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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JASON MURCHISON,

Plaintiff,

v.

CITY OF NEWPORT BEACH, CALIFORNIA,

Defendant.

Case No.: 8:25-cv-00155-FWS-DFM

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: May 29, 2025
Time: 10:00 a.m.
Courtroom: 10D (Santa Ana)
Judge: Honorable Fred W. Slaughter
Trial Date: TBD
Action Filed: January 28, 2025

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INTRODUCTION AND BACKGROUND

Defendant City of Newport Beach generally bans the use of City beaches to teach others how to surf in exchange for money. Newport Beach Muni. Code § 11.04.060(D) (Ordinance); ECF 17, ¶¶ 3, 12 (FAC). To his surprise, Plaintiff Jason Murchison has been unable to obtain the City's permission to do just that. FAC ¶ 18. Mr. Murchison is no amateur unworthy of teaching others. He first began surfing in kindergarten, eventually enrolling at the University of Hawaii so that he could regularly test himself on some of the best waves on the planet. FAC ¶¶ 1, 36-37. He then joined the United States Navy where he served his country as a diver. FAC ¶¶ 2, 38. Mr. Murchison's life in the water even continued through law school, where he paid his way through night school by giving surfing lessons during the day. FAC ¶¶ 2, 39. Upon realizing that his abilities as an instructor were in demand and that he could support himself and his family by teaching others to surf and stand-up paddleboard (SUP), he put away his law books. FAC ¶¶ 2, 40. Until now.

The City prohibits anyone from providing "any instructional activity for monetary consideration in a park, park facility, or on a beach without first obtaining a written agreement from the Director [of the Newport Beach Recreation and Senior Services Department] to conduct or perform said instructional activity in a park, park facility, or on a beach." Newport Beach Muni. Code § 11.04.060(D); FAC ¶ 12. "Instructional activity" is defined as "any educational or recreational program or activity involving individual, team, or group instruction that is conducted or performed when there is monetary consideration provided for participation in the program or activity that occurs in a park, park facility, or on a beach." *Id.* § 11.04.020; FAC ¶ 13. Because Mr. Murchison does not have an agreement with the City, he cannot make his living in the City by teaching others to surf.[1] FAC ¶¶ 18-20.

[1] The City has nearly nine miles of beaches and, as a result, is a popular destination for surfing and SUP by locals and visitors. FAC ¶ 47. There is thus ample demand for surf and SUP lessons. FAC ¶¶ 40, 42, 51, 53.

Mr. Murchison's First Amended Complaint challenges the City's restrictive limitations on surf and SUP instruction on five grounds: (1) the First Amendment to the United States Constitution protects Mr. Murchison's ability to teach others how to surf and SUP, FAC ¶¶ 61-70; (2) the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the City from favoring certain similar beach activities over others, FAC ¶¶ 71-78; (3) the Sherman Act, 15 U.S.C. § 2, forbids the City from monopolizing surf instruction within the City, FAC ¶¶ 79-83; (4) the Sherman Act forbids the City from attempting to monopolize surf instruction within the City, FAC ¶¶ 84-89; and (5) California's Coastal Act, Cal. Pub. Res. Code § 30000, *et seq*., prevents the City from restricting access to the coast without a Coastal Development Permit, FAC ¶¶ 90-98.

The City now seeks to dismiss all of Mr. Murchison's claims on the grounds that his claims are time-barred and have no merit. *See* ECF 20. The City's motion should be denied. First, none of Mr. Murchison's claims are time-barred because the FAC was filed well within any applicable statute of limitations. As recently as May 2024, the City rejected Mr. Murchison's latest attempt to obtain an agreement to provide surf and SUP instruction on the City's beaches. FAC ¶ 18. Second, all of the City's arguments that Mr. Murchison fails to state a claim are conclusory, lack sufficient legal argument, and fail to satisfy the City's evidentiary burden.

LEGAL STANDARD

When considering a motion to dismiss, courts "must review the complaint in the light most favorable to Plaintiffs, accept their factual allegations as true," and grant dismissal only if "Plaintiffs undoubtedly can prove no set of facts in support of their claims that would entitle them to relief." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A plaintiff need only plead general factual allegations, as the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *See LSO, Ltd. v. Stroh*, 205 F.3d 1146,

1156 (9th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (cleaned up).

ARGUMENT

I. None of Plaintiff's Claims Are Time-Barred

A. Plaintiff's Constitutional Claims Are Not Time-Barred

In a case such as this, where "the continued enforcement of a statute inflicts a continuing or repeated harm, a new claim arises (and a new limitations period commences) with each new injury." *Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019). Thus, under the doctrine of "continuing violations," "[e]ach discrete discriminatory act starts a new clock for filing charges." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). *See also Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 973-74 (9th Cir. 2010) ("Section 1983 'is presumptively available to remedy a state's ongoing violation of federal law.'"); *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001).

In *Flynt*, plaintiffs brought a Dormant Commerce Clause challenge to Cal. Bus. & Prof. Code §§ 19858, 19858.5—statutes that restricted ownership in various forms of gambling operations. 940 F.3d at 460. The district court dismissed the complaint because it was filed more than two years after the defendants issued an adverse decision against one of the plaintiffs while enforcing the challenged statutes. *Id*. at 460-61. The Ninth Circuit reversed, holding that because plaintiffs were required to forego investment opportunities on an ongoing basis due to the challenged statutes, the plaintiffs "suffer[ed] a new injury each time they abstain from investing for fear that the Commission will enforce the statutes' prohibition." *Id*. at 463. That plaintiffs were aware of the defendants' adverse decision more than two years prior was thus no bar to their claims for prospective relief against future enforcement of the challenged statutes. *Id*. at 462-63.

The same is true here. Mr. Murchison seeks prospective relief from the continued enforcement of the Ordinance as applied to his surf and SUP instruction

business. FAC, Request for Relief. While the City initiated enforcement proceedings against Mr. Murchison between 2016-17, and renewed those proceedings in 2024, Mr. Murchison does not seek relief from those proceedings—which are final—in this action. FAC ¶¶ 20-21. Rather, Mr. Murchison challenges the City's ongoing enforcement of the Ordinance that continues to prohibit him from providing surf and SUP lessons on City beaches. FAC ¶¶ 61-98. While Mr. Murchison was first denied the opportunity to enter an agreement pursuant to the Ordinance in 2015, FAC ¶ 18, the City has consistently rejected Mr. Murchison each time he has inquired anew, most recently in May 2024, *id*., which is well within the two-year statute of limitations for Mr. Murchison's constitutional claims, *see Flynt*, 940 F.3d at 461. *See also Pouncil v. Tilton*, 704 F.3d 568, 581 (9th Cir. 2012) (separate discrete acts reset the statute of limitations).

B. Plaintiff's Antitrust Claims Are Not Time-Barred

Similar to the reasons that Mr. Murchison's First and Fourteenth Amendment claims are not time-barred, his monopolization and attempted monopolization claims are not time-barred either.

A continuing violation of the antitrust laws that resets the statute of limitations is shown when a plaintiff "allege[s] that a defendant completed an overt act during the limitations period that meets two criteria: '1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict new and accumulating injury on the plaintiff.'" *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1202 (9th Cir. 2014) (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987)). The continuing violation theory thus "differentiate[s] those cases where a continuing violation is ongoing—and an antitrust suit can therefore be maintained—from those where all of the harm occurred at the time of the initial violation." *Id*.

In *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1301 (9th Cir. 1986), the Ninth Circuit held that a cause of action accrued each and every time that

a tourist was shepherded away from the plaintiff's non-preferred shop even though the shepherding resulted from an agreement between a tourism company and preferred souvenir shops made prior to the limitations period. The court so held because the agreement did not "immediately and permanently destroy" the plaintiff's business or result in "irrevocable, immutable, permanent, and final" injury to the business. *Id*. Likewise, in *Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427, 1444 (9th Cir. 1996), the Ninth Circuit held that a power company's decision made pursuant to a market-dividing contract outside the limitations period "was an overt act that restarted" the limitations period because the prior agreement "was not a permanent and final decision that controlled the later act." In contrast, in *AMF, Inc. v. General Motors Corp. (In re Multidistrict Vehicle Air Pollution)*, 591 F.2d 68, 69-70, 72 (9th Cir. 1979), the Ninth Circuit held that the 1964 decisions of various automakers not to include a smog-reducing device manufactured by AMF were final, and subsequent denials merely affirmed those final decisions, thus the antitrust claims brought by AMF in 1970 were time-barred. However, *AMF* "is the exception, not the rule," with most cases considering the statute of limitations in antitrust cases with multiple overt acts. *Samsung Elecs.*, 747 F.3d at 1203.

Here, the City's May 2024 rejection of Mr. Murchison's attempt to obtain an agreement to teach surf and SUP lessons is an overt act that restarts the statute of limitations period. *See* FAC ¶ 18. Even the City confirmed as much. FAC ¶ 18 (City official "encouraged [Plaintiff] to keep applying in case the City's perceived needs changed in the future."). Therefore, the City's earlier denials of Mr. Murchison's attempts to obtain an agreement, *see* FAC ¶ 18, were not final decisions that "immediately and permanently destroy[ed]" Mr. Murchison's business, *Hennegan*, 787 F.2d at 1301, or "controlled" the 2024 denial, *Columbia Steel*, 111 F.3d at 1444. Rather, the 2024 denial was "a new and independent act" that "inflict[ed] new and accumulating injury on" Mr. Murchison. *Samsung Elecs.*, 747 F.3d at 1202. Because

May 2024 is well within the four-year statute of limitations for federal antitrust claims, 15 U.S.C. § 15b, Mr. Murchison's claims are not time-barred.

C. Plaintiff's Coastal Act Claim Is Not Time-Barred

The City asserts that Mr. Murchison was required to bring his Coastal Act claim within 90 days or three years of the City's enactment of the Ordinance. ECF 20 at 8-9 (citing Cal. Gov. Code § 65009(c)(1)(B); Cal. Code Civ. Proc. § 338(a)). While the 90-day limitation does not apply to this case, Mr. Murchison's claim is well within the three-year period.

First, Cal. Gov. Code § 65009(c)(1)(B) does not apply here. The title of section 65009 is "Actions or proceedings challenging local zoning and planning decisions …." The specific provision cited by the City provides that an action or proceeding "[t]o attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a *zoning ordinance*," must be brought "within 90 days after the legislative body's decision." § 65009(c)(1)(B) (emphasis added). Simply, the Ordinance is not a zoning ordinance. Rather, the Ordinance is found in Title 11 of the Newport Beach Municipal Code which regulates "Recreational Activities." ECF 21, Ex. A. *See also* FAC ¶ 11. In contrast, the Newport Beach Code provisions for "Planning and Zoning" are found in Title 20. *See* https://www.codepublishing.com/CA/NewportBeach/#!/NewportBeach20/NewportBeach20.html. Statements made by City officials at the time of the Ordinance's enactment also confirm that the Ordinance is not a "zoning ordinance" enacted pursuant to the City's authority under Division 1 of Title 7 of the Cal. Gov. Code. *See* FAC ¶ 52; Cal. Gov. Code § 65009(a)(2) ("Legal actions or proceedings filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county *pursuant to this division* …") (emphasis added). *See also* Plaintiff's Request for Judicial Notice (Ordinance No. 2012-6) ("Whereas" clauses showing Ordinance is not a zoning ordinance).

Second, that Mr. Murchison had knowledge of the Ordinance and its applicability to him and his business more than three years prior to initiating this action does not preclude his Coastal Act claim. Cal. Code Civ. Proc. § 338(a) sets a three-year statute of limitations for Mr. Murchison's Coastal Act claim, which he easily satisfies due to the City's most recent denial in May 2024 of his attempt to obtain an agreement pursuant to the Ordinance to provide surf and SUP instruction. *See* FAC ¶ 18. In *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 23 P.3d 601, 603, 607-08 (Cal. 2001), the California Supreme Court held that a challenge to a municipal tax filed more than three years after the enactment of the tax could proceed because the plaintiffs challenged the continuous collection of the tax and sought prospective declaratory and injunctive relief against continued enforcement of the tax. Thus, even though Mr. Murchison could have initiated this action within three years of it first being applied against him, that is not the only time period available to him. *See id*. at 608-09. Each time the City newly enforces the Ordinance against Mr. Murchison, the three-year statute of limitations begins anew. And because the most recent application of the Ordinance to Mr. Murchison occurred within three years of the initiation of this action, FAC ¶ 18, his Coastal Act claim is not time-barred.

II. Plaintiff Sufficiently Alleges a First Amendment Claim

A. The Ordinance Restricts Speech

Teaching surfing and SUP lessons is protected speech. *See Pacific Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) ("There can be little question that vocational training is speech protected by the First Amendment."). *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) ("[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."). That surfing and SUP instruction is given in exchange for a fee, rather than offered for free, does not diminish the First Amendment's protection.

Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."). *See also New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964) (rejecting that First Amendment did not apply because an advertisement was paid for); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

Mr. Murchison's First Amended Complaint alleges that the Ordinance prohibits him "from teaching others how to surf and SUP on beaches within Newport Beach." FAC ¶ 64. Indeed, the Ordinance expressly prohibits anyone from teaching others anything on a beach, in exchange for money, "without first obtaining a written agreement from" the City. Newport Beach Muni. Code § 11.04.060(D). That is because the Ordinance defines "instructional activity" as "any educational or recreational program or activity involving individual, team, or group instruction that is conducted or performed when there is monetary consideration provided for participation in the program or activity that occurs in a park, park facility, or on a beach." *Id*. § 11.04.020. *See also* FAC ¶ 14. Thus, the Ordinance restricts who may instruct (teach) others how to surf or SUP on City beaches, and even the City admits as much. ECF 20 at 6 (the Ordinance "serves to regulate instructional activity"). Because the Ordinance restricts who may give surf and SUP instruction to others on City beaches, it necessarily restricts the speech of prospective instructors who do not have agreements with the City.

The City does not seriously argue otherwise. Despite the intent, plain language, and practical effects of the Ordinance as alleged in the First Amended Complaint, FAC ¶¶ 3, 12-22, 52, the City merely claims in conclusory fashion that the Ordinance "does not implicate Plaintiff's right to free speech," ECF 20 at 6. But given that all of Mr. Murchison's factual allegations must be accepted as true at this

stage, *see Balistreri*, 901 F.2d at 699, and that the City agrees that the Ordinance restricts who may provide surf instruction on City beaches, ECF 20 at 6, Mr. Murchison has sufficiently alleged that the Ordinance restricts his speech rights.

Even if the Ordinance does not operate as an outright restriction on the speech of unapproved surf and SUP instructors, the Ordinance still burdens the speech of all prospective instructors. FAC ¶ 65. And because governmental burdens on speech implicate the First Amendment just as governmental bans on speech do, Mr. Murchison still alleges a First Amendment claim. *See Sorrell*, 564 U.S. at 565-66 ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). *See also United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

B. The Ordinance Is an Impermissible Prior Restraint

Because the Ordinance restricts Mr. Murchison's speech, he alleges that it is an impermissible prior restraint. FAC ¶¶ 15, 66. Prior restraints are those which place "unbridled discretion in the hands of a government official or agency," *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988), and "bear a heavy presumption against [their] constitutional validity," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). *See also Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint"). Surprisingly, then, the City gives no direct response to these allegations.

As alleged by Mr. Murchison, the Ordinance prohibits him from teaching others how to surf and SUP without an agreement with the City. FAC ¶ 64. The Ordinance sets out no specifics for such an agreement. Newport Beach Muni. Code § 11.04.060; FAC ¶¶ 12-13, 15, 66. There are no application criteria for City officials

to consider, no regular application periods, or deadlines. It is entirely in the City's discretion as to when agreements are entered, for how long, with whom, and under what conditions and circumstances. The City could also decline to enter any agreements whatsoever. The City's "unbridled discretion" is thus presumptively unconstitutional. *See City of Lakewood*, 486 U.S. at 757; *Southeastern Promotions*, 420 U.S. at 558. And because the City makes no argument that the Ordinance is not a prior restraint, Mr. Murchison has therefore sufficiently alleged his claim.

C. Even if the Ordinance Is Content-Neutral, Plaintiff Has Sufficiently Alleged a First Amendment Claim

The only basis on which the City asserts that Mr. Murchison has failed to state a First Amendment claim if the Ordinance restricts speech, is that the Ordinance is content-neutral. ECF 20 at 6. Even if the Ordinance is content-neutral, the City still must meet its burden to justify the Ordinance. Because it has not even tried, the City's motion must be denied.

A valid time, place, or manner restriction must satisfy three criteria: "(1) it must be content-neutral; (2) it must be 'narrowly tailored to serve a significant governmental interest'; and (3) it must 'leave open ample alternative channels for communication of the information.'" *Berger v. City of Seattle*, 569 F.3d 1029, 1036 (9th Cir. 2009) (*en banc*) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). When permitting schemes are challenged, the Ninth Circuit also requires that such schemes "may not delegate overly broad licensing discretion to a government official." *Kaahumanu v. Hawaii*, 682 F.3d 789, 803 (9th Cir. 2012) (quoting *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1024 (9th Cir. 2009)). *See also Gaudiya Vaishnava Soc. v. City and Cnty. of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) ("a law cannot condition the free exercise of First Amendment rights on the 'unbridled discretion' of government officials.") (quoting *City of Lakewood*, 486 U.S. at 757).

First, the Ordinance is not content-neutral because it only applies to speech that instructs for monetary gain. *See Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) ("a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."); *Sorrell*, 564 U.S. at 564 (law "disfavors marketing, that is, speech with a particular content."). And it is simply not true that the Ordinance "serves purposes unrelated to the content of expression," ECF 20 at 6 (quoting *Ward*, 491 U.S. at 791), because the entire point of the Ordinance is to ban all unapproved instructional speech on City beaches.

Second, even if the Ordinance serves a significant government interest in "controlling business activity on City property, as well as public safety," *see* ECF 20 at 6, it is not narrowly tailored because the process to obtain an agreement with the City is opaque and very few have succeeded. *See Kaahumanu*, 682 F.3d at 805 (burden on speech is a significant narrow tailoring factor). Further, the City has sufficient alternatives to address business activity and public safety concerns. For example, the City could designate areas where surfing is permitted and specify days and times for surfing, Newport Beach Muni. Code § 11.16.020; City officials may prohibit surfing if it becomes dangerous due to hazards, including congestion and storms, *id*. at § 11.16.060; and the City could even require that surf instructors indemnify the City in waivers with customers, carry insurance, and be CPR-certified.

Third, because the Ordinance bans all unapproved instructors from giving paid surfing lessons on City beaches, unapproved instructors have no alternative channels for communicating in Newport Beach. Instead, they must give lessons outside of the City. *See Ctr. for Fair Pub. Policy v. Maricopa Cnty.*, 336 F.3d 1153, 1170 (9th Cir. 2003) (no ample alternatives where government action "foreclose[s] an entire medium of public expression across the landscape of a particular community or setting").

Fourth, because the Ordinance sets out no criteria for City officials to consider proposals by surf instructors wishing to obtain agreements with the City to provide surf instruction, FAC ¶¶ 12-13, 15, 66, the Ordinance impermissibly delegates overly broad discretion to city officials. *See Kaahumanu*, 682 F.3d at 803. Mr. Murchison has stated a First Amendment claim and the City has not satisfied its burden to show otherwise.

III. Plaintiff Sufficiently Alleges an Equal Protection Claim

Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, states shall not "deny to any person within its jurisdiction the equal protection of the laws." "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Mr. Murchison alleges that the Ordinance "creates an arbitrary and irrational distinction between beach uses by singling out paid instructional activities for restriction." FAC ¶ 73. Specifically, he alleges that "[b]y restricting paid instructional activities on beaches … but not unpaid instructional activities and paid non-instructional activities," the City "arbitrarily and irrationally" violates his right to equal protection. FAC ¶ 74.

The "crucial question" in equal protection cases is "whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972). Judicial scrutiny given to laws which implicate the Equal Protection Clause depends upon the nature of the right at issue. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (classification that "neither burdens a fundamental right nor targets a suspect class … uph[e]ld … so long as it bears a rational relation to some legitimate end."). As discussed above, the Ordinance restricts Mr. Murchison's fundamental First Amendment speech rights. *See Mosley*, 408 U.S. at 101. The City's unequal treatment of paid instructional activity (speech) must therefore satisfy strict scrutiny.

See Carey v. Brown, 447 U.S. 455, 461-62 (1980); *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992). As a result, the Ordinance can only be upheld if it is "suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Because the City has made no attempt to satisfy strict scrutiny, *see* ECF 20 at 7, the motion to dismiss must be denied.

Even if rational basis scrutiny applied, Mr. Murchison has still sufficiently stated an equal protection claim that should be permitted to proceed to discovery. *See Crownholm v. Moore*, 652 F.Supp.3d 1155, 1164 (E.D. Cal. 2023) ("when applying rational basis at the pleading stage, 'a court should take as true all of the complaint's allegations and reasonable inferences that follow, but the plaintiff must allege facts sufficient to overcome the presumption of rationality' that applies to government conduct." (citing *HSH, Inc. v. City of El Cajon*, 44 F.Supp.3d 996, 1008 (S.D. Cal. 2014))) (internal quotations removed). The City claims that the Ordinance is supported by two rational bases: (1) the City would have no "contractual defense" or "indemnity provisions" should it be sued by an injured surfing student in the absence of "any sort of written agreement" between the City and the student's instructor; and (2) limiting the number of agreements allows the City to "control access to its property and protect the public." ECF 20 at 7.

First, as noted, the Ordinance does not require that an agreement between the City and an instructor include indemnification defenses for the City, because the Ordinance sets out not a single requirement as to what any agreement must include. Further, there is nothing preventing the City, even in the absence of the Ordinance, from enacting a requirement that surf instructors indemnify the City when instructing students on City beaches. Second, as alleged through Mr. Murchison's Coastal Act claim, the City has no legitimate interest in controlling access to City beaches in a manner that restricts coastal access for the public. *See* FAC ¶¶ 23-35, 91-97. And because the Ordinance in no way limits the number of people using City beaches to engage in unpaid instructional activity or paid non-instructional activity,

it is irrational to single out only one activity (paid instructional activity) for restriction. FAC ¶¶ 73-75. Mr. Murchison has therefore sufficiently alleged an equal protection claim regardless of the level of scrutiny applied.

IV. Plaintiff Sufficiently Alleges Antitrust Claims

Section two of the Sherman Act, 15 U.S.C. § 2, prohibits "monopoliz[ing], or attempt[ing] to monopolize … any part of the trade or commerce among the several States."

A. Plaintiff Alleges a Monopolization Claim

Pleading a monopolization claim requires Mr. Murchison to allege that the City: (1) possesses "monopoly power in the relevant market;" and (2) "willful[ly] acqui[red] or maint[ains] that power as distinguished from [business] growth or development." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541 (9th Cir. 1991) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 596 n.19 (1985)). An "antitrust injury" must also be established. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (Plaintiff's injury must "flow[] from an anticompetitive aspect or effect of the defendant's behavior"). As Mr. Murchison has adequately alleged facts to establish his antitrust claims, the City's motion must be denied.

First, Mr. Murchison alleges that the "relevant product market is individual and group lessons in surfing and SUP provided on beaches in exchange for compensation," and that the "relevant geographic market is Newport Beach, California." FAC ¶¶ 49-50. He alleges that the City possesses monopoly power because the Ordinance prohibits anyone from "offer[ing] surfing or SUP lessons in the City unless the City has entered into a contract with the provider." FAC ¶ 43. Thus, the City "excludes all other competitors from the market for surfing and SUP lessons offered in the City." FAC ¶ 43. The City's monopoly power is further evidenced by a City "webpage where members of the public can obtain information about surf and SUP lessons" and then book and pay for lessons with City-approved

providers through the webpage, from which the City then "disburses payment to approved providers after withholding its payment." FAC ¶ 44. The City even sets the price that approved providers are permitted to charge for lessons. FAC ¶ 51. As a result, Mr. Murchison has amply alleged facts that, if proven, would establish that the City has monopoly power. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (monopoly power is the power to "control prices or exclude competition."). And because whether the City possesses monopoly power "is essentially [a question] of fact," his allegations are more than sufficient to state a claim. *See Cost Mgmt. Servs, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 950 n.14 (9th Cir. 1996) (citing *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993)).

Second, Mr. Murchison alleges that the City willfully acquired and maintains its monopoly power in the surf and SUP instruction market. On its own accord, the City enacted the Ordinance and has consistently enforced it to exclude everyone from the surf and SUP instruction market that the City has not entered an agreement with. *See* FAC ¶¶ 3, 12-13, 16-22, 43-45, 48, 52.

Third, Mr. Murchison has amply alleged antitrust injury resulting from the Ordinance. "To show antitrust injury," Mr. Murchison "must prove that his loss flows from an anticompetitive aspect or effect of the [City's] behavior." *Rebel Oil*, 51 F.3d at 1433 (citing *Atlantic Richfield Co. v. USA Petroleum, Inc.*, 495 U.S. 328, 334 (1990)). "If the injury flows from aspects of the [City's] conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the [City's] conduct is illegal *per se*." *Id*. Here, the First Amended Complaint contains multiple allegations that the Ordinance has harmed competition in the market for surf and SUP lessons in the City, and that harm directly and negatively affects Mr. Murchison by preventing him from competing in the market. *See* FAC ¶¶ 3, 16-22, 40, 43-47, 51-58, 83.

B. Plaintiff Alleges an Attempted Monopolization Claim

Pleading an attempted monopolization claim requires Mr. Murchison to allege: (1) "a specific intent to monopolize a relevant market; 2) predatory or anticompetitive conduct; and 3) a dangerous probability of success." *Alaska Airlines*, 948 F.2d at 542. These elements "emphasize monopoly power and the acquisition or perpetuation of this power by illegitimate 'predatory' practices." *Id*.

First, as discussed above, the City enacted the Ordinance with the "specific intent" to restrict instructional activity on City beaches. *See* FAC ¶¶ 3, 12-13, 16-22, 43-45, 48, 52. The City even admits as much. ECF 20 at 6 (Ordinance "serves to regulate instructional activity"). And given that the Ordinance gives the City complete discretion in entering into agreements with approved providers of surf and SUP lessons, FAC ¶ 15, and has in fact entered into agreements with only three providers in the nearly 13-year history of the Ordinance, FAC ¶ 16, Mr. Murchison has alleged facts to show the City possesses the requisite intent to monopolize the surf and SUP instruction market. FAC ¶ 85, 88.

Second, anticompetitive conduct occurs when monopoly power is used "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Tech. Servs, Inc.*, 504 U.S. 451, 482-83 (1992). Because the Ordinance serves to "foreclose competition" in the surf and SUP instruction market, this element is sufficiently alleged. FAC ¶¶ 43-48, 87.

Third, Mr. Murchison has alleged probability of success in that, because of the Ordinance, no surf and SUP instructors are permitted to operate on City beaches other than the three approved by the City. FAC ¶¶ 16-18. Thus, the facts as alleged show not only a probability of anticompetitive success, but that the Ordinance has already succeeded in obtaining anticompetitive results.

In response to Mr. Murchison's allegations on both his monopolization and attempted monopolization claims, the City merely asserts that it "does not 'monopolize' surfing instruction by requiring businesses to have agreements to use

the City's property, and having a limitation on the amount of agreements with surfing instructors." ECF 20 at 8. That conclusory assertion comes nowhere close to showing that Mr. Murchison has failed to state a monopolization or attempted monopolization claim. To the contrary, as discussed above, Mr. Murchison has alleged facts that, if proven, would establish each element to prove his monopolization and attempted monopolization claims. Therefore, the City's motion to dismiss must be denied.

V. Plaintiff Sufficiently Alleges a Coastal Act Claim

Through his California Coastal Act cause of action, Mr. Murchison alleges that the Ordinance and the City's enforcement of it is an unpermitted "development" that illegally restricts access to the coast. FAC ¶¶ 23-35, 91-97.

Cal. Pub. Res. Code § 30600 mandates that any person, including municipalities, "wishing to perform or undertake any development in the coastal zone … shall obtain a coastal development permit." A "development" is defined as a "change in the density or intensity of use of land," or a "change in the intensity of use of water, or of access thereto." *Id*. at § 30106. State law also directs that a "[d]evelopment shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches." *Id*. at § 30211. And "maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse." *Id*. at § 30210. *See also id*. at § 30001.5 (Coastal Act seeks to "maximize public recreational opportunities"); Cal. Const. art. 10, § 4 ("the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.").

Consistent with state law, Mr. Murchison alleges that the Ordinance is a "development" for which the City has not obtained a Coastal Development Permit and, alternatively, was not properly accounted for via an amendment to its Local Coastal Program or Coastal Land Use Plan. FAC ¶¶ 23-28, 93-97. That the Ordinance is a "development" is evidenced by Mr. Murchison's allegations that it limits instructors' access to City beaches for the purpose of teaching others how to surf and SUP, which in turn limits access to the beach for members of the public who have fewer surf and SUP instructors to choose from, thus deterring and reducing opportunities to learn how to surf and SUP and access the coast. FAC ¶ 32. As a result, the reduction in access to City beaches for instructors and students changes the "density or intensity of the use of land" and "intensity of use of water or access thereto."[2] Cal. Pub. Res. Code § 30106. *See also Spencer v. City of Palos Verdes Estates*, 304 Cal.Rptr.3d 880, 869 (Cal. Ct. App. 2023) (organized harassment to prevent out-of-town surfers from accessing Lunada Bay was a "development").

The City does not contest that it has not obtained the necessary permit or amended its Local Coastal Program or Coastal Land Use Plan. *See* ECF 20. Rather, the City conclusorily asserts that: 1) restricting "instructional activity for monetary gain on a City beach does not ban of (sic) instructional activity, or cause a change in density or use of the land;" and 2) the Ordinance "promotes beach access." ECF 20 at 9. But the City's unsupported assertions are contrary to Mr. Murchison's allegations, which must be taken as true. *See Balistreri*, 901 F.2d at 699. Nor is it accurate for the City to imply that the Ordinance is consistent with the Coastal Act's "reliance on 'local government and local land use planning procedures'" when the City has complied with none of the Act's requirements in enacting the Ordinance, which isn't even a land use ordinance in the first instance. *See supra* at 12. Mr. Murchison has sufficiently stated a Coastal Act claim.

[2] Even the California Coastal Commission seems to agree that the Ordinance restricts access to the coast. *See* FAC ¶¶ 34, 94.

CONCLUSION

For all the reasons discussed above, none of Mr. Murchison's claims are time-barred and his First Amended Complaint adequately states a claim for each of his causes of action. This Court should deny the City's Motion to Dismiss.

DATED: May 8, 2025.

Respectfully submitted,

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