APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONTEST PROMOTIONS, LLC, *Plaintiff-Appellant,* v. CITY AND COUNTY OF SAN FRANCISCO, *Defendant-Appellee*	NO. 17-15909 D.C. NO. 3:16-CV-06539-SI ORDER AND AMENDED OPINION

Appeal from the Unites States District Court
for the Northern District of California
Susan Illston, Senior District Judge, Presiding

Argued and Submitted July 12, 2017
San Francisco, California

Filed August 16, 2017
Amended October 23, 2017

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Consuelo B. Marshall,* District Judge

Order:
Opinion by Judge Graber

*The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Michael F. Wright (argued), Los Angeles, California, for Plaintiff-Appellant.

James M. Emery (argued) and Victoria Wong, Deputy City Attorneys; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; for Defendant- Appellee.

ORDER

The opinion filed on August 16, 2017, and published at 867 F.3d 1171, is amended by the opinion filed concurrently with this order, as follows:

On slip opinion page 14, footnote 4, delete the last sentence: "For the reasons given by the district court, see Contest Promotions, LLC v. City of San Francisco, No. 16- cv-06539-SI, 2017 WL 1493277, at *5 (N.D. Cal. Apr. 26, 2017) (order), we affirm the dismissal of that claim as well." Substitute the following for the deleted sentence: "This claim is moot because no penalties ever were assessed."

With this amendment, the panel has voted to deny Appellant's petition for rehearing. Judges Graber and Friedland have voted to deny Appellant's petition for rehearing en banc, and Judge Marshall has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing and rehearing en banc is **DENIED**. No further petitions for rehearing and rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

Plaintiff Contest Promotions, LLC, rents advertising space from businesses in cities around the country, including San Francisco, and places third-party advertising signs in that space, framed by text inviting passersby to enter the business and win a prize related to the sign. Through its Planning Code, San Francisco prohibits new billboards but allows onsite business signs subject to various rules. Noncommercial signs are exempt from the rules. In this, the latest of several challenges that Plaintiff has mounted to San Francisco's sign-related regulations, Plaintiff argues that the distinction between commercial and noncommercial signs violates the First Amendment. The district court dismissed the complaint. Reviewing the order of dismissal de novo, *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017), we affirm.

BACKGROUND

Like other local governments, the City and County of San Francisco, Defendant here, uses its Planning Code to regulate outdoor advertising, including billboards. The purposes of Planning Code Article 6, which contains the advertising rules, include "pro-

mot[ing] the aesthetic and environmental values of San Francisco," "protect[ing] public investment in and the character and dignity of public buildings, streets, and open spaces," "protect[ing] the distinctive appearance of San Francisco," and "reduc[ing] hazards to motorists, bicyclists, and pedestrians." S.F., Cal., Planning Code ("Planning Code") § 601.

The Planning Code draws two distinctions that are relevant here. First, the Planning Code distinguishes between "general advertising signs" and "business signs." A general advertising sign is

> [a] Sign, legally erected prior to the effective date of Section 611 of this Code, which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises* upon which the Sign is located, or to which it is affixed, and which is sold, offered or conducted on such premises only incidentally if at all.

Id. § 602 (emphasis added). By contrast, a business sign is defined in part as

> [a] Sign which directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted *on the premises* upon which such Sign is located, or to which it is affixed.

Id. (emphasis added). In other words, general advertising signs, like traditional billboards, refer primari-

ly to offsite activities, whereas business signs refer to the activities undertaken on the same premises as the sign. The Code decrees that "[n]o new general advertising signs shall be permitted at any location within the City as of March 5, 2002." *Id.* § 611(a). By contrast, business signs are permitted, subject to other limitations related to neighborhood and development type.

Second, the Planning Code distinguishes between commercial and noncommercial signs. The latter are exempted from Article 6 altogether. *See* Planning Code § 603(a) (explaining that "[n]othing in this Article 6 shall apply to . . . Noncommercial Signs").[1] Article 6 does not define "noncommercial" except by reference to a nonexhaustive list that includes "[o]fficial public notices," "[g]overnmental signs," "[t]emporary display posters," "[f]lags, emblems, insignia, and posters of any nation or political subdivision," and "[h]ouse numbers." *Id.*

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[1] An earlier version of the sign ordinance exempted a long list of types of noncommercial signs without categorically exempting them all. In response to state and federal court decisions that interpreted the ordinance to exempt all noncommercial signs in order to preserve its constitutionality, *see Metro Fuel LLC v. City of San Francisco*, No. C 07- 6067 PJH, 2011 WL 900318, at *9 (N.D. Cal. Mar. 15, 2011) (so holding); *City of San Francisco v. Eller Outdoor Advert.*, 237 Cal. Rptr. 815, 828 (Ct. App. 1987) (same), Defendant recently amended the ordinance to formally exempt noncommercial signs, full-stop. *See* Enactment No. 218-16, File No. 160553, San Francisco Board of Supervisors, eff. Dec. 10, 2016 (exempting all noncommercial signs from Article 6).

Plaintiff is an advertiser that rents the right to post signs on the premises of third-party businesses. Taking the allegations in the complaint as true, Plaintiff's signs advertise contests in which passing customers can participate by going inside the business and filling out a form. Plaintiff alleges that the signs depict prizes that customers may win in Plaintiff's contests. No party disputes that Plaintiff's signs are "commercial" under Article 6. In September and October of 2016, and in January of 2017, Defendant issued several Notices of Enforcement, accusing Plaintiff's signs of violating various requirements of Article 6.

Although the San Francisco Charter sets forth an administrative process for challenging the denial of permits for signs, *see* S.F., Cal., Charter § 4.106(b), Plaintiff did not avail itself of that process. Instead, Plaintiff responded by filing suit under 42 U.S.C. § 1983 alleging, inter alia, that Article 6 of the Planning Code violates the First Amendment by exempting noncommercial signs from its regulatory ambit.[2] Plaintiff moved for a preliminary injunction, which the district court denied. Plaintiff then filed the operative first amended complaint, and Defendant

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[2] This is one of several actions that Plaintiff has filed against Defendant, challenging various aspects of its billboard regulations. In a separate memorandum disposition, we affirm the dismissal of an earlier filed suit raising different First Amendment issues under the Planning Code. And in a second memorandum disposition, also filed this date, we dismiss as moot Plaintiff's appeal from the denial of its motion for a preliminary injunction in this case.

moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The district court granted Defendant's motion and entered a judgment of dismissal, and Plaintiff timely appeals.

DISCUSSION

A. *Level of Scrutiny*

Our First Amendment analysis begins by determining the level of scrutiny that applies to the Planning Code's Article 6. Because noncommercial signs are exempted from its regulatory framework, Article 6 is a regulation of commercial speech. Restrictions on commercial speech are subject to intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), Plaintiff argues that review more searching than *Central Hudson*'s intermediate scrutiny standard should govern our analysis of Defendant's billboard laws. But we recently held that "*Sorrell* did not mark a fundamental departure from *Central Hudson*'s four-factor test, and *Central Hudson* continues to apply." *Retail Dig. Network, LLC v. Prieto ("RDN")*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc).

In *RDN*, we rejected the plaintiff's argument that a liquor advertising rule "imposed a content- or speaker-based burden" and therefore merited "heightened scrutiny." *Id.* at 847. We held that the speaker- or content-based nature of a regulation merely meant that such a regulation "implicates the

First Amendment, which requires scrutiny greater than rational basis review." *Id.* (citing *Sorrell*, 564 U.S. at 567). In those situations, the proper level of scrutiny was the longstanding commercial speech doctrine, which calls for intermediate review. *Id.* at 848.

We have likewise rejected the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework. *See Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("[A]lthough laws that restrict only commercial speech are content based, such restrictions need only withstand intermediate scrutiny." (citing *Reed* and *Central Hudson*)). We thus reject Plaintiff's argument that review more searching than intermediate scrutiny applies here.

Under that standard, we undertake our analysis in four steps. First, the speech "must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 566. Second, "we ask whether the asserted governmental interest is substantial." *Id.* Then, "[i]f both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

B. *Central Hudson Analysis*

"Applying the *Central Hudson* test in the context of billboard regulations is not new for the Supreme Court or us." *Outdoor Sys., Inc. v. City of Mesa*, 997

F.2d 604, 610 (9th Cir. 1993). At the first step, neither party disputes that, as alleged, Plaintiff's advertisements concern lawful, nonmisleading activity. And at the second step, the Supreme Court and this court have long held—and today, we reaffirm—that a locality's asserted interests in safety and aesthetics, *see* Planning Code § 601 (describing the purpose of Defendant's sign controls), are substantial. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981) (plurality) (explaining that there was no "substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial governmental goals"); *accord Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 (9th Cir. 2009) (noting that "[i]t is well-established that traffic safety and aesthetics constitute substantial government interests"); *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) (noting that "both the Supreme Court and our circuit have endorsed these rationales as substantial governmental interests"); *Ackerley Commc'ns of Nw. Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) (reaffirming that "a city's interest in avoiding visual clutter suffices to justify a prohibition of billboards"); *Nat'l Advert. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (same). We therefore proceed to the last two steps of *Central Hudson*.

"The last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to ac-

complish those ends."[3] *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28 (1993) (internal quotation marks omitted). The third *Central Hudson* step asks whether "the restriction . . . directly advance[s] the state interest involved." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 821 (9th Cir. 2013) (internal quotation marks omitted). In considering that question, "we must look at whether the City's ban advances its interest in its general application, not specifically with respect to [the defendant]." *Metro Lights*, 551 F.3d at 904. The regulation also must not be underinclusive, such that it "'undermine[s] and counteract[s]' the interest the government claims it adopted the law to further." *Id.* at 905 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). The fourth step "guards against over-regulation rather than under-regulation." *Id.* at 911. It "does not require that the regulation be the least-restrictive means to accomplish the government's goal. Rather, what is required is a reasonable fit between the ends and the means, a fit 'that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective.'" *Outdoor Sys.*, 997 F.2d at 610 (alteration omitted) (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)).

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[3] As we have observed before, "[i]t has not always been clear how this basic inquiry differs with respect to the last two steps of the *Central Hudson* analysis, and indeed the Supreme Court has observed that the steps of the analysis are 'not entirely discrete.'" *Metro Lights*, 551 F.3d at 904 (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999)).

Relying on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), Plaintiff argues that Article 6 falters at the last two steps of the *Central Hudson* analysis because it exempts noncommercial signs for reasons unconnected to Defendant's asserted interests in safety and aesthetics. We disagree for two reasons.

First, *Discovery Network* is materially distinguishable. There, the Supreme Court considered a First Amendment challenge to a city's ordinance that "completely prohibit[ed] the distribution of commercial handbills on the public right of way" using newsracks, while leaving unaffected a far greater number of newsracks that distributed noncommercial material. *Id.* at 414. In particular, the record showed that "the number of newsracks dispensing commercial handbills was 'minute' compared with the total number (1,500–2,000) on the public right of way." *Id.* The Court held that the ordinance's distinction between commercial and noncommercial speech "b[ore] no relationship *whatsoever* to the particular interests that the city has asserted," making the ordinance "an impermissible means of responding to" the city's "admittedly legitimate interests" in safety and aesthetics. *Id.* at 424; *see also id.* at 428 (concluding that "the distinction [the city] has drawn has absolutely no bearing on the interests it has asserted").

The Court's conclusion rested in significant part on the details of the record before it and on the empirically poor connection between the ordinance and the asserted problem. For example, the Court noted that, "[w]hile there was some testimony in the Dis-

trict Court that commercial publications are distinct from noncommercial publications in their capacity to proliferate, the evidence of such was exceedingly weak," *id.* at 425, and that if the "aggregate number of newsracks on its streets" was the real concern, then "newspapers are arguably the greater culprit because of their superior number," *id.* at 426. Thus, "the fact that the regulation 'provide[d] only the most limited incremental support for the interest asserted,'—that it achieved only a 'marginal degree of protection,' for that interest—supported [the Court's] holding that the prohibition was invalid." *Id.* at 427 (first alteration in original) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983)). As the Court emphasized: "Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record [the city] has failed to make such a showing." *Id.* at 428.

Unlike in *Discovery Network*, Article 6 is not impermissibly under-inclusive. The text of Article 6 explains why such a rule is necessary. It explains that, when the ordinance was adopted, the "increased size and number of general advertising signs" in particular were "creating a public safety hazard," that such signs "contribute to blight and visual clutter as well as the commercialization of public spaces," that there was a "proliferation" of such signs in "open spaces all over the City," and that there was "currently an ample supply of general advertising signs within the

City." Planning Code § 611(f). These are statements of legislative purpose specific to commercial signs. In contrast to a ban on commercial sidewalk newsracks affecting only a tiny fraction of the overall number of newsracks, Defendant's choice to regulate commercial signs (but not noncommercial signs) has a substantial effect on its interests in safety and aesthetics. Accordingly, Article 6 is not constitutionally underinclusive. Its exceptions ensure that the regulation will achieve its end, and the distinctions that it makes among different kinds of speech relate empirically to the interests that the government seeks to advance. *Metro Lights*, 551 F.3d at 906.

Outdoor Systems is not to the contrary. Defendant relies on that case to argue that Defendant impermissibly "discriminate[s] against commercial speech solely on the ground that it deserves less protection than noncommercial speech." 997 F.2d at 610. As explained above, that is not the reason for the distinction drawn by Article 6, which focuses instead on the unique risks to Defendant's interests that commercial signs pose. Plaintiff also contends that, unlike the billboard regulations that survived intermediate scrutiny in *Outdoor Systems*, the ones at issue here are not neutral as between commercial and noncommercial speech. But neither were the regulations that we approved in *Outdoor Systems*. As we observed—in a factual recitation that is admittedly in some tension with other analysis in the opinion—Mesa's regulations "contain[ed] a provision that except[ed] all noncommercial signs from the Code's definition of offsite signs." *Id.* at 608–09.

More generally, a second principle supports our conclusion. It is well established that a law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny. The Supreme Court long ago rejected the notion "that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (noting that "[a] comparable argument was categorically rejected in *Metromedia*"). Instead, for example, "the validity of the [a]esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property." *Id.* at 811. And in *Metromedia*, the Supreme Court noted with approval that the city "ha[d] gone no further than necessary in seeking to meet its ends," when it declined to ban all billboards and instead "allow[ed] onsite advertising and some other specifically exempted signs." 453 U.S. at 508.

We therefore hold that the distinctions drawn in Article 6 between commercial and noncommercial speech directly advance Defendant's substantial interests. We find no constitutional infirmity in the ordinance's failure to regulate every sign that it might have reached, had Defendant (or its voters) instead enacted another law that exhausted the full breadth of its legal authority.

CONCLUSION

The distinction drawn between commercial and noncommercial signs in Article 6 of the Planning

Code survives intermediate scrutiny under *Central Hudson*. Accordingly, we affirm the dismissal of Plaintiff's First Amendment claims.[4]

AFFIRMED.

[4] Plaintiff also argues that the district court erred by refusing to enjoin the accrual of penalties while this litigation is pending, in violation of the due process principle set forth in *Ex Parte Young*, 209 U.S. 123, 147–48 (1908). This claim is moot because no penalties ever were assessed.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTEST PROMOTIONS, LLC, Plaintiff-Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellee	FILED AUG 16 2017 No. 15-16682 D.C. No. 3:15-cv-00093-SI MEMORANDUM*

Appeal from the Unites States District Court
for the Northern District of California
Susan Illston, Senior District Judge, Presiding

Argued and Submitted July 12, 2017
San Francisco, California

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Consuelo B. Marshall,** District Judge

*This disposition is not appropriate for publication and is not precedent as provided by Ninth Circuit Rule 36-3.

**The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

Plaintiff Contest Promotions, LLC, appeals the dismissal of its complaint against Defendant the City and County of San Francisco, alleging that provisions of the San Francisco Planning Code regulating outdoor signs violate Plaintiff's constitutional rights. The Planning Code distinguishes between "general advertising signs" and "business signs." The Planning Code bars new general advertising signs, Planning Code § 611(a), which are defined as signs that "direct[] attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the Sign is located." Id. § 602. On the other hand, the Planning Code permits business signs, subject to various restrictions. A business sign must refer to the "primary business, commodity, service, industry or other activity which is sold, offered, or conducted on the premises upon which such Sign is located." Id.

Plaintiff alleges that section 602 violates the First Amendment, is unconstitutionally vague, and violates Plaintiff's equal protection and substantive due process rights. The district court granted Defendant's motion to dismiss for failure to state a claim. Reviewing de novo, Friedman v. AARP, Inc., 855 F.3d 1047, 1051 (9th Cir. 2017), we affirm.

1. Plaintiff first argues that, by requiring business signs to direct attention to the "primary business . . . conducted on the premises," section 602 is a content-based regulation of speech subject to "heightened" or even strict scrutiny, and that Defendant's proffered justifications of safety and aesthetics fail to satisfy either standard. But as this

court recently reaffirmed, "Central Hudson [Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980),] continues to set the standard for assessing restrictions on commercial speech." Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 849 (9th Cir. 2017) (en banc).[1] Under that standard, we consider four factors. First, the speech "must concern lawful activity and not be misleading." Central Hudson, 447 U.S. at 566. Second, "we ask whether the asserted governmental interest is substantial." Id. Then, "[i]f both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." Id.

Section 602 satisfies the Central Hudson test. First, neither side disputes that Plaintiff's proposed signs concern lawful activity and are not misleading. Second, it is well established that Defendant's interests in safety and aesthetics are

[1] Accordingly, Plaintiff is incorrect that the Supreme Court's recent decisions in Sorrell v. IMS Health Inc., 564 U.S. 552 (2011), and Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), supplant the longstanding Central Hudson intermediate scrutiny framework under which we analyze commercial speech regulations. See Retail Dig. Network, 861 F.3d at 846 (holding that "Sorrell did not mark a fundamental departure from Central Hudson's four-factor test, and Central Hudson continues to apply"); Lone Star Sec. & Video, Inc. v. City of Los Angeles, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) (observing that, "although laws that restrict only commercial speech are content based," "such restrictions need only withstand intermediate scrutiny" (citing Reed, 135 S. Ct. at 2232; Central Hudson, 447 U.S. at 564)).

substantial. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981) (plurality) (noting that "[i]t is far too late to contend otherwise with respect to either traffic safety or esthetics" (citations omitted)); Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898, 904 (9th Cir. 2009) (same). Third, we have repeatedly held that regulations distinguishing between on-site and off-site advertising signs directly advance governmental interests in safety and aesthetics. Id. at 907; see also id. at 908 (noting that a city is permitted to "value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising" (quoting Metromedia, 453 U.S. at 512)).[2] Finally, section 602 is not broader than necessary to achieve Defendant's interests. See, e.g., Metromedia, 453 U.S. at 508 (noting that "[t]he city has gone no further than necessary" when"[i]t has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs"). As noted, Defendant's detailed definition of a "business sign" permissibly ensures that such signs actually relate to on-site activities. The district court did not err

[2] Plaintiff argues that the ordinance—which does not merely distinguish between on-site and off-site ads, but also goes further to specify that on-site ads must bear a relationship to the primary activities on the premises—exceeds what this court and the Supreme Court have approved in the past. But section 602's requirements merely explain what it means to be an on-site business sign by anticipating artful avoidance strategies that might attempt to transform signs depicting otherwise off-site activities into on-site signs.

by dismissing Plaintiff's First Amendment claim.

2. Plaintiff next argues that section 602 (which defines business signs) is unconstitutionally vague because the terms it uses to define what "use" occupies the greatest area of a premises—and thus what may be permissibly displayed on a business sign—is unclear. But because Plaintiff's conduct is "clearly proscribed" by the challenged regulation, no vagueness challenge is available. Holder v. Humanitarian Law Project, 561 U.S. 1, 20 (2010); see also Hunt v. City of Los Angeles, 638 F.3d 703, 710 (9th Cir. 2011). Plaintiff's claim clearly alleges only vagueness, not overbreadth, and "[a]rguments 'not raised clearly and distinctly in the opening brief' are waived." Avila v. L.A. Police Dep't, 758 F.3d 1096, 1101 (9th Cir. 2014) (quoting McKay v. Ingleson, 558 F.3d 888, 891 n.5 (9th Cir. 2009)).

3. Plaintiff's equal protection claims also were properly dismissed. To the extent that Plaintiff advanced a "selective prosecution" claim in the operative complaint, that claim was abandoned on appeal. See id. And to the extent that Plaintiff advances a "class of one" claim, it fails on its merits. Plaintiff has not plausibly alleged that it is "being singled out by the government," raising "the specter of arbitrary classification." Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602 (2008). The ordinance that Plaintiff challenges applies to all, and Plaintiff does not argue otherwise. Plaintiff cannot "demonstrate that [Defendant]: (1) intentionally (2) treated [Plaintiff] differently than other similarly situated [sign] owners, (3) without a rational basis." Gerhart v. Lake County, 637 F.3d 1013,

1022 (9th Cir. 2011). Even if Defendant's ordinance responds to a problem brought about by Plaintiff and other creative would-be advertisers, Defendant had a rational basis for clarifying the definition of an on-site "business sign." Finally, to the extent that Plaintiff advances a more general equal protection theory grounded in a claimed abridgement of its fundamental rights, as discussed above, the ordinance is subject to intermediate scrutiny, and it survives under that framework.

4. Finally, Plaintiff argues that the ordinance violates substantive due process because it furthers no legitimate government purpose. To the extent Plaintiff merely reframes its First Amendment claim under this heading, the two fall together. When a "plaintiff's claim can be analyzed under an explicit textual source of rights in the Constitution, a court should not resort to the 'more subjective standard of substantive due process.'" Hufford v. McEnaney, 249 F.3d 1142, 1151 (9th Cir. 2001) (quoting Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (en banc)). If Plaintiff instead intends this as a distinct claim that the ordinance violated a freestanding right to conduct its business, "governmental action need only have a rational basis to be upheld against a substantive due process attack." Kim v. United States, 121 F.3d 1269, 1273 (9th Cir. 1997). As noted above, Defendant has legitimate interests in safety and aesthetics. Metromedia, 453 U.S. at 508; Metro Lights, 551 F.3d at 904. The ordinance

bears a rational relationship to those interests. Accordingly, this claim was properly dismissed.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONTEST PROMOTIONS, LLC,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 16-cv-06539-SI

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT LEAVE TO AMEND (CORRECTED)

Re: Dkt. No. 40

On April 25, 2017, the Court held a hearing on the motion by defendant City and County of San Francisco to dismiss plaintiff Contest Promotions' first amended complaint. For the reasons set forth below, the Court GRANTS the City's motion and DENIES leave to amend.

BACKGROUND

This Court has presided over several disputes between plaintiff Contest Promotions LLC ("Contest Promotions") and defendant City and County of San

Francisco ("San Francisco" or "the City") related to San Francisco's sign regulations.[1] Beginning March 5, 2002, the City banned construction of new "General Advertising Signs" but continued to allow the construction of new "Business Signs." In short, a "Business Sign" advertises a product or service available at the adjoining business while a "General Advertising Sign" promotes a product or service that is available off-site. Contest Promotions' business model is to lease space on or near businesses to install signs for various promotional giveaways, for which it presumably receives advertising revenues. In 2007, the City determined that even though an interested party must enter the store to fill out an application for an advertised promotion, Contest Promotions' signs amount to "General Advertising Signs" because the prize is not awarded on site. As a result, Contest Promotions' signs were deemed to violate Article 6 of the S.F. Planning Code.

In response, Contest Promotions filed suit against the City on September 22, 2009, challenging Article 6 on various constitutional grounds. The parties eventually settled the case on February 1, 2013. As part of the settlement, the City agreed to recognize Contest Promotions' signs as "business signs" subject to the condition that Contest Promotions apply for new sign permits and that the signs comply with the S.F. Planning Code at the time each permit

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[1] Case Nos. 09-cv-04434 (closed Feb. 4, 2013), 15-cv-04365 (closed Mar. 17, 2016), 15-cv-00093 (closed July 28, 2015), *appeal docketed*, No. 15-16682 (9th Cir. Aug. 25, 2015), and 16-cv-06539 (filed Nov. 10, 2016).

application was filed. In July 2014, shortly after the agreement formally took effect, the City amended Article 6's definition of "Business Sign" as follows:

> **Business Sign.** A sign which directs attention to ~~*a*~~ *the primary* business, commodity, service, industry or other activity which is sold, offered, or conducted*,* ~~*other than incidentally*~~*,* on the premises upon which such sign is located, or to which it is affixed. Where a number of *businesses, services, industries, or other activities are conducted on the premises, or a number of* commodities*,* ~~*with different brand names or symbols*~~ are sold on the premises, up to 1/3 of the area of a business sign, or 25 square feet of sign area, whichever is the lesser, may be devoted to the advertising of one or more of those *businesses,* commodities*, services, industries, or other activities* by brand name or symbol as an accessory function of the business sign, provided that such advertising is integrated with the remainder of the business sign, and provided also that any limits which may be imposed by this Code on the area of individual signs and the area of all signs on the property are not exceeded. *The primary business, commodity, service, industry, or other activity on the premises shall mean the use which occupies the greatest area on the premises upon which the business sign is located, or to which it is affixed*.

Under this amendment, no Contest Promotion sign qualifies as a business sign because the giveaway that a Contest Promotion sign advertises is not the

"primary" service a given business offers. In response to the amendment, Contest Promotion filed a second action (the "January 2015 Action") that challenged, among other things, the constitutionality of the City's new definition of "Business Sign."

Initially, the January 2015 Action only argued that Article 6 could not survive *Central Hudson* scrutiny. In particular, Contest Promotions argued that the regulation "neither directly advances the City's interests nor is it narrowly tailored to achieve its objectives." *Contest Promotions, LLC v. City & Cnty. of S.F.*, No. 15-0093, Dkt. 17 at 15-17. The Court rejected this argument and granted the City's first motion to dismiss, finding that Article 6 was appropriately tailored to the City's interests of aesthetics and safety. *Id.*, Dkt. 25, at 6-8. On May 22, 2015, Contest Promotions filed an amended complaint, and on June 12, 2014, the City moved to dismiss the complaint. *Id.*, Dkts. 29, 33. In between the filing of the amended complaint and the City's motion to dismiss, the U.S. Supreme Court decided *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015), a decision stressing that content-based distinctions are subject to strict scrutiny.

In light of *Reed*, Contest Promotions' opposition brief argued that Section 602.3, the section of Article 6 defining "business sign," is a content-based regulation and is thus subject to strict scrutiny. Specifically, Contest Promotions argued that because section 602.3 distinguishes between on-site and off-site signs, prohibiting signs that advertise a product or service offered off site while allowing signs that advertise a product or service located on site, section 602.3 should undergo strict scrutiny after *Reed*. The

Court disagreed and dismissed Contest Promotions' First Amendment claim with prejudice. *Contest Promotions*, No. 15-0093, Dkt. 43. The Court distinguished *Reed* on the ground that it involved non-commercial speech, whereas Section 602.3 addressed commercial speech. *Id.* at 6 ("However, *Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."). In addition, the Court found that the on-site/off-site distinction was not content based, but rather, was "fundamentally concerned with the location of the sign relative to the location of the product which it advertises." *Id.* at 7. Because Section 602.3 did not "single out specific subject matter [or specific speakers] for disfavored treatment," the Court held that section 602.3 was not subject to anything beyond *Central Hudson* scrutiny. *Id.* (citing *Reed*, 135 S. Ct. at 2230) (alterations original). Having already found in its first dismissal order that Section 602.3 satisfies *Central Hudson*, the Court dismissed with prejudice Contest Promotions' First Amendment claims. Contest Promotions appealed the order. According to the parties, the appeal is fully briefed but not yet scheduled for oral argument.[2] Mot. (Dkt. 40) at 5.

On August 27, 2015, Contest Promotion filed a number of state law claims in state court, alleging various breach of contract theories. It also alleged

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[2] At oral argument on April 25, 2017, the parties represented that the Ninth Circuit was considering setting oral argument between July 10-14, 2017.

violation of the federal Contracts Clause. Based on the federal Contracts Clause claim, the City removed to this Court, and moved to dismiss. *See Contest Promotions, LLC v. City & Cnty. of S.F.*, No. 15-4365 (filed Sept. 23, 2015). The Court dismissed the federal Contract Clause claim on *res judicata* grounds, and remanded the remaining state law claims. Those claims are currently being litigated in state court.

On November 10, 2016, the City amended Section 603 of the S.F. Planning Code to exempt all non-commercial speech. Prior to the formal amendments, the City had long since interpreted the Code as exempting all non-commercial signs. The November 10, 2016 amendment codified this interpretation, making explicit that "[n]othing in this Article 6 shall apply to any of the following signs: (a) Noncommercial signs." That same day, Contest Promotions filed this lawsuit, which, among other things, challenges the changes to section 603 on First Amendment grounds. Specifically, Contest Promotions argues that Article 6's provisions are "content-based because they exempt noncommercial signs." Opp'n (Dkt. 41) at 5. As a result, Contest Promotions argues that the provisions warrant strict or "heightened" scrutiny and that the provisions fail heightened, as well as intermediate, scrutiny. On January 9, 2017, the Court's order denying Contest Promotion's motion for preliminary injunction in this case rejected these exact arguments. In that order, the Court reviewed the case law and concluded that *Central Hudson* continues to govern. Contest Promotions appealed the denial of the preliminary injunction to the Ninth Circuit. Accordingly, two

appeals related to the constitutionality of Article 6 of the SF Planning Code are currently pending before the Ninth Circuit.[3]

The City has now moved to dismiss the first amended complaint in this case with prejudice. At oral argument, the parties agreed that a dismissal with prejudice would moot the appeal of the preliminary injunction order.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires a plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 544, 555.

In deciding whether a plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff's allegations are true and

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[3] At oral argument on April 25, 2017, counsel for defendant City represented that the Ninth Circuit was considering setting oral argument on the preliminary injunction appeal in July also.

must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). If the court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

I. First Amendment

Contest Promotions argues that either "heightened" or strict scrutiny applies to Article 6's provisions. Contest Promotions began pressing this argument in the January 2015 Action. There, Contest Promotions' argued, relying entirely on *Reed v. Town of Gilbert*, that Planning Code Section 602.3 was subject to strict scrutiny because that Section distinguishes between on-site and off-site signs and is therefore content based. Contest Promotions now argues that the provisions of Article 6 are content based because they distinguish between commercial and non-commercial signs. Thus, in Contest Promotions' view, the provisions are subject to strict or heightened scrutiny.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. I. This prohibition applies to states and local governments through the Fourteenth Amendment. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). The First Amendment "accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 64 (1983) (citing *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980)). Specifically, regulations of fully protected non-commercial speech are presumed unconstitutional and are subject to strict scrutiny. In contrast, the Supreme Court has articulated an intermediate standard of review for commercial speech regulations. *Central Hudson*, 447 U.S. at 556.

Here, Contest Promotions argues that *Central Hudson* does not apply to Article 6 of the S.F. Planning Code. As explained below, the Court disagrees and finds that *Central Hudson* continues to provide the appropriate standard of review.

A. Level of Scrutiny

Contest Promotions argues that Article 6 is subject to some form of heightened scrutiny. Contest Promotions argues that under *Reed v. Town of Gilbert*, Article 6's provisions are subject to strict scrutiny because they are content based. Opp'n (Dkt. No. 41) at 6-10. Alternatively, Contest Promotions argues that Article 6's provisions are subject to "heightened scrutiny" under *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) and *City of Cincinnati v.*

Discovery Network, Inc., 507 U.S. 410 (1993), because the provisions impose content-based burdens on commercial speech. Opp'n (Dkt. No. 41) at 10.

The Court's order denying Contest Promotions' motion for a preliminary injunction considered and ultimately rejected these arguments. Dkt. 27 at 7-11. In that order, the Court reviewed the case law and found that *Central Hudson* continues to apply. The Court concluded:

> In brief, a regulation that suppresses or burdens noncommercial speech based on its content or the speaker must undergo strict scrutiny after *Reed*. Similarly, *Sorrell* dictates that a regulation that suppresses or burdens protected expression, based on the speaker or content thereof, must undergo "heightened" scrutiny. *See Sorrell*, 564 U.S. 552. *Discovery Network* demonstrates that intermediate scrutiny is a searching inquiry, and that courts should examine whether a regulation actually advances the government's interests. Contest Promotions may be correct that, after *Reed*, a restriction merely distinguishing between speech based on whether it is "commercial" or "noncommercial" is "content-based," even if it does not target a particular topic or speaker. However, it is not clear that such a generalized restriction on commercial speech need withstand anything more than *Central Hudson*'s intermediate scrutiny. *See Lone Star Security & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) (dictum) ("But, although laws that restrict only commercial speech are content based, *see*

> *Reed III*, 135 S. Ct. at 2232, such restrictions need only withstand intermediate scrutiny. *See Central Hudson* . . . .”). Contest Promotions cites to no authority that a regulation burdening only commercial speech, without restricting a particular commercial speaker or subject, must undergo a higher level of scrutiny.

Dkt. No. 27 at 10.

The Court sees no reason to depart from this ruling. Accordingly, *Central Hudson* continues to provide the governing standard.

B. Application of Scrutiny

Under *Central Hudson*, the Court must determine whether: (1) the regulation seeks to further a substantial government interest; (2) the regulation directly advances the government's interest; and (3) the restriction reaches no further than necessary to accomplish the objective. *Central Hudson*, 447 U.S. at 563-66.

The Court disagrees with how Contest Promotions framed of the *Central Hudson* analysis. Contest Promotions argues that Article 6 fails the *Central Hudson* test because the provisions of Article 6 “exempt noncommercial signs.” Opp'n (Dkt. No. 41) at 16. In other words, Contest Promotion presents the issue as whether a regulation that distinguishes between “commercial and non-commercial” signs can pass muster under *Central Hudson* when the regulation seeks to advance the government's interests of safety and aesthetics.

Article 6, however, does not make a broad distinction between commercial and non-commercial signs, prohibiting the former but allowing the latter. Rather, for the purpose of advancing the City's interests in safety and aesthetics, Article 6 distinguishes between on-site commercial signs and off-site commercials signs. In other words, Article 6 distinguishes between different forms of commercial speech. This makes Article distinguishable from the regulation in *Discovery Network*, which banned all commercial news racks while permitting all non-commercial news racks. In contrast, the City is not banning all forms of commercial speech; rather, the City is striking a balance between allowing certain forms of commercial speech while prohibiting other forms that the City has determined are most inimical to safety and aesthetics. And as the Court has previously ruled, distinguishing between on-site commercial signs and off-site commercial signs satisfies *Central Hudson*:

> In *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 912 (9th Cir. 2009), the Ninth Circuit considered the constitutionality of a law that is substantially similar to Section 602.3. Citing *Metromedia* fifty-six times, the court upheld the law's constitutionality under the *Central Hudson* test. Section 602.3 is substantially similar to the law at issue in *Metro Lights*; the Court therefore finds that the same result must follow.

Contest Promotions, LLC v. City & Cty. of San Francisco, 100 F. Supp. 3d 835, 843–44 (N.D. Cal. 2015).

Article 6's provisions thus survive *Central Hudson* scrutiny. Accordingly, the Court dismisses Contest Promotions' first cause of action for violation of the First Amendment with prejudice.

II. Ex Parte Young

Contest Promotions argues that it is forced, in violation of due process, to risk substantial daily penalties while litigating this action. Contest Promotions seeks an injunction under *Ex Parte Young* to prevent the imposition of penalties under the Planning Code while it obtains a determination as to the code's validity.

A state cannot force a party to risk severe penalties to obtain a judicial determination if that determination involves a complicated or technical question of fact. *Ex Parte Young*, 209 U.S. at 145, 148. A statutory scheme that imposes penalties on those seeking judicial review is unconstitutional if "the penalties for disobedience are fines so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation." *Id.* at 147. The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915).

The Court finds that the risks to Contest Promotions here are insufficient to justify relief under *Ex Parte Young*. As the City points out, Contest Promotions can apply for a permit and

contest the denial of that permit on the same grounds, without incurring daily penalties. Contest Promotions need not violate the Planning Code in order to challenge its constitutionality. Moreover, years of ongoing litigation between the parties also demonstrate that Contest Promotions has not been deterred by "prohibitive penalties."

III. State Law Claims

Contest Promotions and the City agree that the Court should decline to exercise supplemental jurisdiction over the state law claims if the federal law claims are dismissed. Opp'n (Dkt. No. 41) at 20 ("The City argues that if the court dismisses Contest's federal claims, it should decline to exercise supplemental jurisdiction over Contest's state-law claims pursuant to 28 U.S.C. § 1367(c). Contest Agrees."). Because Contest Promotions' federal law claims are dismissed with prejudice, the Court declines to exercise supplemental jurisdiction over Contest Promotions' state law claims.

CONCLUSION

For the same reasons articulated in its Order on Plaintiff's Motion for Preliminary Injunction (Dkt. No. 27), the motion to dismiss the First Amended Complaint is GRANTED without leave to amend, and this Court declines to exercise supplemental jurisdiction over the state law claims. If this order moots the pending appeal of the preliminary injunction order, the Court requests that, to the extent possible, the Ninth Circuit consider the

appeal of this order along with the other currently pending appeal(s).

IT IS SO ORDERED.

Dated: April 26, 2017

/s/
SUSAN ILLSTON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONTEST PROMOTIONS, LLC,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 15-cv-00093-SI

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING MOTION TO SEAL

Re: Dkt. No. 33, 34, 35

A motion to dismiss filed by the defendant City and County of San Francisco ("the City"), seeking dismissal of plaintiff Contest Promotions, LLC's first amended complaint ("FAC") for failure to state a claim, is currently set for argument on July 31, 2015. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby **VACATES** the hearing. For the reasons stated below, the Court **GRANTS** the City's motion as to Contest Promotions' federal law claims *with prejudice*, and **DISMISSES** plaintiff's state law claims *without prejudice*.

BACKGROUND

This is the second lawsuit plaintiff has brought against the City to challenge the legality of its signage ordinances. Plaintiff is a corporation that organizes and operates contests and raffles whereby individuals are invited to enter stores for the purpose of filling out an application to enter a contest. FAC ¶ 12. Plaintiff leases signage space from the stores in order to promote its contests to passersby. *Id.* ¶ 13. The business model drives increased foot traffic to the stores, while also promoting the product or event which is the subject of the raffle or contest. *Id* ¶ 12. Plaintiff operates in many cities across the United States including San Francisco, Los Angeles, New York, Seattle, and Houston. *Id.* ¶ 14.

I. First Lawsuit

In early 2007, Contest Promotions approached the City to discuss its business model in light of the City's restriction on certain types of signage. FAC ¶ 19. At the time, as is still the case today, the City banned the use of "off-site" signage, known as General Advertising Signs, but permitted "on-site" signage, known as Business Signs. The primary distinction between the two types of signage pertains to where they are located. Broadly speaking, a Business Sign advertises the business to which it is affixed, while a General Advertising Sign advertises for a third-party product or service which is not sold

on the premises to which the sign is affixed.[1] The paradigmatic example of an off-site (or General Advertising) sign would be a billboard.

Beginning in December of 2007, the City began citing all of Contest Promotions' signs with Notices of Violation ("NOVs"), contending that they were General Advertising Signs in violation of the Planning Code. In all, over 50 NOVs were issued, each ordering that the signage be removed under penalty of potentially thousands of dollars in fines per sign. FAC ¶ 20.

In response, on September 22, 2009, Contest Promotions filed its first lawsuit in this Court, challenging – both facially and as applied – the constitutionality of the City's ordinance prohibiting its signage. Case No. 09-cv-4434, Docket No. 1. On May 18, 2010, the Court granted in part and denied in part the City's motion to dismiss. Case No. 09-04434, Docket No. 32. In its order, the Court reasoned that Contest Promotions had adequately alleged that the "incidentally" language employed in the ordinance was unduly broad, vague, and could

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[1] In 2007, a General Advertising Sign was defined under Planning Code § 602.7 as a sign "which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the sign is located, or to which it is affixed, and which is sold offered or conducted on such premises *only incidentally if at all*." (emphasis added). A Business Sign was defined under Planning Code § 602.3 as "[a] sign which directs attention to a business, commodity, service, industry, or other activity which is sold, offered, or conducted, *other than incidentally*, on the premises upon which such sign is located, or to which it is affixed." (emphasis added).

potentially invite unbridled discretion on the part of City officials. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. C 09-04434 SI, 2010 WL 1998780 (N.D. Cal. May 18, 2010). The Court denied defendant's motion as to all of Contest Promotions' First Amendment Claims, but granted with leave to amend as to its Equal Protection claim. *Id.* On February 1, 2013, the parties reached a settlement. The terms of the settlement required the following actions: (1) the City would construe plaintiff's signs as Business Signs, as the Planning Code defined them at the time; (2) Contest Promotions would re-permit its entire inventory of signs to ensure compliance with the Planning Code and the settlement agreement, despite the fact that plaintiff already had previously received permits for these signs; (3) Contest Promotions would dismiss its lawsuit against the City; and (4) Contest Promotions would pay the City $375,000. FAC ¶¶ 26-29. On July 8, 2014, the City's Board of Supervisors approved the settlement and Contest Promotions made an initial payment of $150,000. *Id.* ¶ 31.

II. The Present Lawsuit

Soon after approving the settlement, on July 29, 2014, the Board of Supervisors passed legislation to amend the definition of Business Sign under Planning Code § 602.3. *Id.* ¶¶ 32-35. Section 602.3 now defines a Business Sign as "[a] sign which directs attention to ~~a~~ *the primary* business[2],

[2] The section was also amended to clarify that "[t]he primary business, commodity, service, industry, or other activity on the

(continued …)

commodity, service, industry or other activity which is sold, offered, or conducted~~, other than incidentally,~~ on the premises upon which such sign is located, or to which it is affixed." (amendments emphasized). When Contest Promotions submitted its signs for re-permitting pursuant to the Settlement Agreement, the City denied its applications for failure to comply with the Planning Code as amended. FAC ¶ 37-38. Plaintiff alleges that the Planning Code was amended "for the specific purpose of targeting Plaintiff and denying Plaintiff the benefit of its bargain under the Settlement Agreement and to prevent Plaintiff from both permitting new signs and obtaining permits for its existing inventory as it is required to do under the Settlement Agreement." *Id.* ¶ 35. The City contends that the ordinance was amended to address the concerns the Court expressed in its 2010 order. Docket No. 33, Def. Mot. at 10.

On January 8, 2015, Contest Promotions filed the present action alleging a number of constitutional and state law claims. Docket No. 1. The Complaint alleged causes of action for (1) violation of the First Amendment, (2) denial of Due Process, (3) inverse condemnation, (4) denial of Equal Protection, (5) breach of contract, (6) breach of implied covenant of good faith and fair dealing, (7) fraud in the inducement, (8) promissory estoppel, and (9) declaratory relief. *Id.* ¶¶ 36-116. On March 13, 2015, the City filed a motion to dismiss the complaint for

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premises shall mean the use which occupies the greatest area on the premises upon which the business sign is located, or to which it is affixed." S.F. Planning Code § 602.3.

failure to state a claim. Docket No. 15. On April 22, 2015, the Court granted the City's motion to dismiss as to all of plaintiff's federal constitutional claims with leave to amend, and deferred ruling on its state law claims. Docket No. 25. On May 22, 2015, plaintiff filed the FAC which abandons the claim for inverse condemnation, but otherwise alleges the same causes of action as the original complaint. Docket No. 29. Now before the Court is the City's motion to dismiss the FAC for failure to state a claim.

DISCUSSION

I. First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. States and local governments are bound by this prohibition through the Fourteenth Amendment to the Constitution. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."). Although commercial speech is afforded First Amendment protections, it has a subordinate position to noncommercial forms of expression. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993). Accordingly, it is afforded "somewhat less extensive" protection than is afforded noncommercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *see also In re Doser*, 412 F.3d 1056, 1063 (9th Cir. 2005).

First Amendment protections apply to commercial speech only if the speech concerns a lawful activity and is not misleading. Once it has been established that the speech is entitled to protection, any government restriction on that speech must satisfy a three-part test: (1) the restriction must seek to further a substantial government interest, (2) the restriction must directly advance the government's interest, and (3) the restriction must reach no further than necessary to accomplish the given objective. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-66 (1980).

Citing controlling Supreme Court and Ninth Circuit precedent, the Court explained in its prior order that Section 602.3 survives intermediate scrutiny as a ban on off-site commercial speech. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-CV-00093-SI, 2015 WL 1849525, at *4 (N.D. Cal. Apr. 22, 2015). However Contest Promotions argues that this conclusion warrants reconsideration in light of a recently decided Supreme Court case.

Reed v. Town of Gilbert, Arizona, 135 S. Ct. 2218 (2015)[3] concerned a law which banned outdoor signs without a permit, and created 23 exemptions for specific types of signage, placing varying restrictions on the signage depending on which exemption it fell into. 135 S. Ct. 2218 (2015). For example, the law exempted "ideological signs" or "political signs" from

[3] *Reed* was decided after the City filed the motion to dismiss presently under consideration, but before plaintiff filed its opposition.

the outright ban. Plaintiffs, a local church, challenged the law after the Town of Gilbert repeatedly cited them for failure to comply with the requirements imposed by the "Temporal Directional Signs Relating to a Qualifying Event" exemption. The exemption encompassed signs directed at motorists or other passersby, which advertised for events sponsored by a non-profit. *Id.* at 2225. The law required that these signs be "no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward." *Id.* (internal citations omitted). These restrictions were more severe than those placed on ideological signs or political signs.

Justice Thomas, joined by five other Justices, struck down the law, finding that the exemptions were content-based, and could not withstand strict scrutiny. In arriving at this conclusion, the Court emphasized three guiding principles which compelled the result. First, a content-based restriction on speech is subject to strict scrutiny regardless of the government's motive; therefore "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2222. Second, "'[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537 (1980)). Therefore, the mere fact that a law is

viewpoint neutral does not necessarily insulate it from strict scrutiny. Third, whether a law is speaker-based or event-based makes no difference for purposes of determining whether it is content-based. *Id.* at 2231 ("A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea."). Justice Alito, joined by Justices Sotomayor and Kennedy, took part in the majority opinion but wrote separately to "add a few words of further explanation." *Id.* at 2233 (Alito, J., concurring). Therein, Justice Alito outlined a non-exhaustive list of signage regulations that would not trigger strict scrutiny, which included, *inter alia*, "[r]ules distinguishing between on-premises and off-premises signs." *Id.* Justices Ginsburg, Breyer, and Kagan rejected the notion that a content-based regulation must necessarily trigger strict scrutiny, and concurred only in the judgment. *Id.* at 2234-39.

Contest Promotions now argues, in light of *Reed*, that Section 602.3's distinction between primary and non-primary business uses is a content-based regulation of speech subject to strict scrutiny. However, *Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test. Furthermore, as noted above, at least six Justices continue to believe that regulations that distinguish between on-site and off-site signs are not content-based, and therefore do not trigger strict scrutiny.

The distinction between primary versus non-primary activities is fundamentally concerned with the location of the sign relative to the location of the product which it advertises. Therefore unlike the law in *Reed*, Section 602.3 does not "single[] out specific subject matter [or specific speakers] for disfavored treatment." *Reed* 135 S. Ct. at 2230; *see also id.* at 2233 (Alito, J., concurring) (holding that "[r]ules regulating the locations in which signs may be placed" do not trigger strict scrutiny). Indeed, one store's non-primary use will be another store's primary use, and there is thus no danger that the challenged law will work as a "prohibition of public discussion of an entire topic." *Id.*

Because *Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny, the Court holds that its prior analysis continues to control the fate of plaintiff's First Amendment claim. The few courts that have had occasion to address this question since *Reed* was handed down are in accord. *See California Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson,* let alone apply it.")(emphasis in original); *Citizens for Free Speech, LLC v. Cnty. of Alameda*, No. NO. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015) (holding that *Reed* does not alter the analysis for laws regulating off-site commercial speech). Accordingly,

the Court **GRANTS** the City's motion to dismiss plaintiff's cause of action for violation of the First Amendment, *with prejudice*.[4]

II. Due Process

A. Substantive Due Process

In its prior order, the Court dismissed plaintiff's cause of action for violation of substantive due process, explaining that its claim was merely duplicative of other alleged constitutional violations. The Court noted:

> [P]laintiff has merely rehashed the allegations supporting its other constitutional claims—under the Equal Protection Clause, First Amendment, and Fifth Amendment—to support a claim for violation of substantive due process…"[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendments, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive

[4] Plaintiff also supports its claim for violation of the First Amendment under the theory that Section 602.3 is impermissibly vague and grants unbridled discretion to City officials. These allegations do nothing more than repeat arguments that the Court found unavailing in its previous order, and therefore cannot serve to evade dismissal of its First Amendment challenge. *See Contest Promotions*, No. 15-CV-00093-SI, 2015 WL 1849525, at *5-6.

> due process." *United States v. Lanier,* 520 U.S. 259, 272 n.7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (discussing *Graham v. Connor,* 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

Contest Promotions, LLC v. City & Cnty. of San Francisco, No. 15-CV-00093-SI, 2015 WL 1849525, at *7 (N.D. Cal. Apr. 22, 2015).

Plaintiff has done nothing to remedy these defects.[5] Accordingly, the Court **GRANTS** the City's motion to dismiss plaintiff's claim for violation of substantive due process *with prejudice*.

B. Procedural Due Process

Contest Promotions' theory of violation of procedural due process appears to be supported by allegations that (1) the City denied its permit applications without "adequate process for appeal or review," and (2) the City failed to give Contest Promotions notice and an opportunity to be heard

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[5] "The Fifth Amendment does not invariably preempt a claim" for violation of substantive due process, but "[t]o the extent a property owner's complaint [constitutes a Taking] . . . the claim must be analyzed under the Fifth Amendment." *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007). The FAC no longer alleges a cause of action under the Takings Clause; however, plaintiff's theory of constitutional harm continues to be supported by allegations that the City's actions "infringe[d] upon a constitutionally protected property interest," which would be cognizable under the Takings Clause. FAC ¶ 118.

prior to introducing legislation to amend Section 602.3. FAC ¶ 121.

The first issue raised by Contest Promotions is contradicted by the language of the Planning Code which provides a process for administrative appeal and judicial review for reconsideration of NOVs or administrative penalties. S.F. Planning Code § 610(d)(1). A hearing must be scheduled within 60 days of a request for reconsideration. *Id.* The administrative law judge must issue a written decision[6] within 30 days of the hearing, and the ordinance provides a non-exhaustive list of criteria that the administrative law judge "shall" consider. *Id.* Furthermore, on November 18, 2014, the City sent plaintiff a letter responding to specific concerns it articulated about the permitting process, and requesting additional information from plaintiff. Docket No. 16, RJN Exh. F.

Next plaintiff argues that it was deprived of notice and an opportunity to be heard during the legislative enactment of Section 602.3. Plaintiff points to the fact that the amendments to Section 602.3 were originally enacted as an "interim zoning control," which obviated the need for the public hearings which are typically a part of the legislative process. Pl. Opp'n at 17. It further contends that the City did not properly comply with the procedural requirements necessary to pass an interim zoning law. However, as the City correctly notes, any harm

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[6] The written decision must inform the plaintiff "of its right to seek judicial review pursuant to the timelines set forth in Section 1094.6 of the California Code of Civil Procedure." S.F. Planning Code § 610(d)(1)(B).

inflicted by the interim process was mooted by the fact that Section 602.3 was subsequently amended through the normal legislative process. Plaintiff fails to explain why the four public hearings held on Section 602.3 provided an insufficient forum for it to be heard. *See* Pl. RJN Exh C. at 128-129 (listing hearings held on October 22, 2012, January 26, 2015, February 3, 2015, February 10, 2015).

In any event, the concept of procedural due process has limited vitality as applied to laws of general applicability. Justice Holmes explained long ago what is now axiomatic:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

Therefore, the checks inherent in a democratically elected representative government are typically all that is required to ensure compliance with procedural due process. *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012) ("Procedural due process entitles citizens to a

legislative body that 'performs its responsibilities in the normal manner prescribed by law.'") (internal citations omitted); *see also 75 Acres, LLC v. Miami-Dade Cnty., Fla.*, 338 F.3d 1288, 1294 (11th Cir. 2003) ("if government action is viewed as legislative in nature, property owners generally are not entitled to procedural due process."); *Aiuto v. San Francisco's Mayor's Office of Housing*, No. C 09-2093 CW, 2010 WL 1532319, at *8 (N.D. Cal. Apr. 16, 2010).

Plaintiff has therefore failed to state a claim for violation of procedural due process. Accordingly, the Court **GRANTS** the City's motion to dismiss this cause of action, *with prejudice*.

III. Equal Protection

Courts afford heightened review to cases in which a classification jeopardizes a fundamental right, or where the government has categorized on the basis of an inherently suspect characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Where a fundamental right is not implicated, and no suspect class is identified, a government ordinance or action is reviewed under the rational basis test. *Id*. An ordinance satisfies the rational basis test if it is "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). "[S]trict scrutiny under the Equal Protection Clause is inappropriate where a law regulating speech is content-neutral, even where the speech at issue [is] non-commercial." *Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir. 2009). Here, the Court will apply rational basis review. *See Outdoor Media Group v. City of Beaumont*, 506 F.3d 895, 907 (9th

Cir. 2007) (applying rational basis review to equal protection claim against an ordinance distinguishing between on-site and off-site speech).

Plaintiff alleges that it has been singled out by the City for disfavored treatment relative to other similarly situated signage permit-applicants – otherwise known as a "class of one" claim. FAC ¶ 131. "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 601 (2008)). The Equal Protection Clause protects individuals constituting a class of one if the plaintiff demonstrates that there has been irrational and intentional differential treatment. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). "A 'class of one' claim requires a showing that the government '(1) intentionally (2) treated [plaintiffs] differently than other similarly situated [businesses], (3) without a rational basis.'" *Net Connection LLC v. Cnty. of Alameda*, No. C 13-1467 SI, 2013 WL 3200640, at *4 (N.D. Cal. June 24, 2013) (quoting *Gerhart* 637 F.3d at 1022).

"We have recognized that the rational basis prong of a 'class of one' claim turns on whether there is a rational basis for the *distinction,* rather than the underlying government *action*." *Gerhart* 637 F.3d at 1023 (citing *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir.2002)) (emphasis in original). In *Gerhart*, the plaintiff was required to apply for a permit, and was ultimately

denied a permit to build an approach to a county road; meanwhile, ten other landowners on his block were allowed to build approaches to the same road without the county even requiring a permit.

In its prior order in this case, the Court granted the City's motion to dismiss, noting that plaintiff had "failed to make any non-conclusory allegations tending to show that the City treated it differently than other applicants applying for signage permits." *Contest Promotions*, 2015 WL 1849525, at *9. Plaintiff has attempted to remedy this defect by amending its complaint to include a litany of similarly situated businesses which were granted permits for Business Signs.

However, upon closer inspection, these other businesses share little in common with Contest Promotions. Namely, not a single one of the stores that have allegedly received permits for Business Signs applied for signage which advertises off-premises activities – the defining feature of Contest Promotions' business model. FAC ¶¶ 92-98. "Parties allegedly treated differently in violation of the Equal Protection Clause are similarly situated only when they are 'arguably indistinguishable.'" *Erickson v. Cnty. of Nevada ex rel. Bd. of Supervisors*, No. 13-15624, 2015 WL 3541865, at *1 (9th Cir. June 8, 2015) (citing *Engquist* 553 U.S. at 601). Plaintiff has failed to plead any facts which meet this high bar. Viewed in the most generous light, plaintiff has alleged that the City may have granted permits to businesses that have failed to meet the standards set forth in Section 602.3. However, we must take care not to constitutionalize simple violations of municipal law. *See Olech,* 528 U.S. at 565 (Breyer, J.,

concurring). Having failed to properly allege that any similarly situated business was treated differently, plaintiff has failed to state a claim under the Equal Protection Clause. Accordingly, the Court **GRANTS** the City's motion to dismiss plaintiff's cause of action for violation of equal protection, *with prejudice*.

IV. State Law Causes of Action

Contest Promotions has filed its suit in a federal forum pursuant to 28 U.S.C. §1331, which provides for federal question jurisdiction. As the litigants to this action are non-diverse, §1331 is the only plausible basis for federal jurisdiction. In addition to the federal law causes of action discussed above, Contest Promotions has also alleged a number of causes of action based in state law, including (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) fraud in the inducement, and (4) promissory estoppel. Federal courts may take supplemental jurisdiction over such state law claims when they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). However, a district court may decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by

dismissing the case without prejudice." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

Having dismissed all of Contest Promotions' federal claims from this action with prejudice, the Court hereby **DISMISSES** this action *without prejudice* so that a state court may decide the state law claims in the first instance.

V. Motions to Seal

With the exception of a narrow range of documents that are "traditionally kept secret," courts begin their sealing analysis with "a strong presumption in favor of access." *Foltz v. State Farm Mut. Auto. Ins.*, 331 F.3d 1122, 1135 (9th Cir. 2003). "A stipulation, or a blanket protective order that allows a party to designate documents as sealable, will not suffice to allow the filing of documents under seal." Civ. L.R. 79-5(a). When applying to file documents under seal in connection with a dispositive motion, the party seeking to seal must articulate "compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal quotations and citations omitted). Where a party seeks to seal documents attached to a non-dispositive motion, a showing of "good cause" under Federal Rule of Civil Procedure 26(c) is sufficient. *Id.* at 1179-80; *see also* Fed. R. Civ. P. 26(c). In addition, all requests to file under seal must be "narrowly tailored," such that only sealable information is

sought to be redacted from public access. Civ. L.R. 79-5(b). Because a motion to dismiss is a dispositive motion, the "compelling reasons" standard applies here. *See Koninklijke Philips N.V. v. Elec-Tech Int'l Co.*, No. 14-CV-02737-BLF, 2015 WL 581574, at *1 (N.D. Cal. Feb. 10, 2015).

The City wishes to redact certain applications for business signs which contain architectural plans maintained by the City's Department of Building Inspection. The City relies on Section 19851 of California's Health and Safety Code which prohibits dissemination of such plans unless the party that wishes to obtain them certifies that the drawings will be "used for the maintenance, operation, and use of the building." Cal. Health & Safety Code § 19851(c)(1).

While styled as a motion to seal, the City makes no attempt to explain why public filing of the documents in question would cause harm to itself or third parties, or otherwise meet the "compelling reasons" standard. Rather, the City appears to argue that it is statutorily prohibited from publicly filing these documents. However, as the City readily admits, these plans may also be disseminated pursuant to a Court order, which the City never requested. *See* Cal. Health & Safety Code § 19851(a)(2). Accordingly, the Court **DENIES** the City's motion to seal. These documents were not considered by the Court for purposes of ruling on the City's motion to dismiss. *See* Civil Local Rule 79-5(f)(2).

IT IS SO ORDERED.

Dated: July 28, 2015

/s/
SUSAN ILLSTON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONTEST PROMOTIONS, LLC,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 15-cv-00093-SI

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS

Re: Dkt. No. 15

Before the Court is a motion to dismiss filed by the defendant City and County of San Francisco ("the City"), seeking dismissal of Contest Promotions, LLC's complaint for failure to state a claim, currently set for argument on April 24, 2015. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and hereby VACATES the hearing. For the reasons stated below, the Court GRANTS the City's motion as to Contest Promotions' federal law claims, and DEFERS ruling on its state law claims.

BACKGROUND

This is the second lawsuit plaintiff has brought against the City to challenge the legality of its signage ordinances. Plaintiff is a corporation that organizes and operates contests and raffles whereby

individuals are invited to enter stores for the purpose of filling out an application to enter a contest. Complaint ¶ 6. Plaintiff leases signage space from the store in order to promote its contests to passersby. *Id.* ¶ 7. The business model drives increased foot traffic to the stores, while also promoting the product or event which is the subject of the raffle or contest. *Id.* Plaintiff operates in many cities across the United States including San Francisco, Los Angeles, New York, Seattle, and Houston. *Id.* ¶ 8.

I. First Lawsuit

In early 2007, Contest Promotions approached the City to discuss its business model in light of the City's restriction on certain types of signage. At the time, as is still the case today, the City banned the use of "off-site" signage, known as General Advertising Signs, but permitted "on-site" signage, known as Business Signs. The primary distinction between the two types of signage pertains to where they are located. Broadly speaking, a Business Sign advertises for the business to which it is affixed, while a General Advertising Sign advertises for a third-party product or service which is not sold on the premises to which the sign is affixed.[1] The

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[1] In 2007, a General Advertising Sign was defined under Planning Code § 602.7 as a sign "which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the sign is located, or to which it is affixed, and which is sold offered or conducted on such premises *only incidentally if at all*.") (emphasis added). A Business Sign was defined under Planning Code § 602.3 as "[a] sign which directs attention to a

(continued …)

quintessential example of an off-site (or General Advertising) sign would be a billboard.

Beginning in late 2007, the City began citing all of Contest Promotions' signs with Notices of Violation ("NOVs"), contending that they were General Advertising Signs in violation of the Planning Code. In all, over 50 NOVs were issued, each ordering that the signage be removed under penalty of potentially thousands of dollars in fines per sign. Complaint ¶¶ 14-15.

In response, on September 22, 2009, Contest Promotions filed its first lawsuit in this Court, challenging – both facially and as applied – the constitutionality of the City's ordinance prohibiting its signage. Case No. 09-cv-4434, Docket No. 1. On May 18, 2010, the Court granted in part and denied in part the City's motion to dismiss. Case No. 09-04434, Docket No. 32. In its order, the Court reasoned that Contest Promotions had adequately alleged that the "incidentally" language employed in the ordinance was unduly broad, vague, and could potentially invite unbridled discretion on the part of City officials. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. C 09-04434 SI, 2010 WL 1998780 (N.D. Cal. May 18, 2010). The Court denied defendant's motion as to all of Contest Promotions' First Amendment Claims, but granted with leave to amend as to its Equal Protection claim. *Id.* On February 1, 2013, the parties reached a settlement.

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business, commodity, service, industry, or other activity which is sold, offered, or conducted, *other than incidentally*, on the premises upon which such sign is located, or to which it is affixed." (emphasis added).

The terms of the settlement required the following actions: (1) the City would construe plaintiff's signs as Business Signs, as the Planning Code defined them at the time; (2) Contest Promotions would re-permit its entire inventory of signs to ensure compliance with the Planning Code and the settlement agreement, despite the fact that plaintiff already had previously received permits for these signs; (3) Contest Promotions would dismiss its lawsuit against the City; and (4) Contest Promotions would pay the City $375,000. Complaint ¶¶ 20-23. On July 8, 2014, the City's Board of Supervisors approved the settlement and Contest Promotions made an initial payment of $150,000. *Id.* ¶ 24.

II. The Present Lawsuit

Soon after approving the settlement, on July 19, 2014, the Board of Supervisors passed legislation to amend the definition of Business Sign under Planning Code § 602.3. *Id.* ¶¶ 26-28. Section 602.3 now defines a Business Sign as "[a] sign which directs attention to ~~a~~ *the primary* business[2], commodity, service, industry or other activity which is sold, offered, or conducted~~, other than incidentally,~~ on the premises upon which such sign is located, or to which it is affixed." (amendments emphasized). When Contest Promotions submitted its signs for re-permitting pursuant to the Settlement Agreement, the City denied its applications for failure to comply

[2] The section was also amended to clarify that "[t]he primary business, commodity, service, industry, or other activity on the premises shall mean the use which occupies the greatest area on the premises upon which the business sign is located, or to which it is affixed." S.F. Planning Code § 602.3.

with the Planning Code as amended. Complaint ¶ 32. Plaintiff alleges that the Planning Code was amended "for the specific purpose of targeting Contest Promotions and denying Contest Promotions the benefit of its bargain under the Settlement Agreement and to prevent Contest Promotions from both permitting new signs and obtaining permits for its existing inventory as it is required to do under the Settlement Agreement." *Id.* ¶ 29. The City contends that the ordinance was amended to address the concerns the Court expressed in its 2010 order. Docket No. 15, Def. Mot. at 14.

On January 8, 2015, Contest Promotions filed the present action alleging a number of constitutional[3] and state law claims. Docket No. 1. The Complaint alleges causes of action for (1) violation of the First Amendment, (2) denial of Due Process, (3) inverse condemnation, (4) denial of Equal Protection, (5) breach of contract, (6) breach of implied covenant of good faith and fair dealing, (7) fraud in the inducement, (8) promissory estoppel, and (9) declaratory relief. *Id.* ¶¶ 36-116. On March 13, 2015, the City filed a motion to dismiss the complaint for failure to state a claim. Docket No. 15.

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[3] While not pled as independent causes of action, for every federal constitutional claim, Contest Promotions alleges a violation of the analogous provision of the California Constitution. In its motion, the City does not discuss the viability of these state constitutional claims; therefore, the Court does not consider them for purposes of this motion.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a Defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 544, 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.*

In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1055 (9th Cir. 2008). As a general rule, the Court may not consider any materials beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). However, pursuant to

Federal Rule of Evidence 201, the Court may take judicial notice of "matters of public record," such as prior court proceedings, without thereby transforming the motion into a motion for summary judgment. *Id.* at 688-89. If the Court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

I. First Amendment

Plaintiff posits two theories for why Section 602.3 violates the First Amendment. First, plaintiff contends that it unconstitutionally abridges plaintiff's right to commercial speech. Complaint ¶¶ 36-47. Second, plaintiff contends that the ordinance invites unbridled discretion by City officials and thus constitutes an unconstitutional prior restraint on speech. Complaint ¶¶ 48-57.

A. Commercial Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. States and local governments are bound by this prohibition through the Fourteenth Amendment to the Constitution. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the

Fourteenth Amendment from invasion by state action."). Although commercial speech is afforded First Amendment protections, it has a subordinate position to noncommercial forms of expression. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993). Accordingly, it is afforded "somewhat less extensive" protection than is afforded noncommercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *see also In re Doser*, 412 F.3d 1056, 1063 (9th Cir. 2005).

First Amendment protections apply to commercial speech only if the speech concerns a lawful activity and is not misleading. Once it has been established that the speech is entitled to protection, any government restriction on that speech must satisfy a three-part test: (1) the restriction must seek to further a substantial government interest, (2) the restriction must directly advance the government's interest, and (3) the restriction must reach no further than necessary to accomplish the given objective. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-66 (1980).

The City does not contend that plaintiff's signs contain either unlawful or misleading speech. Def. Mot. at 8. Accordingly, the Court presumes that First Amendment protections apply to the commercial speech at issue. With respect to the first element of the *Central Hudson* test, the Supreme Court has specifically held that the City's interest in enacting the ordinance – to promote traffic safety and

aesthetics – is a substantial governmental interest.[4] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-09 (1981); *see also* S.F. Planning Code § 101. The Supreme Court has also held that ordinances differentiating between on-site and off-site advertisements are directly related to the substantial governmental interests of safety and aesthetics. *Id.* Accordingly, the first and second elements of the *Central Hudson* analysis are satisfied.[5]

The third element of the *Central Hudson* analysis – whether the ordinance reaches no further than necessary to achieve its objective – bears the most scrutiny. The Supreme Court has explained that in order to satisfy this element,

> The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest

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[4] Plaintiff concedes in its complaint that the City has "a substantial government interest in regulating signage, for the purpose of promoting traffic safety and aesthetics." Complaint ¶ 40.

[5] "[U]nder Supreme Court precedent, regulations are unconstitutionally underinclusive when they contain exceptions that bar one source of a given harm while specifically exempting another[.]" *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 906 (9th Cir. 2009). Therefore "a regulation can be unconstitutional if it 'in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages [or because] [t]hey may diminish the credibility of the government's rationale for restricting speech in the first place.'" *Id.* at 904-905 (*quoting City of Ladue v. Gilleo,* 512 U.S. 43, 50–51 (1994)). Here, Contest does not argue that Section 602.3 is underinclusive.

> – a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.

Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 188 (1999) (internal quotation marks and citation omitted). In the *Metromedia* case, the Supreme Court suggested that an outright ban on off-site commercial speech is not unduly broad. *Metromedia*, 453 U.S. at 508 ("The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows onsite advertising and some other specifically exempted signs.").

Nonetheless, citing *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), plaintiff argues that Section 602.3 violates the final prong of *Central Hudson*. However, as the City correctly points out, these cases are distinguishable because they addressed content-based bans on commercial speech – *Lorillard* concerned restrictions on tobacco advertising, while *Ballen* addressed a ban on portable signs with certain content-based exceptions. As the Court in *Ballen* made clear:

> In *Metromedia* the distinction that was challenged and upheld was between onsite and offsite billboards. It was a content-neutral distinction. The categorical nature of the ordinance in *Metromedia* precludes its application here. Instead, the inconsistent content-based nature with which the Redmond

> Ordinance distinguishes its interests and the availability of less restrictive alternatives to achieve the City's goals are fatal under *Central Hudson's* [final] prong.

Ballen, 466 F.3d at 744. Unlike the laws at issue in *Ballen* and *Lorillard*, Section 602.3 is content-neutral,[6] and its fate is therefore dictated by *Metromedia,* which upheld an outright ban on off-site advertising.

In *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 912 (9th Cir. 2009), the Ninth Circuit considered the constitutionality of a law that is substantially similar to Section 602.3.[7] Citing *Metromedia* fifty-six times, the court upheld the law's constitutionality under the *Central Hudson* test. Section 602.3 is substantially similar to the law at issue in *Metro Lights*; the Court therefore finds

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[6] "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

[7] "L.A.M.C. § 91.6205.11, provided that '[s]igns are prohibited if they . . . [a]re off-site signs, except when off-site signs are specifically permitted pursuant to a variance, legally adopted specific plan, supplemental use district or an approved development agreement. This shall also apply to alterations or enlargements of legally existing off-site signs.' The L.A.M.C. defines 'Off–Site Sign' as '[a] sign which displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where such sign is located.' L.A.M.C. § 91.6203." *Metro Lights* 551 F.3d at 901-02.

that the same result must follow. Accordingly, the Court GRANTS defendant's motion to dismiss as to plaintiff's first cause of action for violation of its commercial speech rights.

B. Prior Restraint

Section 602.3 defines a Business Sign as a "[a] sign which directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted on the premises upon which such sign is located, or to which it is affixed." Contest Promotions argues that "the City has not provided clear direction regarding the definition of 'primary.' In using vague standards, the City provided itself unfettered discretion to grant or deny applicants the right to engage in a popular form of free speech." Complaint ¶ 51. Contest Promotions argues that the ordinance's vague standards, coupled with the City's permitting requirement, constitutes an unlawful prior restraint on speech.

To comply with constitutional free speech protections, ordinances governing advertising must contain "adequate standards to guide the official's decision and render it subject to effective judicial review." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006). In addressing whether the ordinance at issue here contains sufficient standards to avoid granting City officials unbridled discretion in interpreting the term "primary," each party relies on different Ninth Circuit case law addressing advertising-related ordinances.

Plaintiff cites *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996) for the proposition that an ordinance permitting city officials to make subjective, unguided determinations is unconstitutional. In *Desert Outdoor Advertising*, the City of Moreno Valley adopted an ordinance restricting any sign deemed "detrimental to the aesthetic quality of the community or the surrounding land uses." *Id*. at 818. The ordinance did not provide local officials with any standards or tools to assist in making this determination, and the Ninth Circuit ruled that the ordinance was unconstitutional because it permitted unbridled discretion.

In contrast, the City relies on *G.K. Ltd.* and on *Outdoor Media Group v. City of Beaumont*, 506 F.3d 895 (9th Cir. 2007). In *G.K. Ltd.*, the ordinance in question stated that signs must "be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures." 436 F.3d at 1082. Although the ordinance also directed officials to consider signs' aesthetic properties, the Ninth Circuit distinguished *Desert Outdoor Advertising* because the ordinance in *G.K. Ltd.* provided objective criteria for city officials to apply. In assessing a sign's "compatibility" with nearby signs, officials were specifically to examine "the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering." *Id.* The Ninth Circuit determined that the ordinance was sufficiently specific to permit effective review of City decisions, and therefore did not permit unbridled discretion. *Id.* The court also found it important that the ordinance required the

city to articulate the reasons for its decision to grant or deny the permit. *Id.* at 1083 (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002)).

In *Outdoor Media Group*, the Ninth Circuit upheld the constitutionality of an ordinance which prohibited off-site signs, defined as "any sign which advertises or informs in any manner businesses, services, goods, persons or events at some location other than that upon which the sign is located," and required all signs to be "compatible with the style or character of existing improvements upon lots adjacent to the site, including incorporating specific visual elements such as type of construction materials, color, or other design detail." 506 F.3d at 904 (quotation marks and alteration omitted). The Ninth Circuit held that city officials' discretion with respect to the off-site prohibition was sufficiently "cabined by specific findings regarding the relationship of the sign to the site, the freeway, and other signs in the area," and that the "compatibility requirement delineate[d] fairly specific criteria regarding the relationship between the sign and the site." *Id.* at 904-05.

Section 602.3 clarifies that "[t]he primary business, commodity, service, industry, or other activity on the premises shall mean *the use which occupies the greatest area on the premises upon which the business sign is located, or to which it is affixed*." (emphasis added). Plaintiff contends that the word "use" renders this definition unconstitutionally vague for two main reasons: (1) it does not provide adequate guidance for signs which seek to advertise a specific product, (2) it is unclear "[h]ow closely related [two] products need to be before the sale of

the two types of products is deemed a single 'use'?" Pl. Opp'n at 11. The ordinance addresses the first concern explicitly, by allowing the lesser of 25 square feet or one-third of a sign to be used for a specific product.[8] As to the second concern, plaintiff correctly points out that given the diversity of products sold in San Francisco, enforcement of Section 602.3 will inevitably require some context-specific determinations.

However, "perfect clarity and precise guidance" are not required, even of regulations affecting expressive activity. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) The definition of "primary" outlined in the ordinance provides objective criteria to cabin the discretion of City officials, and is certainly no more indeterminate than the laws that passed constitutional muster in *G.K. Ltd.* and *Outdoor Media Group*. *See G.K. Ltd.* 436 F.3d at 1084 ("Although the design review criteria are somewhat elastic and require reasonable discretion to be exercised by the permitting authority, this alone does not make the Sign Code an unconstitutional prior restraint.); *see also Ward v. Rock Against Racism*, 491 U.S. at 794 ("While these standards are undoubtedly flexible, and the officials

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[8] "Where a number of businesses, services, industries, or other activities are conducted on the premises, or a number of commodities, services, or other activities with different brand names or symbols are sold on the premises, up to one-third of the area of a business sign, or 25 square feet of sign area, whichever is the lesser, may be devoted to the advertising of one or more of those businesses, commodities, services, industries, or other activities by brand name or symbol as an accessory function of the business sign." S.F. Planning Code § 602.3.

implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."). Furthermore, the City provides a process for administrative appeal and judicial review for reconsideration of NOVs or administrative penalties. S.F. Planning Code § 610(d)(1). A hearing must be scheduled within 60 days of a request for reconsideration. *Id.* The administrative law judge must issue a written decision[9] within 30 days of the hearing, and the ordinance provides a non-exhaustive list of criteria that the administrative law judge "shall" consider. *Id.* The availability of prompt administrative review further cabins the discretion of City officials. *See Outdoor Media Group* 506 F.3d at 905 nt.7 ("The Planning Director's discretion was further cabined by provisions explicitly permitting administrative and judicial review of his decision.").

Despite plaintiff's reliance on *Desert Outdoor Advertising*, plaintiff cannot seriously contend that Section 602.3 provides "*no limits* on the authority of City officials to deny a permit." *Desert Outdoor Advertising* 103 F.3d at 819 (emphasis added). To the contrary, the City's ordinance provides safeguards commensurate with those of the laws examined and upheld in *G.K. Ltd.* and *Outdoor Media Group*. Plaintiff's conclusory allegations of unconstitutionality do nothing to refute this.

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[9] The written decision must inform the plaintiff "of its right to seek judicial review pursuant to the timelines set forth in Section 1094.6 of the California Code of Civil Procedure." S.F. Planning Code § 610(d)(1)(B).

Accordingly, the Court GRANTS the City's motion to dismiss as to plaintiff's prior restraint claim.

II. Substantive Due Process

Plaintiff alleges the City has violated its substantive due process rights because (1) Section 602.3 is "arbitrary and capricious and wholly unrelated to any legitimate governmental interest"; (2) the City used "unfettered discretion" in denying plaintiff's permit applications; and (3) the City's denial of permits "infringes on a constitutionally protected property interest." Complaint at ¶¶ 59, 61, 63.

The City highlights that plaintiff has merely rehashed the allegations supporting its other constitutional claims -- under the Equal Protection Clause, First Amendment, and Fifth Amendment -- to support a claim for violation of substantive due process. It argues that plaintiff's "substantive due process claim alleges acts that are regulated under more specific requirements of the First Amendment and the Equal Protection Clause" and should therefore be dismissed. Def. Mot. at 12. Plaintiff responds by accusing the City of "[r]elying upon [an] unpublished decision out of the District of Oregon" to support its position. Pl. Opp'n at 11.

However, in addition to the cases cited by the City, the Supreme Court has held that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendments, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United*

States v. Lanier, 520 U.S. 259, 272 n.7 (1997) (discussing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Plaintiff's allegations that the City has used "unfettered discretion" and deprived plaintiff of "a constitutionally protected property interest" clearly alleges harms under other constitutional provisions – namely the Fifth Amendment,[10] First Amendment, and Equal Protection Clause. Additionally, plaintiff's conclusory allegation that Section 602.3 is "wholly unrelated to any legitimate governmental interest" is insufficient, standing alone, to state a claim; and moreover, is belied by its allegation that the City "has a substantial government interest in regulating signage, for the purpose of promoting traffic safety and aesthetics." Complaint ¶ 40. Accordingly, the Court GRANTS defendant's motion to dismiss as to Contest Promotions' substantive due process claim.

III. Inverse Condemnation

Contest Promotions invokes the Fifth Amendment's Takings Clause, which states, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, § 4. Plaintiff alleges that the City's refusal to re-permit its signs "depriv[es] Plaintiff of substantially all of the value of its property, constituting a *de facto*

[10] "The Fifth Amendment does not invariably preempt a claim" for violation of substantive due process, *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007), but "[t]o the extent a property owner's complaint [constitutes a Taking] . . . the claim must be analyzed under the Fifth Amendment." *Id.* at 855-56. Here, plaintiff has alleged a violation of the Takings Clause. Complaint ¶ 74.

taking, without payment or just compensation." Complaint ¶ 74 (emphasis in original).

The Supreme Court made the Fifth Amendment's prohibition against uncompensated takings applicable to the states through the Fourteenth Amendment's due process clause in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). There the Supreme Court held that state compensation for government takings must comport with due process of law. *Id.* "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S., 264, 297, n. 40 (1981)). "[J]ust compensation [need not] be paid in advance of, or contemporaneously with, the taking." *Id.* (internal quotations omitted). If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, n. 21 (1984).

Therefore, in order for a takings claim to be ripe for review in a federal court, the plaintiff must have (1) received a "final, definitive position regarding how [the state administrative agency] will apply the regulations at issue to the particular land in question." *Williamson County* 473 U.S. at 191; and (2) "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation

Clause until it has used the procedure and been denied just compensation." *Id.* at 195. Here, Contest Promotions has failed to allege that it has availed itself of state procedures to receive just compensation; therefore, its Fifth Amendment claim is unripe.

Contest Promotions makes a number of arguments for why this ripeness requirement should not apply. First, it argues that more recent Supreme Court case law "calls into question the continued vitality of *Williamson County*." Pl. Opp'n at 12. However, contrary to plaintiff's characterization, *Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013) in no way questions the vitality of *Williamson County*; to the contrary, it reaffirms is central holding.[11] *Id.* at 2062.

Next, relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992), Contest Promotions contends that *Williamson County* does not apply to facial challenges of constitutionality, so at a minimum, a facial challenge should be allowed to proceed. In *Yee*, the Supreme Court held that because the allegations supporting plaintiffs' takings claim "[did] not depend on the extent to which [they] [were] deprived of the economic use of their particular pieces of property or the extent to which these particular [plaintiffs] [were] compensated" it was ripe for judicial review. 503 U.S. at 534. However, *Yee* only addressed the first prong of the *Williamson County* ripeness test,

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[11] However, plaintiff is correct that *Horne* did note that the *Williamson County* ripeness requirement is prudential in nature, and "not, strictly speaking, jurisdictional." 133 S. Ct. at 2062.

and is therefore silent on the question of whether a facial challenge may go forward despite having failed to satisfy the second prong. Moreover, unlike in *Yee*, Contest Promotions' takings claim is highly fact specific, and relates to the City's conduct in denying its re-permitting request in light of its previously held permits and the parties' subsequent Settlement Agreement. Complaint ¶ 74. Finally, unlike plaintiff's challenges concerning its First Amendment and due process causes of action, plaintiff does not plead a facial challenge to Section 602.3; and in any event, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005), the Court made clear that the Takings Clause may not be used as a springboard to launch a facial challenge of a statute for failure to advance a legitimate state interest – which would presumably be the basis of any facial challenge Contest Promotions might make.[12] Accordingly, the Court GRANTS the City's motion to dismiss plaintiffs claim for inverse condemnation/takings, on ripeness grounds.

IV. Equal Protection

Plaintiff contends that the City's amendment of Section 602.3 violates the Equal Protection Clause because it was done to specifically target plaintiff and because in denying its permit applications, "the

[12] Similarly, plaintiff argues that the ripeness requirement outlined in *Williamson County* does not apply to plaintiffs seeking injunctive relief. Plaintiff cites no case for this proposition, and the Court declines the invitation to recognize such an exception.

City did not treat other similar applications in this manner." Complaint ¶ 81.

Courts afford heightened review to cases in which a classification jeopardizes a fundamental right, or where the government has categorized on the basis of an inherently suspect characteristic. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Where a fundamental right is not implicated, and no suspect class is identified, a government ordinance or action is reviewed under the rational basis test. *Id*. An ordinance satisfies the rational basis test if it is "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). "[S]trict scrutiny under the Equal Protection Clause is inappropriate where a law regulating speech is content-neutral, even where the speech at issue [is] non-commercial." *Maldonado v. Morales*, 556 F.3d 1037, 1048 (9th Cir. 2009). Here, both parties agree that rational basis review applies to plaintiff's equal protection claim. *See Outdoor Media Group* 506 F.3d at 907 (applying rational basis review to equal protection claim against an ordinance distinguishing between on-site and off-site speech).

Contest Promotions does not appear to allege that the distinction between on-site and off-site speech violates the Equal Protection Clause. Indeed, as noted above, the Supreme Court has already determined that a municipality may "distinguish between the relative value of different categories of commercial speech." *Metromedia*, 453 U.S. at 514. Accordingly, "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Id.* at 512. Furthermore, it would make

little sense to hold that Section 602.3 survives the heightened scrutiny of the *Central Hudson* test, *see* Section IA. *supra*, yet fails under the much more lenient rational basis review. *See Outdoor Media Group* 506 F.3d at 907 (because the ordinance passed the "more stringent" *Central Hudson* test, it also "satisfies the lower hurdle of rational basis review."); *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1076-77 (9th Cir. 2013), *cert. granted*, 134 S. Ct. 2900, 189 L. Ed. 2d 854 (2014) ("[Plaintiff's] assertion that the Sign Code violates its right to equal protection of law is basically a revision of its argument that [defendant] cannot treat different types of noncommercial speech differently. Clothed in the garb of equal protection the argument still is not persuasive."); *Paramount Contractors & Developers, Inc. v. City of Los Angeles*, 805 F. Supp. 2d 977, 1003 (C.D. Cal. 2011), *aff'd*, 516 F. App'x 614 (9th Cir. 2013) ("Paramount's equal protection claim fails for reasons similar to those that caused its *Central Hudson* claims to fail."); Rotunda & Nowak, 4 Treatise on Const. L. § 18.40 ("If the [Supreme] Court examines the classification under the First Amendment and finds that the classification does not violate any First Amendment right, the Court is unlikely to invalidate that classification under equal protection principles . . . [I]t has no need to engage in independent equal protection analysis . . . because it has determined that the law does not constitute the improper allocation of a fundamental right.").

Plaintiff instead alleges that it has been singled out by the City for disfavored treatment relative to other similarly situated signage permit-applicants – otherwise known as a "class of one" claim. Complaint

¶¶ 81-82. "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Engquist v. Or. Dep't of Agric.,* 553 U.S. 591, 601 (2008)). The Equal Protection clause protects individuals constituting a class of one if the plaintiff demonstrates that there has been irrational and intentional differential treatment. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). "A 'class of one' claim requires a showing that the government '(1) intentionally (2) treated [plaintiffs] differently than other similarly situated [businesses], (3) without a rational basis.'" *Net Connection LLC v. Cnty. of Alameda*, No. C 13-1467 SI, 2013 WL 3200640, at *4 (N.D. Cal. June 24, 2013) (quoting *Gerhart* 637 F.3d at 1022). "We have recognized that the rational basis prong of a 'class of one' claim turns on whether there is a rational basis for the *distinction,* rather than the underlying government *action.*" *Gerhart* 637 F.3d at 1023 (citing *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir.2002)) (emphasis in original).

In *Gerhart*, the plaintiff was required to apply for a permit, and was ultimately denied a permit to build an approach to a county road; meanwhile, ten other landowners on his block were allowed to build approaches to the same road without the county even requiring a permit. Here, by contrast, Contest Promotions has failed to make any non-conclusory allegations tending to show that the City treated it

differently than other applicants applying for signage permits. Contest Promotions does not allege that other businesses have received permits to display similar signs; nor does it even allege that its signs are entitled to be permitted as on-site signage as defined by Section 602.3. For this reason, its equal protection claim must fail. *See Summit Media LLC v. City of Los Angeles, CA*, 530 F. Supp. 2d 1084, 1091 (C.D. Cal. 2008) ("[U]nless Plaintiff can plead facts sufficient to show that City actually [acted] with the intent of discriminating against Plaintiff, an amended complaint will not survive the pleading stage."). Accordingly, the Court GRANTS defendant's motion to dismiss Contest Promotions' claim for violation of equal protection.[13]

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[13] To the extent plaintiff's equal protection claim is premised on the notion that the City amended Section 602.3 to specifically target its business, it must also fail. First, Section 602.3 is a law of general applicability, and as Contest argues, the amendment of the ordinance, if anything, "broaden[ed] . . . the City's restriction on commercial speech." Pl. Opp'n at 8. Second, under rational basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Therefore the court "'attach[es no] legal significance to the timing' of legislative or municipal action." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1156 (9th Cir. 2004) (quoting *Bannum, Inc. v. City of Fort Lauderdale,* 157 F.3d 819, 822 n. 3 (11th Cir.1998)). "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Beach Commc'ns* 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973)). The Court expresses no view on whether such a target-

(continued …)

V. State Law Causes of Action

Contest Promotions has filed its suit in a federal forum pursuant to 28 U.S.C. §1331, which provides for federal question jurisdiction. As the litigants to this action are non-diverse, this is the only plausible basis for federal jurisdiction. In addition to the federal law causes of action discussed above, Contest Promotions has also alleged a number of causes of action based in state law, including (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) fraud in the inducement, and (4) promissory estoppel. Federal courts may take supplemental jurisdiction over such state law claims when they "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). However, a district court may decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 619, 98 L. Ed. 2d 720 (1988).

If all of Contest Promotions' federal claims are dismissed from this action, the Court the Court intends to dismiss the action without prejudice so

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ing claim might provide more traction with respect to plaintiff's potential state-law and tort claims.

that a state court may decide the state claims in the first instance. Accordingly, the Court DEFERS ruling on the City's motion to dismiss as to all of Contest Promotions' state law claims.

At the case management conference, scheduled for April 24, 2015, the Court intends to discuss with the parties the question of whether leave to amend any of plaintiff's federal claims should or must be granted.

CONCLUSION

For the foregoing reasons, the Court GRANTS in part the City's motion to dismiss. At the case management conference on April 24, 2015, the Court will discuss with the parties whether dismissal of Contest Promotions' federal law claims should be with or without prejudice. This order resolves Docket No. 15.

IT IS SO ORDERED.

Dated: April 22, 2015

/s/

SUSAN ILLSTON
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTEST PROMOTIONS, LLC, Plaintiff-Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant-Appellee	FILED OCT 17 2017 NO. 15-16682 D.C. NO. 3:15-CV-00093-SI Northern District of California, San Francisco ORDER

Before: GRABER and FRIEDLAND, Circuit Judges, and MARSHALL, District Judge.*

The panel has voted to deny Appellant's petition for rehearing. Judges Graber and Friedland have voted to deny Appellant's petition for rehearing en banc, and Judge Marshall has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has

* The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

requested a vote on it.

Appellant's petition for rehearing and rehearing en banc is DENIED.

APPENDIX G

RELEVANT SECTIONS OF THE SAN FRANCISCO PLANNING CODE

SEC. 176. ENFORCEMENT AGAINST VIOLATIONS.

(a) **Violations Unlawful.** Any use, structure, lot, feature or condition in violation of this Code is hereby found and declared to be unlawful and a public nuisance. Should any permit or license have been issued that was not then in conformity with the provisions of this Code, such permit or license shall be null and void.

(b) **Methods of Enforcement.** The Zoning Administrator shall have authority to enforce this Code against violations thereof by any of the following actions:

(1) Serving notice requiring the cessation, removal or correction of any violation of this Code upon the owner, agent or tenant of the property that is the subject of the violation, or upon the architect, builder, contractor or other person who commits or assists in such violation;

(2) Calling upon the City Attorney to maintain an action for injunction to restrain or abatement to cause the correction or removal of any such violation, and for assessment and recovery of a civil penalty for such violation as well as any attorneys' fees or costs, including but not limited to expert witness fees, incurred in maintaining such an action;

(3) Calling upon the District Attorney to institute criminal proceedings in enforcement of this Code against any such violation; and

(4) Calling upon the Chief of Police and authorized agents to assist in the enforcement of this Code.

(c) **Penalties.**

(1) **Administrative Penalties.** In the notice requiring the cessation, removal or correction of any violation of this Code, the Zoning Administrator may assess upon the responsible party an administrative penalty for each violation in an amount up to $250.00 for each day the violation continues unabated. The "responsible party" is the owner(s) of the real property on which the code violation is located, as listed in the records of the San Francisco Assessor, and the current leaseholder if different from the current owner(s) of the real property.

The responsible party may request a Zoning Administrator's hearing in order to show cause why the notice requiring the cessation, removal or correction of the violation and any assessment of administrative penalties is in error and should be rescinded. The Zoning Administrator may designate a member of Department staff to act as the hearing officer in his or her place. The Department shall send a notice of the date, hour, and place of the hearing to the responsible party at the address specified in the request for hearing and to any member of the public who has expressed an interest in the matter.

The responsible party may also request that the Zoning Administrator terminate abatement proceedings under Section 176 and refer the matter

to the Director for enforcement action under the process set forth in Section 176.1 of this Code. If the Zoning Administrator determines that the enforcement case will proceed under Section 176, that determination shall be made as part of the final written decision and is not appealable separately from the decision on the merits.

The responsible party may waive the right to a Zoning Administrator's hearing and proceed directly to an appeal to the Board of Appeals under Section 308.2 of this Code. Administrative penalties shall not accrue during the period of time that the matter is pending before the Zoning Administrator on a request for hearing or before the Board of Appeals on appeal. If the responsible party elects to request a Zoning Administrator's hearing, the request for hearing must be in writing and submitted to the Zoning Administrator prior to the expiration date of the Notice of Violation and Penalty. If a request for a Zoning Administrator's hearing is timely filed, any appeal to the Board of Appeals shall be from the decision of the Zoning Administrator rendered after the hearing.

The Zoning Administrator or the Zoning Administrator's designee, after a full and fair consideration of the evidence and testimony received at the hearing, shall render within thirty days following the conclusion of the hearing a written decision that either rescinds the notice of violation and dismisses the proceedings, upholds the original decision, or modifies the original decision. In rendering a decision, the Zoning Administrator or the Zoning Administrator's designee shall consider:

(A) whether the responsible party was properly identified;

(B) whether the accrual dates for the administrative penalties are accurate;

(C) the amount of documented staff time spent in order to secure abatement of the violation;

(D) the nature of the violation;

(E) the duration of the violation;

(F) efforts made by the responsible party to correct the violation;

(G) the impact of the violation upon the community;

(H) any instance in which the responsible party has been in violation of the same or similar laws at the same or other locations in the City and County of San Francisco;

(I) the responsible party's good faith efforts to comply;

(J) whether the violation is easy to correct; and

(K) such other factors as the Zoning Administrator or his or her designee may consider relevant.

In hearing any appeal of the Zoning Administrator's determination, the Board of Appeals shall consider the above factors. If the Board upholds the Zoning Administrator's decision in whole or in part but reduces the amount of the penalty, it may not reduce the amount of the penalty below $100.00 for each day that the violation exists, excluding the

period of time that the matter has been pending either before the Zoning Administrator on a request for hearing or before the Board of Appeals on appeal.

In addition to any administrative penalties imposed under this subsection (c)(1), the Zoning Administrator may recover any attorneys fees and costs, including but not limited to expert witness fees, incurred by the City in pursuing administrative remedies. The provision of administrative penalties is not intended to be punitive in nature but is intended to secure compliance with the Planning Code and to compensate the City for its costs of enforcement.

(2) **Civil Penalties.** Any individual, firm, partnership, corporation, company, association, society, group or other person or legal entity that violates any provision of this Code shall be liable for the City's costs of enforcement and a civil penalty, of not less than $200.00 for each day such violation is committed or permitted to continue, which penalty shall be assessed and recovered in a civil action brought in the name of the people of the City and County of San Francisco by the City Attorney in any court of competent jurisdiction. The City Attorney may seek recovery of any attorneys' fees and costs, including but not limited to expert witness fees, incurred by the City in bringing such civil action. For civil actions to enforce Municipal Code provisions related to general advertising signs, the penalties, attorneys' fees and costs set forth in this Section 176 shall be in addition to those authorized by Section 610 of this Code.

(3) **Criminal Penalties.** Any individual, firm, partnership, corporation, company, association, society, group or other person or legal entity that violates any provision of this Code shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in an amount not less than $200.00 or be imprisoned for a period not exceeding six months or be both so fined and imprisoned. Each day such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such hereunder.

(4) **Planning Code Enforcement Fund.** Any fees and penalties collected pursuant to this Section 176 shall be deposited in the Planning Code Enforcement Fund established by Administrative Code Section 10.100-166. The Planning Department, through the Planning Code Enforcement Fund, shall reimburse City departments and agencies, including the City Attorney's Office, for all costs and fees incurred in the enforcement of this Section 176.

(d) **Additional Methods of Enforcement and Penalties for Violation of Sign Regulations.** Violation of the general advertising sign regulations set forth in Article 6 are subject to the administrative penalties and enforcement procedures set forth in Section 610 of this Code, in addition to those set forth in this Section 176.

(e) **Use of Penalties Collected.** All penalties collected under this Section 176 shall be deposited in the Planning Code Enforcement Fund established in Administrative Code Section 10.100.166 and shall be used for the purposes specified in that section.

(f) Remedies under this Section 176 are non-exclusive, and, notwithstanding subsection (b)(2), the City Attorney may at any time institute civil proceedings for injunctive and monetary relief, including civil penalties, against any person for violations of the Planning Code, without regard to whether the Zoning Administrator has issued a notice of violation, instituted abatement proceedings, scheduled or held a hearing on a notice of violation, or issued a final decision. For proceedings instituted under this subsection (f), the City Attorney shall notify the Zoning Administrator or the Planning Director, as appropriate, and collaborate, where mutually desired, on the prosecution of the action. The City Attorney may seek recovery of any attorneys fees and costs, including but not limited to expert witness fees, incurred by the City in bringing a proceedings under this subsection (f).

SEC. 601. PURPOSES OF SIGN CONTROLS.

This Article 6 is adopted in recognition of the important function of signs and of the need for their regulation under the Planning Code. In addition to those purposes of the Planning Code stated in Section 101, it is the further purpose of this Article 6 to:

(a) promote the aesthetic and environmental values of San Francisco by providing for signs that serve as effective means of communication and do not impair the attractiveness of the City as a place to live, work, visit, and shop;

(b) protect public investment in and the character and dignity of public buildings, streets, and open spaces;

(c) protect the distinctive appearance of San Francisco which is produced by its unique geography, topography, neighborhoods, street patterns, skyline and architectural features;

(d) ensure that signs are designed and proportioned in relation to the structures to which they are attached, adjacent structures, and the streets on which they are located;

(e) enhance sidewalks as public spaces by preserving sunlight and views, and foster the unobstructed growth of street trees;

(f) provide an environment which will safeguard and enhance neighborhood livability and property values, and promote the development of business in the City;

(g) encourage sound practices and lessen the objectionable effects of competition in respect to size and placement of signs;

(h) aid in the attraction of tourists and other visitors who are so important to the economy of the City and County;

(i) reduce hazards to motorists, bicyclists, and pedestrians caused by visual distractions and obstructions; and

(j) thereby promote the public health, safety and welfare.

SEC. 602. SIGN DEFINITIONS.

The following definitions shall apply to this Article 6, in addition to such definitions elsewhere in this Code as may be appropriate.

Area (of a Sign).

(a) **All Signs Except on Windows, Awnings and Marquees.** The entire area within a single continuous rectangular perimeter formed by extending lines around the extreme limits of writing, representation, emblem, or any figure of similar character, including any frame or other material or color forming an integral part of the display or used to differentiate such Sign from the background against which it is placed; excluding the necessary supports or uprights on which such Sign is placed but including any Sign Tower. Where a Sign has two or more faces, the area of all faces shall be included in determining the Area of the Sign, except that where two such faces are placed back to back and are at no point more than two feet from one another, the Area of the Sign shall be taken as the area of one face if the two faces are of equal area, or as the area of the larger face if the two faces are of unequal area.

(b) **On Windows.** The Area of any Sign painted directly on a window shall be the area within a rectangular perimeter formed by extending lines around the extreme limits of writing, representation, or any figure of similar character depicted on the surface of the window. The Area of any Sign placed on or behind the window glass shall be as described above in subsection (a).

(c) **On Awnings or Marquees.** The Area of any Sign on an Awning or Marquee shall be the total of

all signage on all faces of the structure. All sign copy on each face shall be computed within one rectangular perimeter formed by extending lines around the extreme limits of writing, representation, or any figure of similar character depicted on the surface of the face of the awning or marquee.

Attached to a Building. Supported, in whole or in part, by a building.

Business Sign. A Sign which directs attention to the primary business, commodity, service, industry or other activity which is sold, offered, or conducted on the premises upon which such Sign is located, or to which it is affixed. Where a number of businesses, services, industries, or other activities are conducted on the premises, or a number of commodities, services, or other activities with different brand names or symbols are sold on the premises, up to one-third of the area of a Business Sign, or 25 square feet of Sign area, whichever is the lesser, may be devoted to the advertising of one or more of those businesses, commodities, services, industries, or other activities by brand name or symbol as an accessory function of the Business Sign, provided that such advertising is integrated with the remainder of the Business Sign, and provided also that any limits which may be imposed by this Code on the area of individual Signs and the area of all Signs on the property are not exceeded. The primary business, commodity, service, industry, or other activity on the premises shall mean the use which occupies the greatest area on the premises upon which the Business Sign is located, or to which it is affixed.

Directly Illuminated Sign. A Sign designed to give forth artificial light directly (or through transparent or translucent material) from a source of light within such Sign, including but not limited to neon and exposed lamp signs.

Freestanding. In no part supported by a building.

Freeway. A highway, in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access, the precise route for which has been determined and designated as a Freeway by an authorized agency of the State or a political subdivision thereof. The term shall include the main traveled portion of the trafficway and all ramps and appurtenant land and structures. Trans-Bay highway crossings shall be deemed to be Freeways within the meaning of this definition for purposes of this Code.

General Advertising Sign. A Sign, legally erected prior to the effective date of Section 611 of this Code, which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the Sign is located, or to which it is affixed, and which is sold, offered or conducted on such premises only incidentally if at all.

Height (of a Sign). The vertical distance from the uppermost point used in measuring the Area of a Sign, as defined in this Section 602, to the ground immediately below such point or to the level of the upper surface of the nearest curb of a Street, Alley or highway (other than a structurally elevated

roadway), whichever measurement permits the greater elevation of the Sign.

Historic Movie Theater Projecting Sign. A projecting Business Sign attached to a Qualified Movie Theater, as defined in Section 188(e)(1), when such sign was originally constructed in association with the Qualified Movie Theater or similar historic use. Such Signs are typically characterized by (a) perpendicularity to the primary facade of the building, (b) fixed display of the name of the establishment, often in large lettering descending vertically throughout the length of the Sign; (c) a narrow width that extends for a majority of the vertical distance of a building's facade, typically terminating at or slightly above the Roofline, and (d) an overall scale and nature such that the Sign comprises a significant and character defining architectural feature of the building to which it is attached. Elimination or change of any lettering or other inscription from a Historic Movie Theater Projecting Sign, such as that which may occur with a change of ownership, change of use, or closure does not preclude classification of the Sign under this Section. For specific controls on the preservation, rehabilitation, or restoration of these signs, refer to Section 188(e) of this Code.

Historic Movie Theater Marquee. A Marquee, as defined in Section 102, attached to a Qualified Movie Theater, as defined in Section 188(e)(1), when such Marquee was originally constructed in association with a Movie Theater or similar historic use. Elimination or change of any lettering or other inscription from a Historic Movie Theater Marquee, such as that which may occur with a change of

ownership, change of use or closure, does not preclude classification of the Marquee under this Section. For specific controls on the preservation, rehabilitation, or restoration of these Signs, refer to Section 188(e) of this Code.

Historic Sign. An Historic Sign is any Sign identified on its own or as one of the character defining features of a property listed or eligible for the National Register of Historic Places or the California Register of Historical Resource, or designated in any manner under Articles 10 or 11 of the Planning Code.

Identifying Sign. A Sign for a use listed in Article 2 of this Code as either a principal or a conditional use permitted in an R District, regardless of the district in which the use itself may be located, which Sign serves to tell only the name, address, and lawful use of the premises upon which the Sign is located, or to which it is affixed. With respect to shopping malls containing five or more stores or establishments in NC Districts, and shopping centers containing five or more stores or establishments in NC-S Districts or in the City Center Special Sign District, Identifying Signs shall include Signs which tell the name of and/or describe aspects of the operation of the mall or center. Shopping malls, as that term is used in this Section, are characterized by a common pedestrian passageway which provides access to the businesses located therein.

(Amended by Ord. 218-16, File No. 160-553, App. 11/10/2016; Eff. 12/10/2016)

Indirectly Illuminated Sign. A Sign illuminated with a light directed primarily toward such Sign and

so shielded that no direct rays from the light are visible elsewhere than on the lot where said illumination occurs. If not effectively so shielded, such sign shall be deemed to be a Directly Illuminated Sign.

Landscaped Freeway. Any part of a Freeway that is now or hereafter classified by the State or a political subdivision thereof as a Landscaped Freeway, as defined in the California Outdoor Advertising Act. Any part of a Freeway that is not so designated shall be deemed a nonlandscaped Freeway.

Nameplate. A sign affixed flat against a wall of a building and serving to designate only the name or the name and professional occupation of a person or persons residing in or occupying space in such building.

Nonilluminated Sign. A Sign which is not illuminated, either directly or indirectly.

Projection. The horizontal distance by which the furthermost point used in measuring the Area of a Sign, as defined in this Section 602, extends beyond a Street Property Line or a building setback line. A Sign placed flat against a wall of a building parallel to a Street or Alley shall not be deemed to project for purposes of this definition. A Sign on an Awning, Canopy or Marquee shall be deemed to project to the extent that such Sign extends beyond a Street Property Line or a building setback line.

Roofline. The upper edge of any building wall or parapet, exclusive of any Sign Tower.

Roof Sign. A Sign or any portion thereof erected or painted on or over the roof covering any portion of a building, and either supported on the roof or on an independent structural frame or Sign Tower, or located on the side or roof of a penthouse, roof tank, roof shed, elevator housing or other roof structure.

Sale or Lease Sign. A Sign which serves only to indicate with pertinent information the availability for sale, lease or rental of the lot or building on which it is placed, or some part thereof.

Sign. Any structure, part thereof, or device or inscription which is located upon, attached to, or painted, projected or represented on any land or right-of-way, or on the outside of any building or structure including an Awning, Canopy, Marquee or similar appendage, or affixed to the glass on the outside or inside of a window so as to be seen from the outside of the building, and which displays or includes any numeral, letter, word, model, banner, emblem, insignia, symbol, device, light, trademark, or other representation used as, or in the nature of, an announcement, advertisement, attention-arrester, direction, warning, or designation by or of any person, firm, group, organization, place, commodity, product, service, business, profession, enterprise or industry.

A "Sign" is composed of those elements included in the Area of the Sign as defined in this Section 602, and in addition the supports, uprights and framework of the display. Except in the case of General Advertising Signs, two or more faces shall be deemed to be a single Sign if such faces are contiguous on the same plane, or are placed back to

back to form a single structure and are at no point more than two feet from one another. Also, on Awnings or Marquees, two or more faces shall be deemed to be a single Sign if such faces are on the same Awning or Marquee structure.

Sign Tower. A tower, whether attached to a building, Freestanding, or an integral part of a building, which is erected for the primary purpose of incorporating a Sign, or having a Sign attached thereto.

Street Property Line. For purposes of this Article 6 only, "street property line" shall mean any line separating private property from either a Street or an Alley.

Video Sign. A Sign that displays, emits, or projects or is readily capable of displaying, emitting or projecting a visual representation or image; an animated video, visual representation, or image; or other video image of any kind onto a building, fabric, screen, sidewalk, wall, or other surface through a variety of means, including, but not limited to: camera; computer; digital cinema, imaging, or video; electronic display; fiber optics; film; internet; intranet; light emitting diode screen or video display; microprocessor or microcontrolled based systems; picture frames; plasma display; projector; satellite; scrolling display; streaming video; telephony; television; VHS; wireless transmission; or other technology that can transmit animated or video images.

Vintage Sign. A Sign that depicts a land use, a business activity, a public activity, a social activity or historical figure or an activity or use that recalls the

City's historic past, as further defined in Section 608.14 of this Code, and as permitted by Sections 303 and 608.14 of this Code.

Wall Sign. A Sign painted directly on the wall or placed flat against a building wall with its copy parallel to the wall to which it is attached and not protruding more than the thickness of the sign cabinet.

Wind Sign. Any Sign composed of one or more banners, flags, or other objects, mounted serially and fastened in such a manner as to move upon being subjected to pressure by wind or breeze.

Window Sign. A Sign painted directly on the surface of a window glass or placed behind the surface of a window glass.

SEC. 603. EXEMPTED SIGNS.

Nothing in this Article 6 shall apply to any of the following signs:

(a) Noncommercial Signs, including but not limited to

(1) Official public notices, and notices posted by public officers in performance of their duties;

(2) Governmental signs for control of traffic and other regulatory purposes, street signs, danger signs, railroad crossing signs, and signs of public service companies indicating danger and aids to service or safety;

(3) Temporary display posters, without independent structural support, in connection with

political campaigns and with civic noncommercial health, safety, and welfare campaigns;

(4) Flags, emblems, insignia, and posters of any nation or political subdivision, and temporary displays of a patriotic, religious, charitable, or other civic character;

(5) House numbers, whether illuminated or not, "no trespassing," "no parking," and other warning signs;

(6) Commemorative plaques placed or provided by recognized historical agencies;

(7) Religious symbols;

(8) Information plaques or signs which identify to the public open space resources, architectural features, creators of artwork, or otherwise provide information required by this Code or by other City agencies, or an identifying sign which directs the general public and/or patrons of a particular establishment to open space or parking resources.

(b) Signs within a stadium, open-air theater, or arena which are designed primarily to be viewed by patrons within such stadium, open-air theater, or arena;

(c) Two General Advertising Signs each not exceeding 24 square feet in area on either a transit shelter or associated advertising kiosk furnished by contract with the Municipal Transportation Agency or predecessor agency for the Municipal Railway in RTO, RTO-M, RM-2, RM-3, RM-4, RC, NC, C, M, PDR, Eastern Neighborhoods Mixed Use Districts, and South of Market Mixed Use Districts, and in those P Districts where such Signs would not

adversely affect the character, harmony, or visual integrity of the district as determined by the Planning Commission; eight General Advertising Signs each not exceeding 24 square feet in area on transit shelters located on publicly owned property on a high level Municipal Railway boarding platform in an RH-1D District adjacent to a C-2 District, provided that such advertising signs solely face the C-2 District; up to three double-sided General Advertising Signs each not exceeding 24 square feet in area on or adjacent to transit shelters on publicly owned high level Municipal Railway boarding platforms along The Embarcadero south of the Ferry Building, up to six double-sided panels at 2nd and King Streets, and up to four double-sided panels at 4th and King Streets; up to two double-sided panels not exceeding 24 square feet in area on each low-level boarding platform at the following E-Line stops: Folsom Street and The Embarcadero, Brannan Street and The Embarcadero, 2nd and King Streets, and 4th and King Streets; and a total of 71 double-sided General Advertising Signs each not exceeding 24 square feet in area on or adjacent to transit shelters on 28 publicly owned high level Municipal Railway boarding platforms serving the Third Street Light Rail Line. Each advertising sign on a low-level or high-level boarding platform shall be designed and sited in such a manner as to minimize obstruction of public views from pedestrian walkways and/or public open space.

Notwithstanding the above, no Sign shall be placed on any transit shelter or associated advertising kiosk located on any sidewalk which shares a common boundary with any property under

the jurisdiction of the Recreation and Park Commission, with the exception of Justin Herman Plaza; on any sidewalk on Zoo Road; on Skyline Boulevard between Sloat Boulevard and John Muir Drive; on John Muir Drive between Skyline Boulevard and Lake Merced Boulevard; or on Lake Merced Boulevard on the side of Harding Park Municipal Golf Course, or on any sidewalk on Sunset Boulevard between Lincoln Way and Lake Merced Boulevard; on any sidewalk on Legion of Honor Drive; or in the Civic Center Special Sign Districts as established in Section 608.3 of this Code.

The provisions of this subsection (c) shall be subject to the authority of the Port Commission under Sections 4.114 and B3.581 of the City Charter and under State law.

(d) Two General Advertising Signs each not exceeding 52 square feet in area on a public service kiosk furnished by contract with the Department of Public Works which contract also provides for the installation and maintenance of automatic public toilets. Each such public service kiosk shall be divided into three sections, one of which shall provide a public service, such as a newsstand, newsrack, map, public telephone, vending machine, display of public service information, or interactive video terminal.

(e) Advertising placed on fixed pedestal newsrack units in accordance with Section 184.12 of the Public Works Code.

(f) To the extent not otherwise exempted pursuant to subsection (a) of this Section 610[1], any Historic Movie Theater Projecting Sign or Historic Movie

Theater Marquee when preserved, rehabilitated, restored, or reconstructed pursuant to Section 188(e) of the Planning Code.

SEC. 607. COMMERCIAL AND INDUSTRIAL DISTRICTS.

Signs in C, M, and PDR Districts, other than those Signs exempted by Section 603 of this Code, shall conform to the following provisions:

(a) **General Advertising Signs.** No General Advertising Sign shall be permitted in any C, M, or PDR District.

(b) **Roof Signs.** Except for Historic Signs and Vintage Signs, Roof Signs are not permitted in C, M, and PDR Districts.

(c) **Wind Signs.** No Wind Sign shall be permitted in any C, M, or PDR District.

(d) **Window Signs.** The total Area of all Window Signs shall not exceed one-third the area of the window or clear door on or in which the Signs are located. Such Signs may be Nonilluminated, Indirectly Illuminated, or Directly Illuminated.

(e) **Moving Parts.** No Sign shall have or consist of any moving, rotating, or otherwise physically animated part (as distinguished from lights that give the appearance of animation by flashing, blinking or fluctuating), except as follows:

(1) Moving or rotating or otherwise physically animated parts may be used for the rotation of barber poles and the indication of time of day and temperature.

(2) Notwithstanding the type of Signs permissible under subsection (e), a Video Sign is prohibited.

(f) **Illumination.** Any Sign may be Nonilluminated or Indirectly or Directly Illuminated. Signs in PDR, C-3, and M-2 Districts shall not be limited in any manner as to type of illumination, but no Sign in a C-2 or M-1 District shall have or consist of any flashing, blinking, fluctuating or otherwise animated light except as specifically designated as "Special Districts for Sign Illumination" on Sectional Map SSD of the Zoning Map of the City and County of San Francisco, described in Section 608 of this Code, in the C-2 area consisting of five blocks in the vicinity of Fisherman's Wharf. Notwithstanding the type of Signs permissible under subsection (f), a Video Sign is prohibited in the district.

(g) **Projection.** Except for Historic Signs, Vintage Signs, Historic Theater Marquees, and Historic Theater Projecting Signs, no Sign shall project more than 75% of the horizontal distance from the Street Property Line to the curbline and in no case shall a Sign project more than six feet beyond the Street Property Line or building setback line.

(h) **Height and Extension Above Roofline.**

(1) **Signs Attached to Buildings.** Except as provided in Section 260 for Historic Signs, in Section 608.14 for Vintage Signs, and in Section 188(e) for Historic Movie Theater Marquees and Historic Movie Theater Projecting Signs, no Sign Attached to a Building shall extend or be located above the Roofline of the building to which it is attached. In addition, no Sign Attached to a Building

shall under any circumstances exceed a maximum height of:

In C-3: 100 feet;

In all other C, M, and PDR Districts: 60 feet.

Such Signs may contain letters, numbers, a logo, service mark and/or trademark and may be Nonilluminated or Indirectly Illuminated.

(2) **Freestanding Signs.** The maximum height for Freestanding Signs shall be as follows:

In C-2: 36 feet;

In all other C, M, and PDR Districts: 40 feet.

(i) **Special Standards for Automotive Service Stations.** For Automotive Service Stations, only the following Signs are permitted, subject to the standards in this subsection (i) and to all other standards in this Section 607.

(1) A maximum of two oil company Signs, which shall not extend above the Roofline if Attached to a building, or exceed the maximum height permitted for Freestanding Signs in the same district if Freestanding. The Area of any such Sign shall not exceed 180 square feet, and along each street frontage all parts of such a Sign or Signs that are within 10 feet of the street property line shall not exceed 80 square feet in area. No such Sign shall project more than five feet beyond any Street Property Line or building setback line. The areas of other permanent and temporary Signs as covered in subsection (i)(2) below shall not be included in the calculation of the areas specified in this subsection (i)(1).

(2) Other permanent and temporary Business Signs, not to exceed 30 square feet in Area for each such Sign or a total of 180 square feet for all such Signs on the premises. No such Sign shall extend above the Roofline if Attached to a building, or in any case project beyond any Street Property Line or building setback line.

SEC. 610. VIOLATION OF GENERAL ADVERTISING SIGN REQUIREMENTS.

(a) **General.** The penalties and methods of enforcement set forth in this Section 610 are in addition to those set forth in Section 176 of this Code and any other penalties or methods of enforcement authorized by law. In light of the findings of Proposition G, approved by the voters in March of 2002, a violation of the Code's general advertising sign requirements is deemed to be a public nuisance.

(b) **Administrative Penalties.** The Director of Planning may impose administrative penalties for violations of the regulations governing General Advertising Signs set forth in this Article 6. These administrative penalties are cumulative to and do not foreclose any criminal or civil penalties that may apply under state or local law. Administrative penalties shall be imposed in accordance with the following procedures:

(1) **Notice of Violation.**

(A) Upon the Planning Department's determination pursuant to Section 176 of this Code that a general advertising sign has been erected, installed, expanded, intensified, relocated, or

otherwise operated in violation of the requirements of this Code or has been denied an in-lieu identifying number pursuant to Section 604.1(c) of this Code, the Director shall send a written notice of violation to the Responsible Party for delivery by first class mail, hand-delivery, or electronic mail. The notice of violation shall describe the violation(s), state that the Responsible Party has five calendar days from the date postmarked on the notice or three calendar days from the date of hand-delivery or electronic mail delivery of the notice to: (i) file an application for a permit to remove the general advertising sign; (ii) correct the violation(s) pursuant to subsection (c); or (iii) request reconsideration pursuant to subsection (d). An electronic mail message shall be considered delivered on the same day that it is sent.

(B) **Responsible Party.** For the purposes of this Section 610, "Responsible Party" shall mean the owner(s) of the real property on which the general advertising sign is located, as listed in the Assessor's record, and the current leaseholder(s) or owner(s) of the general advertising sign, if different from the owner(s) of the real property. If the identity of the person or business entity that installed or operates the general advertising sign is unknown, the notice of violation shall be posted as close as practicable to the location of the sign; once the identity of the person or business entity is known, notice of violation shall be sent to such person or business entity without any such delay affecting the time limits, fees, or penalties imposed by this Section 610.

(2) **Penalties.**

(A) **Accrual of Penalties.** If a Responsible Party fails to respond to the notice of violation as outlined in Subsection (b)(1)(A), penalties shall accrue under this Section 610 at the daily rate set forth in Subsection (b)(2)(B) beginning on the Accrual Date, which is defined as the sixth day after the date postmarked on a notice delivered by first class mail, or on the fourth day after hand-delivery or electronic mail delivery of a notice, and the Director shall refer the matter to the City Attorney for further action. If the Responsible Party responds after the Accrual Date, but before the Director has referred the matter to the City Attorney, the Responsible Party shall be assessed a penalty based on the number of days that have passed beginning on the Accrual Date until the date the Responsible Party responded. Once the matter has been referred to the City Attorney for further proceedings, it shall be within the discretion of the City Attorney, in consultation with the Director, whether to allow the Responsible Party to request a reconsideration of the notice of violation or to proceed with other legal action. If the Responsible Party is allowed to request reconsideration, the Responsible Party shall pay a penalty based on the amount accrued beginning on the Accrual Date until the date the Responsible Party responded. The Responsible Party shall pay this penalty within five business days of notice that the Responsible Party will be allowed to request reconsideration.

(B) **Amount of Penalties.**

(i) The administrative penalties that the Director or administrative law judge assesses against the Responsible Party shall be related to the

square footage of the General Advertising Sign found to be in violation of the Planning Code, as shown below:

a. 100 square feet or less - $100 per day per violation;

b. 101 - 300 square feet - $1,000 per day per violation;

c. 301 - 500 square feet - $1,750 per day per violation; and

d. Over 500 square feet - $2,500 per day per violation.

If the violation for which the administrative penalty is assessed has increased the size of the General Advertising Sign, the penalty shall be based on the actual size of the General Advertising Sign.

(C) **Collection.** The Director may request that the Tax Collector pursue collection of any penalty, from the Responsible Party including imposition of a special assessment lien in accordance with the requirements of Article XX of Chapter 10 of the San Francisco Administrative Code (commencing with Section 10.230). The Director may also request that the City Attorney pursue collection of the penalty against the Responsible Party in a civil action to enforce the provisions of this Code.

(D) **Planning Code Enforcement Fund.** Fees and penalties collected pursuant to this Section 610 shall be deposited in the Planning Code Enforcement Fund established in Administrative Code Section 10.100-166.

(c) **Building Permit.** A building permit shall be required to remove or modify any general advertising sign when such removal or modification is required pursuant to this Section 610.

(1) Additional time and material costs shall be added to the Building Permit fee pursuant to Section 350(c).

(2) The Responsible Party has thirty days from the filing of any required building permit application to remove or modify the general advertising sign to either: (i) obtain a Final Inspection Approval or Certificate of Final Completion from the Department of Building Inspection (DBI); or (ii) remove all advertising copy from the general advertising sign until the required DBI approval is obtained. If the Final Inspection Approval or Certificate of Final Completion has not been obtained or the advertising copy has not been removed within this time period, penalties shall accrue at the daily rate outlined in Subsection (b)(2)(B) until the advertising copy is removed or the required DBI approval is obtained.

(d) **Reconsideration of Notice of Violation or Administrative Penalty.**

(1) **Reconsideration Hearing.**

(A) A Responsible Party may seek reconsideration of the issuance of the notice of violation or any administrative penalty. Any request for reconsideration shall be accompanied by written evidence that demonstrates why the notice of violation was issued in error or why the administrative penalties were assessed in error. Upon receipt of a request for reconsideration within the time limits established by subsection (b)(1)(A) or

when allowed under subsection (b)(2)(A), the Planning Department shall schedule a reconsideration hearing before an administrative law judge. Such hearing shall be scheduled for a date no later than 60 days after the request. At least 10 days before the scheduled hearing, the Planning Department shall notify the Responsible Party by mail in writing of the hearing date, time, and location.

(B) The administrative law judge shall hold a hearing to reconsider the Director's notice of violation or administrative penalty. The administrative law judge's decision for a reconsideration of the notice of violation shall be based upon, but not limited to, the Planning Code, any final Zoning Administrator Interpretations, the Building Code, building permits issued by the City, and any final decisions of the Board of Appeals regarding the subject property. The administrative law judge's determination of a request for reconsideration of any administrative penalty shall take into account the validity of accrual dates, accuracy of assessment based upon sign size and whether the Responsible Party was accurately identified. For repeat violations, the administrative law judge shall also take into account the considerations specified in subsection (f)(3) of this Section 610. Within 30 days of the hearing, the administrative law judge shall issue a final written decision, which shall be mailed to the Responsible Party. The final written decision shall not be appealable to the Board of Appeals. All final written decisions shall inform the Responsible Party of its right to seek judicial review pursuant to the

timelines set forth in Section 1094.6 of the California Code of Civil Procedure.

(C) If the Planning Department rescinds the notice of violation or penalties prior to the reconsideration hearing, the case shall be considered abated and all accrued penalties shall be rescinded. If penalties or the reconsideration hearing fee set forth in subsection (d)(2), below, have been paid, the Planning Department shall refund in a timely matter any unused portions of the penalties or fee.

If the administrative law judge overturns the notice of violation or penalties, the case shall be abated and all accrued penalties shall be rescinded. If penalties have been paid, the Planning Department shall refund the penalties.

If the Responsible Party withdraws its request for reconsideration of notice of violation or penalties prior to the reconsideration hearing and cures the violation(s) by filing for a building permit under subsection (c), any accrued penalties shall apply in addition to a mandatory ten-day fixed penalty based upon the daily rate outlined in subsection (b)(2)(B). If the request for reconsideration is withdrawn within less than 10 days from the date it was timely made, the Responsible Party may apply to the Director for a reduction in the fixed penalty amount based upon the number of days less than 10 that the reconsideration request was withdrawn. Any such reduction shall be granted or denied at the sole discretion of the Director and is not appealable.

If the administrative law judge upholds the notice of violation or penalties, the Responsible Party shall cure the violation(s) by filing for a building

permit pursuant to the procedures and requirements of subsection (c) within fifteen days of the date the decision is mailed to the Responsible Party. The Responsible Party shall be subject to any accrued penalties, plus a mandatory twenty-day fixed penalty based upon the daily rate outlined in subsection (b)(2)(B). If the reconsideration hearing is held within less than 20 days from the date it was timely requested, the Responsible Party may apply to the Director for a reduction in the fixed penalty amount based upon the number of days less than 20 that the reconsideration hearing was held. Any such reduction shall be granted at the sole discretion of the Director and is not appealable. If the Responsible Party does not file for a building permit within the fifteen-day period, additional penalties shall accrue at the daily rate outlined in subsection (b)(2)(B) and the Director shall refer the case to the City Attorney for further action.

(2) **Reconsideration Hearing Fee.** At the time the Responsible Party requests reconsideration, the Responsible Party shall pay an initial hearing fee of $3,400.00 to the Planning Department; the Responsible Party shall also be liable for time and materials as set forth in Section 350(c). The Planning Department shall increase this fee on an annual basis at a rate equal to that of the Consumer Price Index (CPI). The fee shall be waived if the Responsible Party would qualify for a waiver of court fees and costs pursuant to California Government Code Section 68511.3, as amended from time to time. Additionally, if the Responsible Party withdraws its request for reconsideration, any portion of the fee not expended to process the hearing shall be refunded.

(3) **Postponement.** The administrative law judge may grant a postponement of a hearing for Good Cause. Requests for postponement of a hearing shall be made in writing at the earliest date possible, with supporting documentation attached. The party requesting the postponement shall notify any other parties of the request and provide them with copies of the complete request and the supporting documentation.

For the purposes of this Section 610, "Good Cause" includes, but is not limited, to the following:

(A) The illness of a party, an attorney or other authorized representative of a party, or a material witness of a party;

(B) Verified travel outside of San Francisco scheduled before the receipt of notice of the hearing; or,

(C) Any other reason which makes it impractical to appear on the scheduled date due to unforeseen circumstances or verified pre-arranged plans that cannot be changed. Mere inconvenience in appearing shall not constitute "good cause."

(e) Failure of the City, including the Director, the Planning Department, or the administrative law judge, to act within any of the timeframes set forth in this Section 610 shall not be considered approval of any general advertising sign.

(f) **Repeat Violations.**

(1) The Director of Planning may use the provisions of this subsection (f) to abate and discourage repeated violations of this Section 610.

(2) For the purposes of this subsection (f), a repeat violation shall mean any violation of the general advertising provisions of this Article which (A) occurs on a property that was the subject of a notice of violation under Article 6 during the previous five years and (B) is owned by the same entity which owned the property upon which the general advertising was located at the time of the earlier violation. A repeat violation shall not include one based upon a notice of violation that was overturned by an administrative law judge or rescinded by the Planning Department under subsection (d)(1)(C) of this Section 610. A Responsible Party may seek reconsideration of a notice of violation for a repeat violation under subsection (d) of this Section 610, provided that the request for reconsideration is filed and all general advertising copy is removed prior to the Accrual Date, as defined in subsection (b)(2)(A) of this Section 610.

(3) Penalties for violations under this subsection (f) shall accrue as described in subsection (b)(2) of this Section 610, except that the amount of penalties shall be calculated as follows:

(A) **Daily Penalties.** Daily penalties shall accrue as described below, until the date that the General Advertising Sign and any associated sign structure are removed from the site, or, if the City accepts a late request for reconsideration from the Responsible Party pursuant to subsection (b)(2)(A) of this Section 610 , until the date that all copy is removed from the General Advertising Sign:

(i) On the Accrual Date, which is the first day on which penalties accrue, the daily penalty shall be the amount specified in subsection (b)(2)(B) of this Section 610 multiplied by 2.

(ii) On the second day on which penalties accrue, the daily penalty shall be the amount specified in subsection (b)(2)(B) of this Section 610 multiplied by 3.

(iii) On the third day on which penalties accrue, the daily penalty shall be the amount specified in subsection (b)(2)(B) of this Section 610 multiplied by 4.

(iv) On the fourth day on which penalties accrue and for each day thereafter for which penalties accrue, the daily penalty shall be the amount specified in subsection (b)(2)(B) of this Section 610 multiplied by 5.

(B) **Alternative Penalty.** As an alternative to the daily penalties described in subsection (f)(3)(A) of this Section 610 , all Responsible Parties may jointly opt to pay an alternative penalty, which consists of (i) the income earned by the Responsible Parties for the display of the illegal General Advertising Sign, including but not limited to revenue earned by the Sign owner or operator from advertisers or advertisement placement firms and revenue earned by the property owner or lessee from the lease or sublease of the property to the Sign owner or operator; plus (ii) an additional 20% of that total income amount. The income amount shall be calculated beginning on the Accrual Date, as defined in subsection (b)(2)(A) of this Section 610 , until the date that the General Advertising Sign and any

associated sign structure are removed from the site, or, if the City accepts a late request for reconsideration from the Responsible Party pursuant to subsection (b)(2)(A) of this Section 610 , until the date that all copy is removed from the General Advertising Sign.

To calculate this alternative penalty, the Planning Department may require that all Responsible Parties provide evidence of their income, such as a lease between the property owner and the Sign operator or Sign owner, and any agreements between the Sign owner or operator and advertisers or advertisement placement firms who have contracted to have their advertisements displayed on the Sign during the relevant time period.

(C) **Standard of Review.** Pursuant to subsection (d) of this Section 610 , a Responsible Party may request reconsideration of a notice of violation for a repeat violation by an administrative law judge. In any such proceeding, a rebuttable presumption shall exist that the penalty amount is reasonable. In reviewing a penalty imposed pursuant to subsection (f)(3) of this Section 610 , the administrative law judge shall give substantial weight to that presumption, but may consider the nature and egregiousness of the violation, the financial resources of the Responsible Party, the need to deter illegal conduct, and the Responsible Party's culpability, to determine if the penalty is excessive.

(g) **Liens.** For any penalties assessed pursuant to this Section 610 , the Director may initiate proceedings to make the payment amount due and

all additional authorized costs and charges, including attorneys' fees, a lien on the property pursuant to Chapter 100 of the Administrative Code. This subsection (g) does not apply to a notice of violation that has been overturned by an administrative law judge or rescinded by the Planning Department under subsection (d)(1)(C) of this Section 610 .

SEC. 611. GENERAL ADVERTISING SIGNS PROHIBITED.

(a) No new general advertising signs shall be permitted at any location within the City as of March 5, 2002, except as provided in Subsection (b) of this ordinance.

(b) Nothing in this ordinance shall be construed to prohibit the placement of signs on motor vehicles or in the public right-of-way as permitted by local law.

(c) **Relocation Agreements.**

(1) Nothing in this ordinance shall preclude the Board of Supervisors, upon recommendation from a department designated by the Board, from entering into agreements with general advertising sign companies to provide for the relocation of existing legally permitted general advertising signs. Any such agreements shall provide that the selection of a new location for an existing legally permitted general advertising sign be subject to the conditional use procedures provided for in Article 3 of the Planning Code.

(2) Locations where general advertising signs could have been lawfully erected pursuant to the zoning laws in effect prior to the effective date of this

ordinance may be considered as relocation sites. Future zoning laws may additionally restrict the locations available for the relocation of existing legally permitted general advertising signs.

(d) Pursuant to Subsection (c)(1) of this ordinance, the selection of a relocation site for an existing legally permitted general advertising sign shall be governed by the conditional use procedures of Section 303 of the Planning Code.

(e) Nothing in this ordinance shall preclude the Board of Supervisors from otherwise amending Article 6 of the Planning Code.

(f) A prohibition on all new general advertising signs is necessary because:

(1) The increased size and number of general advertising signs in the City can distract motorists and pedestrians traveling on the public right of way creating a public safety hazard.

(2) General advertising signs contribute to blight and visual clutter as well as the commercialization of public spaces within the City.

(3) There is a proliferation of general advertising signs visible from, on, and near historically significant buildings and districts, public buildings and open spaces all over the City.

(4) San Francisco must protect the character and dignity of the City's distinctive appearance, topography, street patterns, open spaces, thoroughfares, skyline and architectural features for both residents and visitors.

(5) There is currently an ample supply of general advertising signs within the City.