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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RITA T. HOOPER AND LOUIS G.
HOOPER AS TRUSTEES OF THE
GORDON HOOPER REAL ESTATE, INC.
EMPLOYEES' PENSION AND PROFIT
SHARING PLAN; RITA T. HOOPER,
INDIVIDUALLY; LOUIS G. HOOPER,
INDIVIDUALLY; GORDON HOOPER
REAL ESTATE, INC.,

No. Civ. S-08-0699 JAM KJM

ORDER DENYING PLAINTIFFS'
MOTION FOR WRIT OF POSSESSION
AND FOR INJUNCTIVE RELIEF

Plaintiffs,

v.

KENDRICK HOOPER,

Defendant.

KENDRICK HOOPER,

Counter-Claimant,

v.

RITA T. HOOPER AND LOUIS G.
HOOPER AS TRUSTEES OF THE
GORDON HOOPER REAL ESTATE, INC.
EMPLOYEES' PENSION AND PROFIT
SHARING PLAN; RITA T. HOOPER,
INDIVIDUALLY; LOUIS G. HOOPER,
INDIVIDUALLY; GORDON HOOPER
REAL ESTATE, INC.,

Counter-Defendants.

1 This matter comes before the Court on Plaintiffs Gordon
2 Hooper Real Estate, Inc., Rita T. Hooper, and Louis G. Hooper's
3 (collectively "Plaintiffs") motion for writ of possession
4 pursuant to California Code of Civil Procedure §§ 511.010
5 through 516.050 and California Corporations Code § 1602, as
6 those statutes are made applicable through Rule 64 of the
7 Federal Rules of Civil Procedure ("FRCP"), and for injunctive
8 relief pursuant to FRCP 65(a). Defendant Kendrick Hooper
9 ("Defendant") opposes the motion. For the reasons set forth
10 below¹, Plaintiffs' motion is DENIED.
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13 I. FACTUAL AND PROCEDURAL BACKGROUND

14 This dispute concerns Gordon Hooper Real Estate, Inc.
15 ("Hooper Real Estate") a California Corporation that was formed
16 on July 1, 1976. Plaintiffs' Memorandum of Points and
17 Authorities in Support of Pls' Motion, filed Nov. 14, 2008,
18 Docket # 17 ("Pls' Mot.") 4:8-9. From the date of incorporation
19 until disputably July 19, 2000, Plaintiff Louis G. Hooper
20 ("Gordon Hooper") was the President and Chief Financial Officer
21 of Hooper Real Estate. Id. at 4:9-11. Plaintiff Rita Hooper,
22 Gordon Hooper's wife, was the Vice President and Secretary of
23 the corporation from 1976 until July 20, 1992. Id. On July 20,
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27 ¹ Because oral argument will not be of material assistance,
28 the court orders this matter submitted on the briefs. E.D. Cal.
L.R. 78-230(h).

1 1992, Plaintiffs appointed Defendant Kendrick Hooper, Rita and
2 Gordon's son, as Vice President of the corporation. Id. at
3 4:17-18. At some point thereafter², Plaintiffs increased the
4 size of the Board of Directors to three, to include Gordon,
5 Rita, and Kendrick Hooper. Id. at 19-23. In addition, Kendrick
6 Hooper was appointed as the Chairman of the Board, President,
7 Chief Executive Officer, Treasurer, and Chief Financial Officer
8 of Hooper Real Estate. Defendant's Opposition, filed December
9 5, 2008 at Docket # 34, ("Def's Opp.") 3:6-8. Gordon Hooper
10 retired and Rita Hooper became Vice President and Secretary.
11 Pls' Mot. at 4:25-26. As of 2000, Defendant Kendrick Hooper
12 retained all corporate records, was responsible for most of the
13 corporation's business, and became the primary contact for
14 clients' real estate matters. See Id. at 4:26, 5:1-2; see also
15 Def's Opp. at 3:8-9.

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19 On April 2, 2008, Plaintiffs filed a complaint against
20 Defendant seeking a constructive trust and injunctive relief and
21 alleging breach of fiduciary duty, diversion of commissions,
22 seizure of corporate opportunity, elder abuse, and intentional
23 infliction of emotion distress. Doc. # 1. Plaintiffs allege
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27 ² The specific dates regarding Kendrick Hooper's appointment
28 to Chairman of Board, President, Chief Executive Officer,
Treasurer, and Chief Financial Officer, as well as Gordon
Hooper's date of retirement vary between Defendant and
Plaintiffs' moving papers.

1 Defendant misappropriated corporate funds by depositing
2 commissions earned by Hooper Real Estate into his personal bank
3 accounts and further, that Defendant failed to provide
4 Plaintiffs with a complete account of Hooper Real Estate
5 commissions. Plaintiffs Gordon Hooper Real Estate, Inc. and
6 Rita and Gordon Hooper, in their capacity as Officers and
7 Directors of Hooper Real Estate, assert they are entitled to
8 possession and control of the corporation's property.

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10 Plaintiffs' Reply Brief, filed December 12, 2008 at Doc. # 42,
11 ("Pls' Reply) 3:21-27, 4:1-17.³
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13 On May 13, 2008, Defendant filed his answer and counter-
14 claims, including claims for breach of fiduciary duty, removal
15 of trustees, specific performance, and *quantum meruit* for
16 reimbursement of his personal funds used to pay for the
17 corporation's expenses. Doc. # 6. Defendant contends he is
18 entitled to the funds in his personal banking accounts and has
19 provided Plaintiffs with over 4,800 pages of documents related
20 to Hooper Real Estate. Def's Opp. at 5:8-9, 6:2-5, 14:6-10.
21 Defendant also argues since May 27, 2008, he incorporated
22 Kendrick Hooper Real Estate, Inc. ("KHRE") and became the sole
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27 ³ Plaintiffs violated the Court's Scheduling Order, Doc. #
28 11, by filing a Reply Brief that is fourteen pages. The Court's
Scheduling Order limits reply memoranda to ten pages, absent
leave of court. Any future violations of this Order may result
in sanctions.

1 owner and Broker of Record. Id. at 12:19-20. Defendant claims
2 the commissions earned as owner and broker of KHRE were properly
3 deposited in his personal banking accounts and that Plaintiffs
4 have no ownership interest in the commissions. Id. at 12:20-22.
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6 In the instant motion, Plaintiffs seek a writ of possession
7 and a preliminary injunction against Defendant. Doc. # 16, 24.
8 Plaintiffs seek to enjoin Defendant from selling, conveying, or
9 encumbering two properties that Plaintiffs allege belong to
10 Hooper Real Estate, as well as mandate Defendant to permit
11 Plaintiffs to have possession to any and all assets and accounts
12 of Hooper Real Estate, to preserve all corporate books, minutes,
13 records, and related documents for Hooper Real Estate, and to
14 deposit all commissions and funds earned as a real estate agent
15 or broker, past, present, and future, into the designated bank
16 account of Hooper Real Estate. In opposition, Defendant argues
17 Plaintiffs' motion for a writ of possession and a preliminary
18 injunction against him fail as a matter of law. Doc. # 34.
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21 II. OPINION

22 A. Legal Standard

23 A writ of possession is a provisional remedy which, when
24 granted, awards the moving party temporary possession of the
25 property in question. See PMS Distributing Co., Inc. v. Huber &
26 Suhner, A.G., 863 F.2d 639 (9th Cir. 1988). The court's
27 authority to issue a writ of possession is provided in
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1 California Code of Civil Procedure Section 512.010, made
2 applicable by Federal Rule of Civil Procedure 64. Under Federal
3 Rule of Civil Procedure 64, "[a]t the commencement of and
4 throughout the action, every remedy is available that, under the
5 law of the state where the court is located, provides for
6 seizing a person or property to secure satisfaction of the
7 potential judgment." Fed. R. Civ. P. 64(a). California Code of
8 Civil Procedure § 512.010 provides, "[u]pon the filing of the
9 complaint or at any time thereafter, the plaintiff may apply
10 pursuant to this chapter for writ of possession by filing a
11 written application for the writ with the court in which the
12 action is brought." Cal. Civ. Proc. Code § 512.010(a).

15 To obtain a writ of possession under § 512.010, the moving
16 party must show: (1) he is entitled to possession of the
17 property; (2) the property is wrongfully detained by the
18 defendant; (3) a particular description of the property and a
19 statement of its value; (4) the location of the property; and
20 (5) that the property has not been taken for a tax, assessment,
21 or fine. Cal. Civ. Proc. Code § 512.010(b)(1)-(5). In
22 addition, a writ of possession shall issue only if the plaintiff
23 has established the "probable validity" that he is entitled to
24 immediate possession of the property. Id. §§ 511.090,
25 512.060(a)(1), see Western Oil Fields Supply v. Goodwin, 2008
26 U.S. Dist. LEXIS 80199 (E.D. Cal. Oct. 4, 2008), at *6. A
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1 plaintiff's claim has "probable validity" if "it is more likely
2 than not that the plaintiff will obtain a judgment against the
3 defendant on that claim. Id. § 511.090.

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5 In addition to seeking a writ of possession, the plaintiff
6 may apply for an injunction against the defendant by setting
7 forth grounds justifying the issuance of such an order. See
8 Fed. R. Civ. P. 65(a). For a moving party to prevail on its
9 request for injunctive relief, the party must either show a
10 likelihood of success on the merits of the underlying
11 controversy and the possibility of irreparable injury, or that
12 serious questions are raised and the balance of hardships tips
13 sharply in the movant's favor. See Coalition for Economic
14 Equity v. Wilson, 122 F.3d 692, 700 (9th Cir. 1997); Oakland
15 Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1376 (9th
16 Cir. 1985). Under any formulation of the test, however, the
17 moving party must demonstrate that there exists a significant
18 threat of irreparable injury. See Oakland Tribune, 762 F.2d at
19 1376. In the absence of a significant showing of possible
20 irreparable harm, the court need not reach the issue of
21 likelihood of success on the merits. See id. The loss of
22 money, or an injury whose measure of damages can be calculated
23 in terms of money, will not be considered irreparable. See id.
24 at 1334-35.

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28 B. Writ of Possession

1 Plaintiffs seek a writ of possession for nine categories of
2 property including all commissions earned by Defendant for real
3 estate transactions between the dates of January 1, 2003 and the
4 present, all funds belonging to Hooper Real Estate, all
5 corporate books and records, complete copies of listing
6 agreements, and all instructions and things necessary for
7 Plaintiffs to obtain access to two properties owned by Hooper
8 Real Estate, including but not limited to alarm security codes
9 and keys. Pl's Mot. 2:1-27, 3:1-18. To obtain a writ of
10 possession for these requested items, Plaintiffs must show: (1)
11 they are entitled to possession of the property through either
12 an ownership or security interest; (2) the property is
13 wrongfully detained by Defendant; and (3) there is a "probable
14 validity" that Plaintiffs are entitled to immediate possession
15 of the property. Cal. Civ. Proc. Code §§ 511.090,
16 512.010(b)(1)-(2).
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20 Here, Plaintiffs have failed to meet the statutory
21 requirements for issuance of a writ of possession because they
22 fail to meet the first prong of the test, to show an entitlement
23 to possession of the property. See Id. § 512.010(b)(1). First,
24 Plaintiffs have not established with probable validity that they
25 are entitled to immediate possession of all funds, commissions,
26 documents, listing agreements, and other requested property
27 items belonging to KRHE. On May 27, 2008, Defendant became the
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1 sole owner and broker of record for KHRE, a separate legal
2 entity from Hooper Real Estate. Defs' Opp. at 12:19-20.
3 Despite Plaintiffs' lack of ownership in KHRE, they seek
4 possession of KHRE corporate books and records, transaction
5 documents, listing agreements, and commissions. Def's Opp. at
6 12:19-22. At this point in the litigation there remain factual
7 disputes as to whether Defendant has usurped a corporate
8 business opportunity by opening a competing business and if so,
9 what amount of commissions and funds from these real estate
10 transactions are owing to Plaintiffs. Thus, although Plaintiffs
11 argue Defendant usurped a Hooper Real Estate business
12 opportunity by opening KHRE and that they are entitled to
13 recover all documents and profits from these transactions,
14 Plaintiffs have not demonstrated to the Court that "they are
15 more likely than not" to obtain a judgment against Defendant as
16 required by statute. See id. at § 511.090. Moreover,
17 Plaintiffs have failed, pursuant to Cal. Civ. Proc. Code §
18 512.010(b)(3), to provide the Court with a particular
19 description and statement of the value of the property they seek
20 from KHRE. As such, Plaintiffs have failed to meet the
21 statutory requirements for a writ of possession.
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24 Plaintiffs also seek immediate possession of property
25 belonging to Hooper Real Estate. Although Plaintiffs claim they
26 are entitled to possession of all corporate commissions earned
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1 by Defendant and all funds, property, listing agreements, and
2 documents relating to Hooper Real Estate, Plaintiffs have again
3 failed to meet the statutory requirements with respect to Hooper
4 Real Estate property. See Cal. Civ. Proc. Code § 511.090,
5 512.010(b)(1)-(5). Plaintiffs have not provided the Court with
6 a title deed to the corporate property, they have not presented
7 evidence that the property is being wrongfully withheld by
8 Defendant, and they have failed to show a probable validity that
9 they are entitled to immediate possession of such property as
10 required by the statute. See id., Cf. Western Oil Fields, 2008
11 U.S. Dist. LEXIS 80199, at *7-9 (Plaintiffs established the
12 probable validity of their claim by presenting evidence of a
13 balance due in a specific amount of money and a contractual
14 agreement). In the instant motion, Plaintiffs simply identify
15 commissions paid to Defendant totaling \$858,129.87, however they
16 fail to show an agreement, contract, or documentation that
17 entitles them to possession of these commissions. Pls' Mot. at
18 7:8-27 through 9:1-20. Defendant maintains that as the Broker
19 of Record he was entitled to the standard commission-split of
20 ninety-two percent of any real estate transactions and that the
21 remainder of the commissions were allocated toward Hooper Real
22 Estate expenses. Defs' Opp. 16:2-15. Because Plaintiffs have
23 failed to establish that they are entitled to possession through
24 an ownership or security interest and further, have failed to
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1 provide the Court with a particular description and statement of
2 the value of the property they seek from Defendant, Plaintiffs
3 have failed to meet the statutory requirements of Cal. Civ.
4 Proc. Code § 512.010(b). Accordingly, Plaintiffs are not
5 entitled to a writ of possession.
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7 Finally, Plaintiffs argue they are entitled to a writ of
8 possession under California Corporations Code Section 1602.
9 Section 1602 provides, "[e]very director shall have the absolute
10 right at any reasonable time to inspect and copy all books,
11 records and documents of every kind and to inspect the physical
12 properties of the corporation of which such person is a
13 director." Cal. Corp. Code § 1602. Here, Plaintiffs Rita and
14 Gordon Hooper, as members of the Board of Directors, have a
15 right under Section 1602 to inspect and copy corporate records
16 and documents as well as to inspect the Hooper Real Estate
17 property. However, Section 1602 does not afford Plaintiffs the
18 right to possession of corporate documents, records, or
19 property. See Jara v. Suprema Meats, Inc., 121 Cal. App. 4th
20 1238, 1263-64 (1st Dist. 2004)(holding that Section 1602 affords
21 no more than a right to inspect and copy records at the company
22 office). As noted in Jara, it would be unreasonable to construe
23 Section 1602 as requiring the corporation to assemble and
24 deliver voluminous documents upon request. Id. The potential
25 burden of such an obligation is demonstrated by the fact that
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1 Defendant produced 4,800 pages of documents dating back to
2 January 1, 2005 in accordance with Plaintiffs requested
3 documents during the discovery process. Defs' Opp. at 14:6-8.
4 Moreover, Defendant asserts he remains willing to exchange
5 documents and he has agreed not to sell or encumber the Hooper
6 Real Estate offices until after the completion of this case.
7 Id. at 9:19-20, 14:8-9. If Defendant does not produce all of
8 the documents responsive to Plaintiffs discovery requests,
9 Plaintiffs can pursue that claim through a discovery motion.
10 Accordingly, Plaintiffs have failed to show that they are
11 entitled to the provisional remedy of immediate possession of
12 the requested property and consequently, Plaintiffs' motion for
13 a writ of possession is denied.

14 C. Injunctive Relief

15 Plaintiffs seek a preliminary injunction which would
16 require Defendant to deliver to Plaintiffs all future documents
17 regarding real estate transactions, all future listing
18 agreements, and all future commissions, and to provide dual
19 signatures in order to withdraw any cash from Hooper Real Estate
20 bank accounts before trial. Defs' Opp. 16:16-24, 17:1-5. To be
21 successful on their request for a preliminary injunction
22 Plaintiffs must, at a minimum, demonstrate that they will be
23 exposed to irreparable harm. Oakland Tribune, 762 F.2d at 1376.
24 A preliminary injunction is a very far reaching power never to
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1 be indulged except in a case clearly warranting it, Dymo Indus.
2 v. Tapeprinter, Inc., 326 F.2d 141, 143 (9th Cir. 1964), and
3 therefore will not issue unless necessary because threatened
4 injury would impair the court's ability to grant effective
5 relief in a pending action. Sierra On-Line, Inc. v. Phoenix
6 Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984).

8 To show there is a substantial threat of suffering
9 irreparable harm, Plaintiffs must show an immediate threat of
10 injury. Caribbean Marine Serv. Co., Inc. v. Baldrige, 844 F.2d
11 668, 674 (9th Cir. 1988). Speculative injury does not
12 constitute irreparable injury sufficient to warrant granting a
13 preliminary injunction. Id. The threat of harm must be
14 imminent to satisfy this requirement; it cannot be a past
15 exposure to harm or a threat of irreparable harm at some point
16 in the indefinite future. See City of Los Angeles v. Lyons, 461
17 U.S. 95, 102 (1983), see also Midgett v. Tri-County Metro.
18 Transp. Dist. Of Oregon, 254 F.3d 846, 850-51 (9th Cir. 2001).

21 In addition to showing irreparable injury, Plaintiffs must
22 demonstrate that legal remedies are inadequate. Legal remedies
23 are only inadequate if the harm cited by Plaintiffs cannot be
24 redressed by a legal or equitable remedy following trial.
25 Sampson v. Murray, 415 U.S. 61, 90 (1974) (the availability of
26 money damages weighs heavily against irreparable harm); Los
27 Angeles Memorial Coliseum Comm'n v. NFL, 634 F.2d 1197, 1202
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1 (9th Cir. 1980)(lost revenues can be remedied by a money damage
2 award).

3 Here, Plaintiffs have failed to show the possibility of
4 irreparable injury because Plaintiffs' arguments for seeking a
5 preliminary injunction are based on alleged past harms committed
6 by Defendant. Plaintiffs assert Defendant has not deposited
7 real estate commissions into Hooper Real Estate's bank accounts
8 and has not paid Plaintiffs their share of the proceeds from
9 these commissions since January 1, 2006. Pls' Mot. at 9:22-27,
10 11:26-27. Plaintiffs now seek a preliminary injunction
11 mandating Defendant to deposit all future commissions into the
12 Hooper Real Estate account. Such allegations of past harm,
13 however, do not demonstrate an immediate threat of irreparable
14 injury. See City of Los Angeles, 461 U.S. at 102, see also
15 Midgett, 254 F.3d at 850-51. Moreover, even if Plaintiffs'
16 allegations are true and a judgment will render against
17 Defendant for diversion of real estate commissions, money
18 damages will be an adequate legal remedy. See Sampson, 415 U.S.
19 at 90; see also Los Angeles Memorial Coliseum Comm'n, 634 F.2d
20 at 1202. Any funds that were improperly drawn from Hooper Real
21 Estate's account and any commissions not paid to Plaintiffs, in
22 which they were entitled, can be fully remedied by a damages
23 award. Id. Thus, because Plaintiffs have not made the
24 requisite showing of irreparable harm, this Court cannot grant a
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1 preliminary injunction against Defendant. In the absence of a
2 significant showing of possible irreparable harm, the Court need
3 not reach the issue of likelihood of success on the merits. See
4 Oakland Tribune, 762 F.2d at 1376. Accordingly, Plaintiffs
5 motion for injunctive relief is denied.
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7 III. ORDER

8 For the reasons set forth above, Plaintiffs' motion for
9 writ of possession and for injunctive relief is DENIED.
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11 IT IS SO ORDERED.

12 Dated: January 20, 2009

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15 JOHN A. MENDEZ,
16 UNITED STATES DISTRICT JUDGE
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