



Roark v. Richardson Bay Regional Agency et al

2023 | Cited 0 times | N.D. California | December 1, 2023

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

ROBERT JAMES ROARK,

Plaintiff, v. RICHARDSON BAY REGIONAL AGENCY, et al.,

Defendants.

Case No. 22-cv-07610-WHO

ORDER GRANTING MOTION TO DISMISS Re: Dkt. No. Plaintiff Robert James Roark has brought a broad array of constitutional and other claims

challenging defendant Richardson Bay Regional Agency (RBRA)

prior motion to dismiss the First Amended Complaint and invited it to file a more comprehensive motion that addressed the substance of each of claims. Dkt. No. 37. 1

It did so. Because Roark has not alleged facts that plausibly support his claims, and because the law is so clear that an leave to amend.

BACKGROUND As noted in my prior Order, Roark FAC challenges the constitutionality of the Permit Scheme under the Fourth, Fifth, Eighth and Fourteenth Amendments because: 2

(i) the Permit Scheme and

1 The pleadings opposing the requests for temporary restraining orders were filed on behalf of defendants RBRA, James Malcolm, and Steven McGrath. Dkt. No. 12. The prior motions to dismiss were filed on behalf of defendant RBRA only. Dkt. Nos. 19, 29. The pending motion to dismiss was filed on behalf of defendants RBRA and James Malcolm. Dkt. No. 41. Throughout the pleadings in this case, and in the public agency records and RBRA Code, the bay at issue is and Harbor Master. 2 The Permit Scheme is outlined in the RBRA Agency Code Ex. H-2 [Dkt. No. 25- [Dkt. No. 25-8].

(ii) the Permit Scheme unconstitutionally allows warrantless searches in violation of the Fourth Amendment; 3



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(iii) the Permit Scheme violates the Due Process Clause and Fifth Amendment Takings Clause because the permits can be revoked at any time without due process; 4

(iv) the Permit Scheme unconstitutionally requires permit ap 5

(v) the Permit Scheme requires permit applicants to swear under penalty of perjury facts that could be used against them in criminal proceedings; 6

and

3 FAC ¶ 108, citing Permit Application pg. 1: the RBRA harbormaster is authorized to inspect the vessel at any time to enforce compliance with the permit. Any vessel this [sic] is found to be out of compliance with the conditions listed below may be cited, have its permit revoked, and forced to leave the anchorage ; pg. 2: whenever a vessel appears to be in, or is likely to create distress or potential to other vessels, real 4 See FAC ¶ 111, citing Permit Application pg. 1: compliance with the conditions listed below may be cited, have its permit revoked, and forced to leave the anchorage ; pg. 3: be required to ; pg. 3: of any precaution which may be required by the ordinary practice of seamen, will be required to move immediately when requested to do so by the RBRA and may be subject to citation and 5 See FAC ¶ 116, citing Permit Application pg. damage to person or property caused by or on behalf of the permittee. Furthermore, the permittee agrees to be responsible to the RBRA and to pay for any or all loss or damages to piers, floats, or other public or private facilities caused by permittee [] whether caused by negligence or not, and further to defend and hold the RBRA [] ; pg. 3: agreed that the RBRA shall not be liable for loss or damage to any property left or stored by permittee or any other person in or upon the vessel or boat in RBRA/public waters or bay bottom, and permittee waives any and all claims for such loss or damage against the RBRA and agrees to ; pg. 3: themselves, their assigns [] hereby release and agree to hold harmless the RBRA, their assigns []

6 See FAC ¶¶ 122-137, citing numerous provisions of the RBRA Code providing authority to the Harbor Master to issue citations, making violation of code provisions an infraction that if occurring three times in a twelve-month period rises to a misdemeanor, and requiring vessels in anchored to Richardson Bay to be seaworthy and operable. Roark also argues that because the Permit Application requires applicants to declare under penalty of perjury that the vessel is safe, seaworthy, registered, and has operable tackle, lights, and signals, the Permit Scheme violates the right against self-incrimination.

(vi) the Permit Scheme places permit applicants or those without permits in the 7 See FAC ¶¶ 78-79, 97-146 & Ex. H.

Roark further alleges that a June 2021 Notice identifying his boat as marine debris y the RBRA violated his Fourth, Fifth, and Fourteenth Amendment rights. FAC ¶¶ 71-72, 284-326 & Ex. C. He contends that RBRA and others have conspired to take his boat and defraud the State of California in



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violation

December 2020 and December 2021. FAC ¶¶ 65-71, 175-234, 260-283, 327-335, 389-417 & Exs. A, B (listing the Kittiwake in the scope of work for destruction). He alleges that these contracts, as well as shown by the contracts, were concealed from and never disclosed to plaintiff or the public. FAC ¶ 185. He states that this conduct violates California Civil Code sections 526(a) & 1085. FAC ¶¶ 409-431. Finally, he asserts a claim for a

442, 443.

Roark false claims or false statements made to secure state funds from the California Department of Boating and Waterways (CDBW,) or federal funds from the National Oceanic Atmospheric Administration form the basis at least in part of the following causes of action: the Solutions, and RBRA); the

defendants Pollard and Havel, based on misuse of federal funds from the NOAA, the Ocean Protection Council, and CDBW); the 1985 V submitted to NOAA; the

based on fraudulent claims made to CDBW to secure Cal Save Grants); and the Nineteenth Cause

7 See id. These claims all rely on allegations that various defendants made false claims to state and federal agencies for the purpose of securing funds under the pretense or intent to destroy the Kittiwake.

Roark submitted a notice voluntarily dismissing In an dismissal as applying only to the Fifteenth Cause of Action,

with prejudice. aining causes of action in turn.

LEGAL STANDARD Under FRCP 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts or the Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). There must Id. While courts do not Twombly, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the gations as true and draws all reasonable inferences in favor of the plaintiff. See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). However, the court deductions of In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir.

amend the pleading was made, unless it determines that the pleading could not possibly be cured



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Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000). In making delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, Moore v. Kayport Package Express, 885 F.2d 531, 538 (9th Cir. 1989).

DISCUSSION I. CONSTITUTIONAL RIGHT TO ANCHOR

Defendants contend has a constitutional right to anchor in Richardson Bay. See Mot. at 4-5 (citing ¶¶ FAC 106, 113, 144) to the extent Roark is alleging a stand-alone constitutional entitlement to anchor where he chooses, ght to anchor in Richardson Bay. See Graf v. San Diego Unified Port Dist constitutional right to unregulated long-

II. PREEMPTION

Defendants also anchorage ordinance is preempted by federal law. See, e.g., application violates the Supremacy Clause because it effectively bans all anchoring within the fed I agree that no regulation or federal authority identified by Roark preempts the authority of RBRA to control anchorages in Richardson Bay. Instead, the federal regulations he identified establish Richardson Bay as a and Permit Scheme. 8 Significantly, the Ninth Circuit has expressly rejected the argument that the special anchorage

8 Roark cites to various federal regulations in his FAC. The regulations that he alludes to in support of preemption include 33 C.F.R. § 110.126a, that classifies Richardson that ing in the special anchorage area should consult applicable ordinances of the Richardson Bay Regional Agency and the County of Marin. These ordinances establish requirements on matters including the anchoring of vessels, placement of moorings, and use of anchored and moored vessels within the special anchorage area. Information on these local agency requirements may be obtained from the Richardson Bay Harbor He also relies on 33 C.F.R. § 109.10, that provides anchorage areas wherein vessels not more than sixty-five feet in length, when at anchor, will not be required to carry or exhibit anchorage lights. [] The areas so designated should be well removed from the fairways and located where general navigation will not endanger or be designations conflict with local ordinances requiring permits to stay beyond 72 hours. See Barber v. State of Hawai'i, 42 F.3d 1185, 1191 (9th Cir. 1994) 65 feet anchored in Keehi Lagoon must exhibit white lights while at anchor does not conflict with Hawaiis regulations, which simply require that boats in the lagoon obtain a permit and moor in a designated area if the boat is to remain in the lagoon for more than 72 hour ; see also Graf v. San Diego Unified Port Dist., 205 Cal. App. 3d 1189, 1193 (Cal. Ct. App. 1988) jurisdiction to establish and enforce the anchorage and nonanchorage areas in San Diego Harbor is between the federal government and the local body delegated with authority).

Any cause of action or theory based on preemption is DISMISSED without leave to amend. III. PROCEDURAL DUE PROCESS CLAIM



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Defendants in the First Cause of Action, where he challenges the lack of an appeal process when RBRA revokes a 30-day anchoring permit P because a vessel is out of compliance with the conditions required by the Permit Application. FAC ¶¶ 110, 190; see also Permit Application pg. 2 (identifying conditions required for vessels to secure or maintain a Permit). Because no fundamental property interest is implicated, there is no procedural due process violation.

a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the

See Portman v. Cnty. of Santa Clara, 995 F.2d 898, 904 reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of

the action and afford them an opportunity to be heard. Mullane v. Cent. Hanover Bank & Tr. Co. circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard. Id. at 314.

In addition to notice, [o] Memphis Light, Gas, and Water Div. v. Craft, 436 U.S. 1, 19 (1978). However, a pre-deprivation hearing is not or where provision of a

pre- Weinberg v. Whatcom Cnty., 241 F.3d 746, 753 54 (9th Cir. 2001).

Defendants argue that Roark lacks standing to bring a procedural due process claim because he has not applied for a Permit (Mot. at 8-9) and admits that he intends to live on his boat in Richardson Bay, which is not allowed under RBRA Code §3.04.020 and means that he would be denied a Permit. See Mot. at 8-9; RBRA Code 3.04.020 el anchored or moored in Richardson Bay is prohibited. The Harbor Master may issue a permit to transient vessel to anchor in the designated anchorages for more than 72 hours, provided that the Harbor Master determines that no permanent residential use is intended. In such cases, the Harbor Master shall issue a permit valid for 30 days. This permit may be renewed for two additional 30 day

Roark alleges and defendants do not dispute that Malcom and RBRA posted at least one Notice of Removal on the Kittiwake because Roark had not secured a Permit. Both sides also admit that defendants provided Roark with a Permit Application and suggested he apply. See, e.g., Compl. ¶¶ 79-83. Roark alleges that he filled out part of the Permit Application but that he objected to some of the conditions and returned it to defendants with the provisions he objected to crossed out. Id. ¶¶ 86-87, Ex. I. The RB Id. ¶ 89. Given , defendants argument that he lacks standing to challenge the provisions is not well taken.

On the merits of the claim, defendants contend that adequate process is provided under the RBRA Code as a matter of law because:

Any person administratively cited for violating RBRA code is entitled to procedural



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protections including notice, service, an opportunity to appeal the citation to a neutral hearing officer, and an additional opportunity to appeal the administrative decision to the Superior Court. RBRA Code § 1.04.050. In the event that a vessel is impounded, the owner has an opportunity to claim and retrieve

the vessel. RBRA Code § 4.05.010. The RBRA code outlines the procedures for declaring a vessel anchored in Richardson

Bay without a permit to be a nuisance, including providing notice, service, and an opportunity to appeal the decision. RBRA Code §§ 6.04.040, 6.04.060. Mot. at 9. Review of the sections identified by the RBRA, however, do not fully match RBRA Code section 1.04.050 outlines the penalties allowed under the Code. RBRA Code section 4.05.010 allows the Harbor Master to remove or impound any vessel owners an opportunity to claim and retrieve impounded vessels. RBRA Code sections 6.04.010 et seq. (including 6.04.040 and 6.04.060), govern abatement of identified nuisances. Those sections require notice to vessel owners if vessels are determined to be public nuisances (for identified reasons, see §6.04.020) and allow the owner to either abate the nuisance or appear before the RBRA Board to contest the nuisance designation. The form of notice required by section 6.04.050 of the RBRA Code must identify the conditions creating the nuisance that needs to be abated and also inform the vessels owner that she can appear at an identified RBRA Board meeting to contest the negligence determination. See RBRA Code 6.04.050.

These provisions do not, on their face, appear to apply to the challenge Roark makes to the revocation of 30-day anchoring permits without a pre-deprivation hearing. Nor is the form of notice identified in section 6.04.050 similar to the Notice to Remove given to Roark. Compare Dkt. No. 25-10 at ECF pg. 15 with Dkt. No. 35-6 (December 2022 Notice to Remove). 9

It appears that there is no opportunity given to 30-day Permit holders to contest and be heard when RBRA revokes a 30-day permit.

That does not mean that Constitutional rights have been violated, however. Constitutional

9 When asked at oral argument about what appeal process is provided, if any, for the 72-hour Notices to Remove for vessels that have not secured a Permit or presumably ones where the However, no information regarding methods by which recipients can appeal the Notice to Remove is included on the Notice itself. See Compl. Ex. F [Dkt. No. 25-6]. procedural due process rights attach only when a fundamental property right has been implicated. A See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) person clearly must have more than an abstract need or desire for it. He must have more than a

The question, then, is whether a 30-day Permit involves the type of protected property interest that would require a pre-deprivation hearing before it was revoked. See Weinberg v. Whatcom Cnty., 241



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F.3d 746, 753 (9th Cir. 2001) Court recognized to be the subject of a valid -deprivation notice and opportunity to be heard was required before the permit could be invalidated).

Neither side has provided authority regarding this issue under California law, but a 30-day Permit that provides only a temporary, limited-in-time ability to anchor in RBRA if the vessel is

to which pre-deprivation hearing rights attach. As the California Court of Appeal explained in *Calvert v. Cnty. of Yuba*, 145 Cal. App. 4th 613, 622 23 (2006), as modified (Jan. 3, 2007), permits that are involve . Given the ministerial

nature of the permitting process, the revocation of those types of permits falls outside the realm of procedural due process, at least in terms of pre-deprivation hearings. 10

The time-limited 30-day Permit allowed under the Permitting Scheme is similarly limited in time and can be issued only if certain fixed standards are met.

is DISMISSED without leave to amend.

10 Read generously, Roark also contends that IV. SUBSTANTIVE DUE PROCESS

42 U.S.C. section 1983 ¶¶ 260-279. Roark alleges a

Id. ¶¶ 327-335 The bases for the mail fraud and substantive due process causes of action are the same; Roark alleges that RBRA falsely identified the Kittiwake as an abandoned vessel and thereby secured grant funding under the Cal Save Grant from CDBW to target the Kittiwake for destruction.

Corales v. Bennett, 567 F.3d 554, 568 (9th Cir. 2009) (quoting *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998)); *United States v. Salerno*, 481 U.S. 739, 746 (1987); see also *Brittain v. Hansen*, 451 F.3d 982, 990-91 (9th Cir. 2006). Id. at 990 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721-22 (1997)).

Roark alleges that defendants Havel and Pollard (who have not apparently been served and who have not appeared in this case but who in the past worked for RBRA), RBRA, Malcom and another unserved defendant (Brad Gross) deprived Roark of substantive due process when they used the mails in 2020 and 2021 to apply to CDBW for grants to destroy the Kittiwake and defraud CDBW by falsely stating the Kittiwake was an abandoned derelict vessel. Id. ¶¶ 260-275, 327-335 anchoring permit (when that the permit would have required Roark to waive his rights to damages

if his boat were illegally seized) CDBW to seize and destroy the Kittiwake. By doing this, Roark alleges that Malcolm was him to waive his right to damages that the RBRA could execute its fraudulent contract Id. ¶¶ 276-279.



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RBRA argues that Roark has failed to identify facts showing that defendants interfered or attempted interfere with any of his s through mail fraud. Even if those facts had been adequately alleged, RBRA asserts that Roark cannot state a claim for damages based on mail fraud under Section 1983 because as Section 1983 protects only against violations of civil rights not violations based on fraud. RBRA is correct: under Section 1983, Roark can seek relief only for deprivation of rights secured by the constitution, not for allegations of fraud or mail fraud.

In opposition, Roark clarified his substantive due process theory. He contends that fraudulent use of the mails to secure CDBW grants to destroy the Kittiwake (despite the Kittiwake not being an abandoned vessel) is conduct that s the conscience in violation of his due process rights. He further alleges that purpose in directing Roark to secure a permit in December 2022, while not disclosing the existence of the grants to destroy the Kittiwake, was to force Roark to waive his right to damages against RBRA once the Kittiwake was seized and destroyed. Opposition [Dkt. No. 42] at 6-8.

Conduct that shocks the conscience, however, must be more than mere negligence, but

Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) (internal quotations omitted). s to the level of abusive government acts that could shock the conscience.

First, destroyed using Cal Grant funds, and failing to disclose the listing to Roark, does not rise to the level of mail fraud or governmental conduct that shocks the conscience. Roark attaches as Exhibit

Dkt. Nos. 25-1 & 25-2. Those documents show that RBRA was authorized to seek reimbursement from state funds if and had them destroyed. Id., . If vessels are destroyed, RBRA then entified claims process. Id., Section 24 Because the program covers vessels that might might also be voluntarily surrendered, that the RBRA listed the Kittiwake as a vessel that was in Richardson if it was seized or if it was voluntarily surrendered) does not support a charge of fraudulent activity by RBRA or any individual defendant. It is not legally significant that the RBRA did not disclose to Roark that it listed the Kittiwake on the grant applications; there are a number of anchored vessels

RBRA would list vessels that might potentially fall within the funding parameters for that year.

Second, for the same reasons, that Malcom encouraged Roark to seek a 30-day Permit at the same time that the Kittiwake was listed on the grant applications does not support a claim or mail fraud or shock the conscience behavior. The RBRA was simply seeking the maximum possible funds in case the Kittiwake or . There is no basis for a

substantive due process claim related to RBRA identifying the Kittiwake as a vessel in its grant applications. 11 In addition to the substantive due process allegations in his Fifth and Eleventh Causes of Action, under his First Cause of Action Roark alleges that the Permit Scheme violates Section the mariner to waive their rights to due process of law for deprivation of property and rights.



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FAC ¶ 114. Application that:

11. The permittee shall be liable for any loss or damage to person or property caused by or on behalf of permittee. Furthermore, the permittee agrees to be responsible to the RBRA and to pay for any or all loss or damages to piers, floats, or other public or private facilities caused by permittee, his or her agents, and/or employees whether caused by negligence or not, and further to defend and hold the RBRA, its agents and employees, harmless for any of the foregoing. This indemnification shall survive the expiration or termination of this agreement. 12. It is expressly agreed that the RBRA shall not be liable for loss or damage to any property left or stored by permittee or any other person in or upon the vessel or boat in RBRA/public waters or bay

11 Roark argues that his claims are similar to those raised in Knight v. Richardson Bay Reg'l Agency, 637 F. Supp. 3d 789 (N.D. Cal. 2022). However, in Knight the question was whether the

the Fourth Amendment. The analysis there turned on the dispute of fact over whether the boat was Notice and no finding or survey (as in Knight) that the Kittiwake is still considered Marine Debris by RBRA.

bottom, and permittee waives any and all claims for such loss or damage against the RBRA and agrees to hold the RBRA harmless from and against any such claims. 13. The permittee, for themselves, their assigns, successors and interests, legal representatives, their estate as the case may be, hereby release and agree to indemnify and hold harmless the RBRA, their assigns, successor's and interests, legal representatives for any liability for personal injury, loss of life and/or any property damage of any kind whatsoever. Dkt. No. 25-8. The first paragraph clearly covers damage that occurs as the result of the The second paragraph addresses only loss of property stored in or on the vessel. The third paragraph is a very broad indemnity granting the vessel owner the right to anchor in s.

I agree with Roark that the scope of the paragraph is unclear, but I cannot say that its presence in the Permit Application effects a violation of substantive due process because it requires permittees to give up all possible damage claims constitutional challenge to the Permit Application can only succeed if Roark e that no set of circumstances exists under which the [Permit Application United States v. Salerno, 481 U.S. 739, 745 (1987). While broad, the third indemnity paragraph serves obvious, legal purposes: For example, where becomes unmoored and damages a third- vessel, requiring the permittee to indemnify the RBRA for damage to the third- vessel would be appropriate. And t signing a Permit Application he would give up the right to seek damages from RBRA for conduct unrelated to the 30-day Permit, such as damage claims that either preexisted the Permit or occurred after the Permit expired, i.e., if the RBRA unconstitutionally seizes or otherwise unreasonably takes his boat.

is DISMISSED without leave to amend. V. TAKINGS CLAIM



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Defendants move to dismiss the takings claims Roark alleges in his First, Seventh, and Tenth Causes of Action. Roark states these claims under different theories, based on : (1) an asserted right to anchor in Richardson Bay that is taken away by the use of the notices and forcing vessels to leave or be seized; (2) posting of the two notices ; one declaring the Kittiwake marine debris and the other for failing to secure a permit, FAC ¶¶ 312-318; (3) the purported contract entered into between RBRA and CDBW to seize and destroy the Kittiwake, FAC ¶¶ 280-283; and (4) the Permit Application requiring permittees to waive rights to damages against RBRA for any unconstitutional takings. FAC ¶¶ 115-119.

Knick v. Township of Scott, Pa., 139 S. Ct. 2063, 2071 (2021) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115- Id. (first quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), then citing *Tahoe-Sierra*

Pres. Council, Inc. v. Tahoe Regional Plan. Agency, 535 U.S. 302, 322 (2002)). Additionally,

Gremmels v. FDA, No. 21-CV-06102-JSC, 2021 WL 7448539, at *2 (N.D. Cal. Oct. 5, 2021), report and recommendation adopted, No. 21-CV-06102-VC, 2021 WL 7448546 (N.D. Cal. Nov. 4, 2021) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993)).

first theory is not cognizable because there is no constitutional right to anchor in Richardson Bay, as discussed above. He identifies no other source of a right to anchor in Richardson Bay. His third and fourth theories, based on the CDBW Grant Agreements and purported waiver of rights to seek damages, fail for the reasons discussed in Section IV, above, with respect to the substantive due process claims. The defendants did not commit fraud or shock the conscience with their conduct.

His second theory fails because impoundments like those contemplated by the Notice to Remove only if the vessel owner does not move their unpermitted vessel within 72 hours are permissible where allowed by law and where sufficient notice has been given, as it was here. *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008) long interpreted this along with the parallel restriction on the federal government in the Fifth Amendment to require that notice generally be given before the government may seize ; see also *Deligiannis v. City of Anaheim*, No. SACV 06-720 DOC(JC), 2010 WL 1444538, at *8 (C.D. Cal. Mar. 2, 2010), report and recommendation adopted, No. SACV 06-720DOC(JC), 2010 WL 1444535 (C.D. Cal. Apr. 3, 2010), *aff'd*, 471 F. App'x 603 (9th Cir. 2012) (no takings claim where vehicle impounded for unpaid parking t

There has been no impoundment and no taking here. The posting of the Notice to Remove gives the vessel owner the option to remove the vessel or to face potential impoundment. In and of itself, that is not an unconstitutional taking. Roark contends that he may pursue his taking claims, even though *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019). Opposition at 3-4. But that case stands for the proposition that once a taking occurs, a property owner may file a federal takings claim and need not exhaust state law processes. It does not stand for the proposition that the government may



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be enjoined from taking property when there are procedures in place to provide just compensation for any eventual taking. Id governments provide just compensation remedies to property owners who have suffered a taking,

equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government

nder the Fifth Amendment is DISMISSED without leave to amend. VI. FIFTH AMENDMENT - SELF-INCRIMINATION

Roark alleges that the Permit Application violates the Fifth Amendment privilege against self-nder penalty of perjury, that can RBRA Code that provide for issuances of infractions up to the level of misdemeanors FAC ¶¶ 121-137, 146. 12 This claim lacks merit.

person to refuse to testify against himself at a criminal trial in which he is a defendant, but also

privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (internal quotations omitted). To establish a Fifth Amendment violation outside the context of a criminal trial, a person must prove two things: (1) the testimony desired by the government carries real and appreciable danger of self-incrimination in a future criminal prosecution; and (2) the testimony was compelled, i.e., the penalties suffered are sufficiently coercive and not hypothetical. United States v. Antelope, 395 F.3d 1128, 1134-39 (9th Cir. 2005) (citing Minor v. United States, 396 U.S. 87, 98 (1969) and Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977)).

s that if he was to affirm, under penalty of perjury, that his boat meets the health and safety requirements required for a 30-day Permit, he faces - Roark relies on the sections of the RBRA Code that provide the Harbor Master the power to issue citations if boats are deemed to violate the Code or other regulations. RBRA Code § 2.040.010(b). He also relies on the section of the Code that been convicted of violating the same ordinance three times in a twelve- elev Code §1.04.050(c). But the substantive Code provisions Roark identifies are the independent

be seaworthy, have adequate sanitation

12

Permit Application pg. 2. facilities, and comply with other agency regulations. See It is

violation of these provisions not the statements under penalty of perjury required in the Permit Application that might subject vessel owners to citations or possible prosecution for misdemeanors under the RBRA Code. See United States v. Drollinger, 80 F.3d 389, 392 (9th Cir. 1996) United States



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v. Neff, 615 F.2d 1235, 1239 (9th Cir.1980)).

Nor can Roark demonstrate that he was compelled to provide the testimony, much less testimony that would be potentially incriminating. 13

Roark has a choice of whether or not to anchor in Richards as opposed to China Camp or other areas in the San Francisco Bay because he has neighbors in that will keep an eye on the Kittiwake while he is away does not equate to being compelled to seek a Permit and thereby make statements that might be false under penalty of perjury. While a permit is required under the RBRA Code and relevant regulations, he is not compelled to seek one sufficient to state -incrimination.

Self-Incrimination claim is DISMISSED without leave to amend. VII. FOURTH AMENDMENT

Defendants move to dismiss the claims asserted in his First and Eighth Causes of Action that allege . Roark asserts these claims based on two different theories. First, Roark makes a facial challenge to the Permit Application language requiring permittees to allow warrantless searches of permitted vessels. See, e.g., FAC ¶¶ 107-109. 14

Second, he challenges the ability of RBRA to seize boats

13 Roark does not admit it in his FAC, but presumably he is concerned that the affirmations he objects to in the Permit Application affirming that his vessel has specific equipment and is seaworthy would be proven objectively false. See Dkt. No. 25-11 at ECF pg. 12-15 (Permit Application provisions objected to by Roark). 14 subject to the 10-day Marine Debris Notices and the 72-hour Notice to Remove unpermitted boats. As applied to him, he challenges the posting of the Marine Debris Notice on his boat in June 2021 and the 72-hour Notice to Remove for failure to secure a permit posted in December 2022. FAC ¶¶ 79, 139, 284-293, 308.

Defendants rely on a series of cases holding that certain commercial entities operating in rant. 15

See, e.g., Killgore v. City of S. El Monte, 3 F.4th 1186, 1189 (9th Cir. 2021). must risk to the public welfare. City of Los Angeles, Calif. v. Patel, 576 U.S. 409, 424 (2015). A

under the Fourth Amendment provided that substantial government interest that informs the regulatory scheme pursuant to which the

application, [must] provid[e] a constitut Killgore, 3 F.4th at 1192 (quoting New York v. Burger, 482 U.S. 691, 702-03 (1987). These cases are inapplicable. No court has found that non-commercial permits allowing private vessels to anchor fall within or is akin to the because it requires all people with boats in Richardson Bay to submit to warrantless searches of



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their home without probable cause of a crime being committed, without exigent circumstances, Id. ¶ compliance with the permit. Any vessel this is found to be out of compliance with the conditions (citing Permit Application, Page 1). Id. ¶ 109: Emergency inspections of unattended vessels will be conducted whenever a vessel appears to be in, or is likely to create distress or potential to other vessels, real property or the environment (citing Permit Application, Page 2). 15 Defendants also argue that Roark lacks standing to challenge the Permit Scheme, as he refused to apply for a Permit, he submitted a Permit Application striking out the language he objects to, and RBRA is still requiring Permits to anchor for 30 days. In these circumstances, Roark has standing to facially challenge the allegedly unconstitutional conditions imposed by the Permit Scheme. warrant requirement. See Kilgore, 3 F.4 th

at 1189 (identifying the few heavily or closely regulated industries that have been recognized by courts; sale of sporting

fishing, family day care homes, transportation of hazardous materials, veterinary drugs, foreign parlors).

facial Fourth Amendment challenge fails for a different reason. A long line of cases allow government officials to tow vehicles that pose safety or other public health hazards

See, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) and remove from the streets vehicles impeding traffic or threatening public safety and convenience

Coal. on Homelessness v. City & Cnty. of San Francisco, 93 Cal. App. 5th 928, 2023 WL 4673776 *6-7, 9 (2023) (discussing the vehicular community caretaking exception

based on unpaid tickets This applies to the Permit Application provision, which allows for emergency inspections to determine whether a boat should be seized and removed in order to protect public health and safety is not facially unconstitutional. See FAC ¶ 109 (citing Permit Application, page 2). It does not impose an unconstitutional condition and does not unreasonable searches - at pg. 2.

With respect to the broader provision in the Permit that Roark challenges giving the Harbor M e Permit that provision is not on its face limited to inspections necessary to protect public health or safety. But all of the requirements identified in the Permit Application concern the maintenance of the vessel and presence of equipment; those requirements are on their face related to health and safety. See id. at pg. 2-3. Moreover, in order to bring a successful facial challenge, Roark must show that cannot be constitutionally applied in any set of circumstances. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (explaining that difficult challenge to mount successfully, since the challenger must establish that no set of



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numerous circumstances identified on the face of the Permit Application e.g., the vessel is in seaworthy condition and that would support a

community caretaking exception search.

Roark or another permittee may be able to challenge the search provisions of the Permit Scheme on an as-applied basis if the Harbor Master is unreasonably searching vessels with Permits. But his facial challenge fails.

second Fourth Amendment challenge to the Marine Debris Notice and Notice to Remove Notices as warrantless seizures fails because the Notices themselves are on their face not seizures. They provide owners the option of moving the boats to other anchorages within 10 days (for vessels determined to be marine debris) or within 72 hours (for vessels without a 30-day Permit). Only if the vessels are not moved will there be a potential, subsequent seizure. 16

Roark has not shown that there are no sets of circumstances where the vessels cannot properly be seized under either Notice in light of the RBRA Code provisions and Permit Applications giving the Harbor Master that authority.

As applied, there was no seizure here. Roark was warned of possible seizures pursuant to He did so in 2021 in response to the Marine Debris Notice. He did not in response to the December 2022 Notice. But providing notice of a possible seizure, if the vessel owner does not move his vessel, bring his vessel to seaworthy condition (i.e., remediate the conditions causing the vessel to be considered marine debris), or secure a permit, does not equal a seizure under the Fourth Amendment. See, e.g., *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61 (1992)

16 The due process protections regarding the posting of the Notices are discussed above. s possessory interests in *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). s Fourth Amendment claims are DISMISSED without leave to amend. VIII. EIGHTH AMENDMENT

In the Twelfth Cause of Action, Roark argues that the Permit Application requiring him to make affirmations concerning the condition of his vessel, and the ons that make repeated failures to comply with the Code requirements for living on his boat in violation of the Eighth Amendment. FAC ¶¶ 336-346; see also RBRA . 17

This claim fails. Ninth Circuit caselaw holds that the Cruel and Unusual Punishment Clause of the Eighth Amendment *Martin v. City of Boise*, 920 F.3d 584, 616 (9th Cir. 2019). In *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) citations that, later, become crimi Id. at 890. But these cases do not confer upon individuals a right to shelter where they wish. Instead, they hold that local governments cannot penalize homeless individuals, or criminally cite them for merely sleeping outdoors, unless the local governments offer the homeless an adequate place to shelter, e.g., an



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indoor shelter bed or an alternative campsite. See Martin, 920 F.3d at 617.

This line of cases does not Permit Scheme and Code provisions regarding penalties violate the Eighth Amendment by threatening criminal sanctions for repeated violations. The Permit Scheme and Code require vessels to be seaworthy and possess equipment, in order to protect the public health and safety. Enforcement of those provisions does

must secure a permit to anchor more than 72-hours. As noted above, courts have upheld the right

17 The Eleventh Cause of Action refers to cruel and unusual punishment and the Eighth Amendment, but the allegations regard an alleged denial of substantive due process rights and boat being unfairly targeted for destruction through CDBW grants. Those arguments are addressed above. of local agencies to enforce permit schemes for any vessels anchoring in excess of 72-hours. Barber v. State of Hawai'i, 42 F.3d 1185 (9th Cir. 1994); Graf v. San Diego Unified Port Dist., 205 Cal. App. 3d 1189 (Cal. Ct. App. 1988). And I have also rejected in Section VI, above, the argument that Roark's privilege against self-incrimination is violated by requiring individuals to Code provisions in order to secure a Permit.

h Amendment is DISMISSED without leave to amend. IX. STATE-CREATED DANGER & NEGLIGENCE

In his Ninth and part of his Tenth Cause of Action, Roark argues that defendants violated the state-created danger doctrine when they posted the Marine Debris Notice on the Kittiwake in June 2021. He alleges that the Notice forced him to leave defendants that Richardson that he had no other place to anchor his boat. He contends that unserved defendant Havel (a former RBRA Harbor M China Camp, knowing that anchoring there was more dangerous given the cross currents and that there were no neighbors there to keep a watch on the Kittiwake. Despite these known dangers, Roark alleges that him to move and anchor at China Camp where he was subsequently damaged when the boat was burglarized and set adrift in November 2022. FAC ¶¶ 76, 294-307, 313-319. He claims that he was again placed in -created danger when Malcom issued the December 2022 Notice to Remove for failure to secure a permit, and continues to be at risk by the conduct of new Harbor Master and unserved defendants Brad Gross and Anne Luger (the Deputy Harbor Master) by their attempt to enforce the Permit Scheme. Id. ¶¶ 308-311.

To state a substantive due process claim based on the state-created danger doctrine, Roark must establish that Martinez v. City of

Clovis, 943 F.3d 1260, 1271 (9th Cir. 2019). The third element, deliberate indifference, requires

Id. at 1274 (quoting Patel v. Kent Sch. Dist., 648 F.3d 965, 974 (9th Id. (quoting Patel, 648 F.3d at 974)). In other words, plaintiff must allege plausible facts showing that unreasonable risk and actually



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intends to expose the plaintiff to such risks without regard to the *L.W. v. Grubbs*, 92 F.3d 894, 899 (9th Cir. 1996) (internal quotation omitted).

To start, the only affirmative actions alleged to support a - were the posting of the Marine Debris Notice in June 2021 and the 72-hour Notice to Remove posted in December 2022. Th particularized danger, however, because Roark who had no permit for anchoring in was not forced by those Notices to move his boat to any particular place. Roark admits that he had lived in a Marina for 20 years and that he had been able to secure private anchoring options. FAC ¶ 49. Just because he preferred to anchor that the RBRA cannot either require him to secure a permit or move his boat. See, e.g., *DeShaney v. Winnebago County of Department of Social Services* knowledge of the individuals predicament or from its expressions of intent to help him, but from .

The dangers Roark alleges that he faced when moving to China Camp purportedly at the suggestion of the former Harbor Master were the need to address the stronger currents there and the more difficult access to and from land. Roark also alleges a greater danger of theft of skiffs and threats of vandalism to his boat because, id not have friends to watch over his boat while he was away working in a different county when moored at China Camp. Id. ¶¶ 192, 301-306. These alleged dangers do not rise to the level of serious, particularized, foreseeable life or liberty to which the Harbor Master intended to expose Roark that he would have not otherwise have faced had he remained in

Even assuming that him to China Camp, Roark did not have to go there. The dangers that Roark faced and suffered (the stealing of his skiff and vandalism of his boat) were caused by third-parties; he does not allege any facts that could plausibly show that the former Harbor Master knew or should have expected that Roark would suffer those particularized forms of damage at the hands of unknown third-parties. 18

The level of harm alleged simply does not rise to the level of harm recognized in the case law to plausibly support a state-created danger claim. See, e.g., *Reed v. City of Emeryville*, 568 F. Supp. 3d 1029, 1040 41 (N.D. Cal. 2021) (identifying cases rejecting state-created danger theory where homeless individuals were forced to leave an encampment for a congregate shelter, absent allegations that of the COVID-19 pandemic; allowing claims to continue based on allegations that homeless encampment demolitions were d not offer adequately congregate shelter beds); see also *Sacramento Homeless Union v. County of Sacramento*, No. 222CV01095TLNKJN, 2023 WL 5280238, at *2 (E.D. Cal. Aug. 16, 2023) duals at an increased

Relatedly, Roark alleges in his Thirteenth Cause of Action that the posting of the Marine Debris Notice on his boat in June 2021 and former Harbor M Camp was negligent and knowingly exposed him to dangers. Those dangers materialized when boat was vandalized, given the lack of neighbors at China Camp who could watch over his boat . FAC ¶¶ 347-353. He also complains that the continued threats the current Harbor Master (Gross) will issue future Notices to Remove negligently continue to place him in danger. Id. ¶¶ 354-360.



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18 Any such allegation is undermined by Roark voluntarily remaining anchored at China Camp from June 2021 through November 2022. FAC ¶¶ 72, 75, 76, 79. That, by itself, shows the implausibility that the dangers Roark alleges were likely or foreseeable to the RBRA officials who posted the Notices in June 2021 and December 2022. Defendants argue that Roark admitted in his original Complaint that he left for China Camp in 2019, but changed that date to June 2021 in his FAC to avoid the three year statute of limitations for maritime negligence and two year statute of limitations for Section 1983 state created danger. See Mot. at 14 n.10. I assume for purposes of this Order that the Marine Debris Notice was posted, and Roark left for China Camp, in June 2021.

The negligence claim fails for the same reasons the state-created danger claim fails. 19

It when faced with the Marine Debris Notice, o do so. He remained there for at least eighteen months, from June 2021 through November 2022. FAC ¶¶ 72, 75, 76, 79. Any damages he suffered during that time (from stolen skiffs and vandalism) were caused by third parties and not by any of the defendants. FAC ¶¶ 27, 76, 188, 192. Even if Roark could allege facts showing that the former Harbor Master owed Roark a duty, as required for this claim, there are no facts alleged plausibly showing that the conduct of those third parties should have or even could have been known to th admissions. See *Steinle v. United States*, 17 F.4th 819, 824 (9th Cir. 2021) (rejecting proximate

ction are DISMISSED without leave to amend. X. CONSTITUTIONAL CONSPIRACY AND RELATED CLAIMS

and part of (first) Third Causes of Action are for violation of 42 U.S.C. section 1985. 20

Roark brings the conspiracy claims against a dozen different defendants, the majority of whom have not appeared in this case and do not appear to have been served, alleging a vast conspiracy between: RBRA; the Bay Conservation and /directors; current and past employees or officers of RBRA; consulting firm); two other consulting firms; and the County of Marin and its county administrator. Roark generally alleges that the named individuals and entities conspired to pass

19 of the duty, proximate *Shaw v. United States*, 436 F. Supp. 3d 1315, 1327 (N.D. Cal. 2020) (quoting *Prince v. Thomas*, 25 F. Supp. 2d 1045, 1047 (N.D. Cal. 1997)). 20 FAC contains two conspiracy based Third Causes of Action. See FAC ¶ 161 & ¶ 175. ordinances and make plans to remove vessels from Richardson Bay and obtain grants from state and federal agencies through false statements to accomplish that goal of destroying private property. FAC ¶¶ 147-160 (Second Cause of Action); ¶¶ 161-174 (first Third Cause of Action).

Roark is asserted against unserved defendants Regional Government Services (RGS), Brad Gross, Anne Luger, County of Marin, Marin County Administrator Daniel Eilerman, as well as against McGrath (who appeared to oppose the motion for a preliminary injunction). FAC ¶¶ 161-174. The only facts alleged in this alleged to have conducted a flawed and fraudulent study in 2018-2019



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regarding eelgrass in Richardson Bay in order to enrich herself and causing destruction of boats anchored in Richardson Bay. Id. ¶¶ 165-174; see also id. ¶¶ 35-36. Lesberg has not been served. research and studies, and submission of the same to fraudulently secure grants from NOAA, are repeated in the Fifth Cause of Action for violation of substantive due process under 41 U.S.C. sections 1983 and 1985. FAC ¶¶ 235-259.

42 U.S.C. section 1985, challenging the Bay Conservation Development Commission in conjunction with RBRA to seize and destroy vessels as marine debris with monies fraudulently secured from state and federal agencies. FAC ¶¶ 373-388.

To bring a cause of action successfully under § 1985(3), a plaintiff must demonstrate a deprivation of a right motivated by -based, invidiously discriminatory animus behind the *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir.1992); see also id. at 1526-38 (examples of categories of racial or class-based animus recognized by courts to support a section 1985 claim, including animus based on race and gender). The Supreme Court has held, however, *United Bhd. of Carpenters & Joiners of Am. v. Scott*, 463 U.S. 825, 839 (1983). Roark has not alleged that he is a member of any recognized protected or quasi-protected class. His Second, Third (first and second), and Fourteenth Causes of Action are DISMISSED without leave to amend. XI. PUBLIC CONTRACT CODE

Fourth Cause of against unserved defendants Beth Pollard and Curtis Havel. The moving defendants (RBRA and Malcom) do not address this claim. Section 10411 prohibits former public employees from entering into contracts with government agencies where the individual played some role in planning or negotiating the contract while still a public employee. 21

Roark alleges that Pollard left avel (the then, but now former, RBRA Harbor Master) to be a consultant to help Havel secure funds for RBRA removal program from NOAA, CDBW, and others. He also contends that Havel used his RBRA r, Clipper Harbor marina. Roark generally claims that Pollard and Havel submitted fraudulent reports and claims to CDBW to secure funds to destroy his boat. FAC ¶¶ 201-234.

Neither RBRA nor any of the individual defendants who appeared in this action are named as defendants under this cause of action. More problematic is that this claim must be brought in Superior Court. See the state, may bring a civil action seeking a

21 time prohibition

(a) No retired, dismissed, separated, or formerly employed person of any state agency or department employed under the state civil service or otherwise appointed to serve in state government may enter into a contract in which he or she engaged in any of the negotiations, transactions, planning, arrangements, or any part of the decisionmaking process relevant to the contract while employed in



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any capacity by any state agency or department. The prohibition of this subdivision shall apply to a person only during the two- year period beginning on the date the person left state employment. (b) For a period of 12 months following the date of his or her retirement, dismissal, or separation from state service, no person employed under state civil service or otherwise appointed to serve in state government may enter into a contract with any state agency, if he or she was employed by that state agency in a policymaking position in the same general subject area as the proposed contract within the 12-month period prior to his or her retirement, dismissal, or separation. The prohibition of this subdivision shall not apply to a contract requiring the person's services as an expert witness in a civil case or to a contract for the continuation of an attorney's services on a matter with which he or she was involved prior to leaving state service. The Public Contract Code claim is DISMISSED for lack of jurisdiction without leave to amend. XII. BANE ACT

In his Sixteenth (first) Cause of Action Roark argues that the defendants violated ey threatened to seize and destroy his boat (his home) a threat that exposed Roark to serious bodily injury and death and in order to deprive him of his constitutional rights. 22

Section 52.1 of the California Civil Code, also known as the Bane Act, creates a right of or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the

United Sta Shoyoye v. Cnty. of Los Angeles, egregious interferences with constitutional rights, not just any tort. The act of interference with a

Id. at 959. The court also explained that

constitutional deprivation. Id. at 962. Courts have pointed out that the constitutional deprivation in Shoyoye wrongful incarceration was due to an error and not intentional conduct, hence the need to show some form of coercion, intimidation, or harassment independent from the act alleged See, e.g., Jones v. Cty. of Contra Costa, No. 13- CV-05552-TEH, 2016 WL 1569974, at *6 (N.D. Cal. Apr. 19, 2016); see also Sandoval v. Cty. of Sonoma, No. 11-CV-05817-TEH, 2016 WL 612905, at *3 (N.D. Cal. Feb. 16, 2016) (where the constitutional deprivation was an unlawful search and seizure, the court followed Lyall v. City of Los Angeles requires threats, intimidation or coercion separate from the coercion inherent in the search and

as demonstrated throughout

22 In the FAC, Roark has two Sixteenth Causes of Action. this Order, he has not successfully alleged a constitutional violation. Second, even if Roark had alleged a constitutional violation, he would need to allege coercion or intimidation independent from the alleged constitutional violation. He has not done so.

The Bane Act claims is DISMISSED without leave to amend. XIII. CAL. CODE OF CIVIL



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PROCEDURE SECTION 1085

In his (second) Sixteenth Cause of Action, Roark relies on Cal. Code of Civ. Proc. section 1085 a provision allow a court to grant a writ to compel public entities to perform acts which California law requires them to perform to argue that defendants must be ordered to return the \$70,000 they fraudulently secured from CDBW to destroy the Kittiwake. FAC ¶¶ 418-431. Section 1085 is inapplicable on these facts.

compel public agencies to perform acts required by law. [Citation.] To obtain relief, a petitioner
People v. Picklesimer, 48 Cal.4th 330, 339-340 (2010).

that defendants owe to CDBW in connection with the CDBW Grant Agreements. Compl., Exs. A&B. Deciding what vessels to list in the grant agreements that the RBRA considers to be abandoned or that might be willing to be voluntarily is on its face a discretionary act, not a ministerial act. And Roark has no grant agreements that provide funds for the removal and destruction of abandoned vessels or voluntarily surrendered vessels. See e.g., Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal.4th 155, 165 (2011) (only

if the person has some special interest to be served or some particular right to be preserved or .

The Section 1085 claim is DISMISSED without leave to amend. XIV. TAXPAYER ACTION

marine debris and securing \$70,000 from CDBW to destroy the boat. FAC ¶¶ 409-417.

officer of a local agency to obtain a judgment restraining or preventing illegal expenditure, waste, or injury of the estate, funds, or property of s Schmid v. City & Cnty. of San Francisco, 60 Cal. App. 5th 470, 495 (2021). 23

to attack exercises of administrative discretion and may not be employed to interfere with

policymaking Schmid v. City & Cnty. of San Francisco, 60 Cal. App. 5th 470, 495 96 (2021); see also San Bernardino County v. Superior Court suits are authorized only if the government body has a duty to act and has refused to do so. If it

quotation omitted); Humane Society of the United States v. State Bd. of Equalization, 152 its. In particular, the courts have stressed

23 section; municipal bonds:



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(a) An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency, including, but not limited to, the following:

(1) An income tax. (2) A sales and use tax or transaction and use tax initially paid by a consumer to a retailer. (3) A property tax, including a property tax paid by a tenant or lessee to a landlord or lessor pursuant to the terms of a written lease. (4) A business license tax. (b) This section does not affect any right of action in favor of a local agency, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities. (c) An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law. (d) For purposes of this section, the following definitions apply:

public authority, or any other political subdivision in the state. in the jurisdiction of the defendant local agency. As shown b complaint, the CDBW grants that he complains about

surrendered vessels. Dkt. 25-1 at §§ 1, 24. While the Kittiwake is listed on the grant applications Roark cannot state a claim based on section 525a because the inclusion of the Kittiwake on the list is the result of the discretionary determination by RBRA that the Kittiwake might be abandoned or voluntarily surrendered. Even assuming Roark overcame the discretion inherent in the grant agreement, absent the seizure and destruction of the Kittiwake and for reimbursement of those costs from the CDBW grant, there is no

DISMISSED without leave to amend.

CONCLUSION claim is DISMISSED without leave to amend. The defects identified above that lead to dismissal as a matter of law cannot be cured by alleging further facts. Based on inapplicable legal theories or on facts he has admitted, each claim fails.

IT IS SO ORDERED. Dated: December 1, 2023

William H. Orrick United States District Judge

