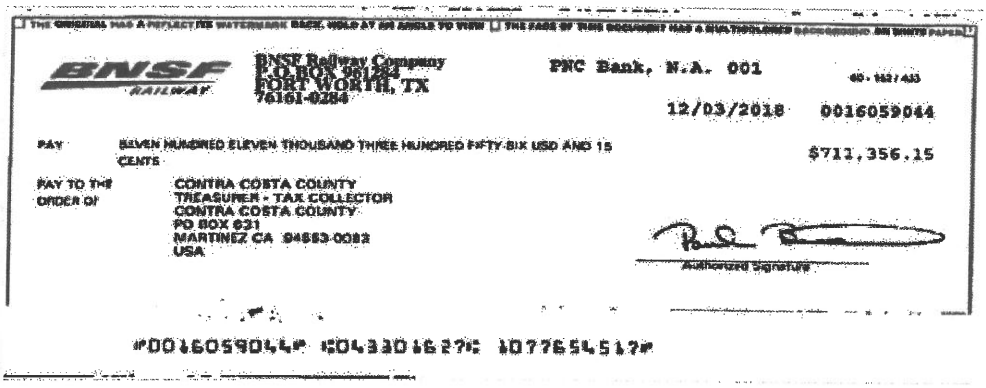
SEQ / REF #

77586385

SERIAL #

16059044

IMAGE FRONT



BNSF RAILWAY

BNSF Railway Company
P.O.BOX 961242
FORT WORTH, TX
76161-0284

PNC Bank, N.A. 001

12/03/2018 0016059044

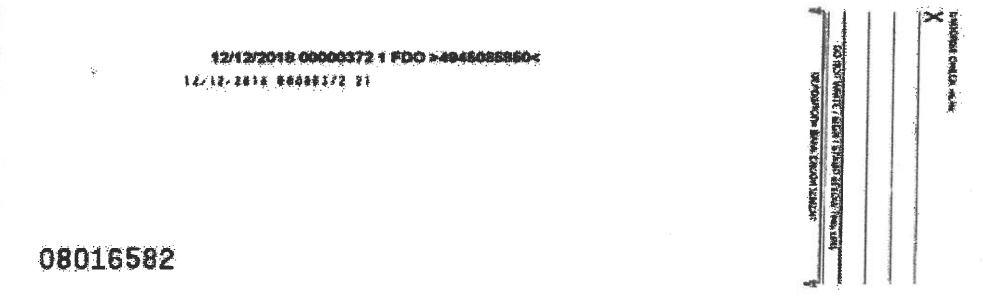
PAY ELEVEN HUNDRED ELEVEN THOUSAND THREE HUNDRED FIFTY-SIX USD AND 15 CENTS $711,356.15

PAY TO THE ORDER OF
CONTRA COSTA COUNTY
TREASURER - TAX COLLECTOR
CONTRA COSTA COUNTY
PO BOX 631
MARTINEZ CA 94553-0063
USA

Authorized Signature

⑈0016059044⑈ ⑆043300627⑆ 1077654517⑈

IMAGE BACK



12/12/2018 00000372 1 FDO >49460858<

08016582

View Image: Image On-Demand

ITEM DETAILS

ACCOUNT NUMBER

1077654517

ACCOUNT NAME

BNSF RAILWAY COMPANY ACCOUNTS

POST DATE

04/11/2019

CCY

USD

AMOUNT

711,356.15

TRANSACTION TYPE

Checks/Debits

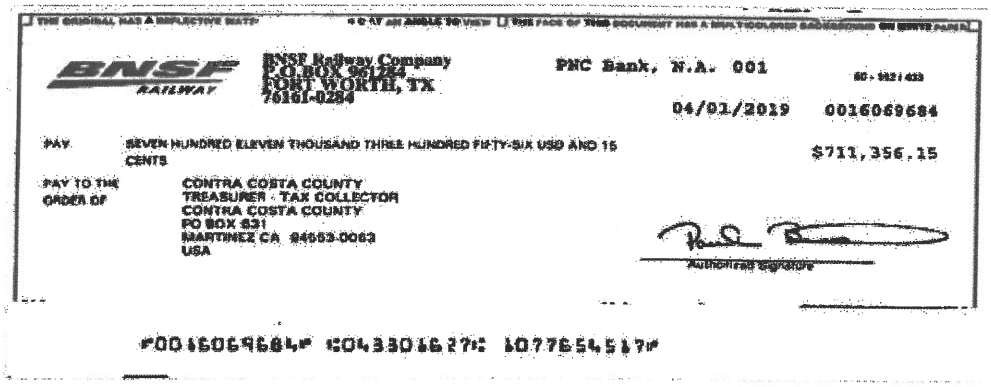
SEQ / REF #

72234628

SERIAL #

16069684

IMAGE FRONT



BNSF RAILWAY

BNSF Railway Company
P.O.BOX 961244
FORT WORTH, TX
76161-0244

PNC Bank, N.A. 001

04/01/2019 0016069684

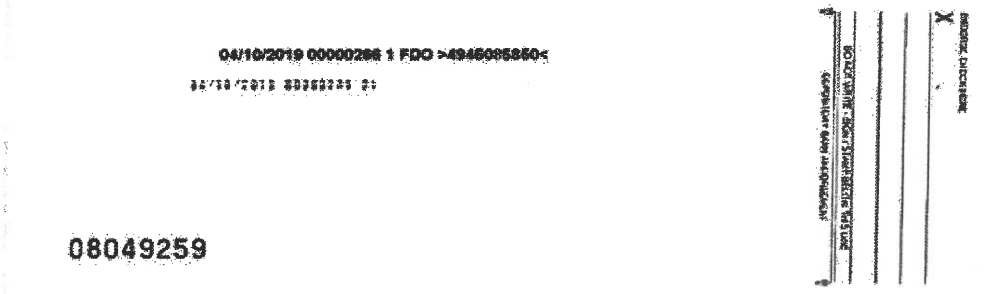
PAY SEVEN HUNDRED ELEVEN THOUSAND THREE HUNDRED FIFTY-SIX USD AND 15 CENTS $711,356.15

PAY TO THE ORDER OF
CONTRA COSTA COUNTY
TREASURER - TAX COLLECTOR
CONTRA COSTA COUNTY
PO BOX 631
MARTINEZ CA 94553-0063
USA

Authorized Signature

⑈0016069684⑈ ⑆043300627⑆ 1077654517⑈

IMAGE BACK



04/10/2019 00000288 1 FDO >4946005850<

08049259

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

Legislative and Research Division– MIC: 121
TELEPHONE: (916) 319-9220

Memorandum

To: Honorable George Runner, Chair
Honorable Fiona Ma, Vice Chair
Honorable Jerome E. Horton, Third District
Honorable Diane Harkey, Fourth District
Honorable Betty T. Yee, State Controller

Date: July 13, 2018

From: Mark Durham, Chief
Legislative and Research Division

Subject: **PRIVATE RAILROAD CAR TAX RATE**
JULY 2018 – BOARD MEETING

The attached table shows the 2017-18 average tax rate applicable to 2018-19 private railroad car tax assessments. The average rate of taxation throughout the state for **2017-18** was 1.149 percent, as computed under the provisions of Section 11403 of the Revenue and Taxation Code.

The report on computation of the tax rate indicates a rate for the 2018-19 private railroad car tax of 1.149 percent.

MD:yb

Attachment

cc: Mr. David Yeung
Ms. Joann Richmond
Mr. Richard Reisinger

Recommendation by:

FOR

Mark Durham, Chief
Legislative and Research Division

Approved:

Dean R. Kinnee
Executive Director

COMPUTATION OF THE TAX RATE APPLICABLE TO
2018-19 PRIVATE RAILROAD CAR TAX ASSESSMENTS
(Assessed Values and Levies in Thousands of Dollars)

Counties	Net Taxable Assessed Value	Total Levies	Non-total Property Levies[1]	Levies on Total Property	Average Tax Rate
Alameda	$ 272,626,240	$ 3,352,083	$ -	$ 3,352,083	1.230 %
Alpine	729,942	7,300	-	7,300	1.000
Amador	5,086,623	51,691	-	51,691	1.016
Butte	22,080,235	243,346	-	243,346	1.102
Calaveras	6,848,694	74,655	-	74,655	1.090
Colusa	3,998,054	43,036	-	43,036	1.076
Contra Costa	195,103,960	2,237,382	754	2,236,628	1.146
Del Norte	1,820,890	19,176	-	19,176	1.053
El Dorado	31,534,124	336,029	225	335,804	1.065
Fresno	77,707,738	919,346	-	919,346	1.183
Glenn	3,153,412	34,739	-	34,739	1.102
Humboldt	13,219,427	144,308	-	144,308	1.092
Imperial	11,778,289	139,272	-	139,272	1.182
Inyo	4,329,189	46,071	-	46,071	1.064
Kern	85,761,123	1,060,379	-	1,060,379	1.236
Kings	10,748,509	117,191	-	117,191	1.090
Lake	6,932,405	76,414	-	76,414	1.102
Lassen	2,279,215	23,517	-	23,517	1.032
Los Angeles	1,431,177,503	16,814,569	3,538	16,811,031	1.175
Madera	14,192,563	155,410	-	155,410	1.095
Marin	74,752,038	857,288	-	857,288	1.147
Mariposa	2,328,479	24,080	-	24,080	1.034
Mendocino	11,943,540	134,258	-	134,258	1.124
Merced	23,168,528	253,577	-	253,577	1.094
Modoc	994,400	9,944	-	9,944	1.000
Mono	5,879,453	64,275	-	64,275	1.093
Monterey	63,346,959	692,426	-	692,426	1.093
Napa	37,630,063	421,986	498	421,488	1.120
Nevada	18,699,362	199,813	-	199,813	1.069
Orange	560,813,880	5,993,102	32,965	5,960,137	1.063
Placer	71,975,458	784,824	-	784,824	1.090
Plumas	4,112,117	44,739	-	44,739	1.088
Riverside	266,992,247	3,129,479	17,681	3,111,798	1.166
Sacramento	150,856,151	1,735,159	-	1,735,159	1.150
San Benito	7,922,816	96,159	-	96,159	1.214
San Bernardino	211,988,010	2,448,228	-	2,448,228	1.155
San Diego	492,568,102	5,621,557	-	5,621,557	1.141
San Francisco	234,074,597	2,746,711	-	2,746,711	1.173
San Joaquin	72,199,514	818,198	-	818,198	1.133
San Luis Obispo	53,254,133	582,871	-	582,871	1.095
San Mateo	207,939,918	2,325,587	-	2,325,587	1.118
Santa Barbara	79,468,595	854,265	-	854,265	1.075
Santa Clara	451,768,226	5,483,116	28,142	5,454,974	1.207
Santa Cruz	43,284,454	481,640	-	481,640	1.113
Shasta	17,746,515	198,950	1,920	197,031	1.110
Sierra	557,600	5,576	-	5,576	1.000
Siskiyou	4,824,179	51,052	-	51,052	1.058
Solano	51,727,035	608,659	-	608,659	1.177
Sonoma	86,548,248	1,003,002	59	1,002,943	1.159
Stanislaus	46,888,862	518,060	-	518,060	1.105
Sutter	9,516,132	105,428	-	105,428	1.108
Tehama	5,315,738	56,352	-	56,352	1.060
Trinity	1,597,985	16,265	-	16,265	1.018
Tulare	34,338,233	383,052	74	382,978	1.115
Tuolumne	7,122,616	76,426	-	76,426	1.073
Ventura	129,988,430	1,423,042	2,326	1,420,717	1.093
Yolo	26,383,570	283,043	-	283,043	1.073
Yuba	5,625,811	62,399	-	62,399	1.109
TOTAL	$ 5,777,250,125	$ 66,490,501	$ 88,181	$ 66,402,320	1.149 %

CERTIFIED MAIL

neopost
08/27/2021
US POSTAGE $007.15

ZIP 76131
041L12204880

Railway
ou Menk Drive
nis
rth Texas 76131

USPS CERTIFIED MAIL

9214 8901 9403 8347 7622 12

CLERK OF THE BOARD OF SUPERVISORS
CONTRA COSTA COUNTY
RM 106
651 PINE ST
MARTINEZ CA 94553-1229

RECEIVED
AUG 30 2021
CLERK BOARD OF SUPERVISORS
CONTRA COSTA CO.