

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MYRTLE STREET FLATS LLC,
d/b/a Sunrise Properties,

Plaintiff,

v.

CITY OF VALLEJO, a public
entity, et al.,

Defendants.

No. 2:17-cv-1662-JAM-KJN

**ORDER RE MOTION FOR PRELIMINARY
INJUNCTION AND MOTION TO DISMISS**

Myrtle Street Flats LLC ("Plaintiff"), doing business as Sunrise Properties, owns multiple properties in downtown Vallejo. Plaintiff embarked on a project to transform those properties into live/work spaces following passage of a city ordinance permitting such use. Plaintiff now sues the City of Vallejo, Vincent Sproete, Jack McArthur, Daniel E. Keen, Lonell Butler, Robert Chambers, and Michelle Hightower (collectively "City Defendants"), as well as Emergency Construction Services ("ECS"), for constitutional violations and declaratory relief due to the Fire Department officials' decision to evacuate and red tag two of the properties and notice the other properties for evacuation.

1 Plaintiff seeks a preliminary injunction enjoining Vallejo
2 from evacuating the noticed properties and permitting Plaintiff
3 to operate all of the properties. For the reasons set forth
4 below, Plaintiff's motion for preliminary injunction is DENIED in
5 part and GRANTED in part. Additionally, the Court DISMISSES all
6 the individuals Plaintiff sued in their official capacity.

7
8 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

9 Plaintiff alleges the following facts:

10 Vallejo passed a city ordinance allowing live/work
11 occupancies in 2001 and Plaintiff worked with the city to
12 determine what guidelines would apply to these unique
13 occupancies. Compl. ¶¶ 16-17. Plaintiff began transforming
14 units located at 616, 620, 624, 628, and 630 Marin St., and 405
15 and 409 Virginia St., (collectively "Subject Properties") into
16 spaces for live/work use. Id. at ¶¶ 15, 19. In 2003, Plaintiff
17 and Vallejo got into a dispute over the business licensing
18 requirements for the units, which culminated in a letter, dated
19 September 8, 2004, from then-Chief Building Official Leon McNeil,
20 identifying three requirements for Plaintiff to meet for the
21 units to "be occupied in compliance with the Vallejo Building
22 Code." Id. at ¶¶ 21-22. On April 27, 2007, Vallejo issued final
23 approvals for the permits governing the work performed pursuant
24 to the McNeil letter, plus the re-roofing Vallejo had also
25 indicated would be necessary. Id. at ¶¶ 26-27. Plaintiff
26 completed additional work that Vallejo "demanded" in 2012 and
27 received final approval from the City that year. Id. at ¶¶ 28-
28 30.

1 During that period, Plaintiff also restored the Subject
2 Property's historic façade and original design. Id. at ¶ 23.
3 The Subject Property had previously been identified as a
4 structure of individual importance, if restored, in the 2005
5 Downtown Specific Plan. Id. at ¶ 24. Plaintiff contends this
6 work qualifies the building for protection under the California
7 Historic Building Code. Id. at ¶ 31.

8 Plaintiff's recent troubles began with an unwelcome guest
9 (Ms. Cote) who would not vacate the premises of 616 Marin despite
10 efforts of the master lessee to evict her. Id. at ¶ 33. During
11 this time, on March 23, 2017, fire inspector William Tweedy
12 prepared a "Fire & Life Safety Inspection Report" identifying
13 eight issues that required attention for 616 Marin, along with
14 several issues with the other units. Id. at ¶ 36. The work was
15 completed and Tweedy provided fire clearance to all seven units
16 on April 7, 2017. Id. Contending that the Subject Property had
17 undergone a change in use, Vallejo then issued a separate list of
18 requirements based on the 2016 building and fire codes "in a
19 letter [dated March 27, 2017] signed by Sproete and reflecting
20 involvement of McArthur and Butler." Id. at 37. The letter set
21 a June 1st compliance deadline. Id. at ¶ 38. Plaintiff believes
22 these codes are inapplicable to the Subject Property. Id. at
23 ¶ 37.

24 Vallejo evicted the 616 Marin tenant and guests on May 23,
25 2017, and red-tagged the unit, preventing Plaintiff from entering
26 the premises and hiring Defendant ECS to board it up. Id. at
27 ¶¶ 38-39. Apparently, on May 22, 2017, Ms. Cote set a small fire
28 in the kitchen of this unit. Id. at ¶ 33. Her complaints led to

1 the May 23rd inspection that, in turn, led to the declaration
2 that the unit was unsafe. Id. at ¶¶ 33-35. Plaintiff believes
3 Vallejo officials, including Sproete, encouraged Ms. Cote to
4 manufacture safety concerns. Id. The red-tagging and boarding
5 up of 616 Marin caused damage to the doors and frames and the
6 termination of services caused rotting food in refrigerators.
7 Id. at ¶ 39. Vallejo continued to deny Plaintiff access to the
8 property after being informed that the tenant had terminated his
9 tenancy and the unit was vacant. Id.

10 On May 31, 2017, Vallejo also red-tagged and boarded up 624
11 Marin, without any notice to Plaintiff. Id. at ¶¶ 40-41.
12 Although Plaintiff assured Vallejo the unit was vacant commercial
13 space, Vallejo premised its actions on the fact that an
14 individual was observed residing in the unit. Id. at ¶¶ 40-42.
15 Plaintiff had not authorized anyone to reside in the unit, had
16 shut off water service to the unit during its vacancy, had not
17 charged or collected rent from any person during the vacancy, and
18 had been close to entering a lease with a commercial tenant. Id.
19 at ¶¶ 41-43.

20 The following month, Vallejo issued evacuation notices,
21 signed by Sproete and McArthur, to the tenants at the five
22 occupied live/work storefronts at 620, 628, and 630 Marin and 405
23 and 409 Virginia (collectively "Occupied Units"). Id. at ¶ 46.
24 The notices rely upon 2016 code requirements that, Plaintiff
25 believes, do not apply to the units and contain additional
26 unsupported demands. Id. "The evacuation notices purport to
27 authorize Vallejo to evict all tenants at the Subject Property
28 and to seize it in its entirety with no notice or opportunity to

1 be heard[,] . . . and remain in effect to this day[.]” Id. at
2 ¶¶ 47, 52. Vallejo allegedly has refused to respond to
3 Plaintiff’s questions, observations, and requests relating to
4 these notices. Id. at ¶ 46.

5 On June 30, 2017, Vallejo issued administrative notices for
6 all Subject Property units, other than 624 Marin, on behalf of
7 Hightower, Sproete, and Butler. Id. at 48. The notices also
8 cite to the 2016 code requirements as well as non-safety
9 concerns. Id.

10 Plaintiff sent a letter to Vallejo on July 10, 2017,
11 asserting violations of its rights and, on July 14, 2017,
12 requested a hearing to challenge the building code violations
13 cited in the notices. Id. at ¶ 49. Vallejo denied the hearing
14 request and summarily denied Plaintiff’s other assertions in (a)
15 letter(s) dated July 18, 2017. Id. at ¶¶ 50-51. Although
16 Vallejo purportedly authorized Plaintiff to possess and control
17 616 and 624 Marin, it has not authorized Plaintiff to use either
18 space the way Plaintiff intends without costly alterations and
19 payment of civil fines and charges, including ECS’s fees. Id. at
20 ¶ 53. On August 2, 2017, Vallejo and Sproete issued
21 administrative citations against Plaintiff alleging the Occupied
22 Units must have fire sprinklers, unspecified changes to egress,
23 and unspecified changes to smoke alarms. Id. at ¶ 54.

24 Plaintiff filed its Complaint in this Court asserting five
25 claims: (1) Unreasonable seizure under the Fourth and Fourteenth
26 Amendments; (2) Violation of Due Process under the Fifth and
27 Fourteenth Amendments; (3) Declaratory Relief; (4) Inverse
28 Condemnation under the Fifth Amendment; and (5) Inverse

1 Condemnation under the California Constitution. Plaintiff moved
2 for a preliminary injunction, ECF Nos. 4 & 9, and City Defendants
3 moved to dismiss, ECF No. 12. The parties came before the Court
4 for a hearing on the pending motions on November 7, 2017. ECF
5 No. 25. The Court ruled on the motion to dismiss, but permitted
6 Plaintiff to further brief the question of whether the
7 individually named City Defendants sued in their official
8 capacities should be dismissed from the lawsuit. The Court also
9 gave the parties an opportunity to resubmit proposed orders for
10 the preliminary injunction. The Court took the preliminary
11 injunction motion under submission.

12 II. OPINION

13 A. Legal Standard

14 "To obtain a preliminary injunction, a party must show that
15 'he is likely to succeed on the merits, that he is likely to
16 suffer irreparable harm in the absence of preliminary relief,
17 that the balance of equities tips in his favor, and that an
18 injunction is in the public interest.'" Friends of the Wild Swan
19 v. Weber, 767 F.3d 936, 942 (9th Cir. 2014) (quoting Winter v.
20 Natural Res. Def. Council, 555 U.S. 7, 20 (2008)). "If a
21 plaintiff can only show that there are 'serious questions going
22 to the merits'—a lesser showing than likelihood of success on the
23 merits—then a preliminary injunction may still issue if the
24 'balance of hardships tips sharply in the plaintiff's favor,' and
25 the other two Winter factors are satisfied." Id. (citations
26 omitted). "Serious questions" are ones "as to which the moving
27 party has 'a fair chance of success on the merits.'" Sierra On-
28 Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th

1 Cir. 1984) (citing Benda v. Grand Lodge of the Int'l Ass'n of
2 Machinists, 584 F.2d 308, 315 (9th Cir. 1978)).

3 B. Judicial Notice and Evidentiary Objections

4 Both parties submitted exhibits and declarations for the
5 Court's review. ECF Nos. 5-8, 19. City Defendants objected to
6 the declarations of Alan Wofsy and George Leake. ECF No. 19-3.
7 They contend Mr. Wofsy's declaration is argumentative and that
8 many of his statements lack foundation. As the Court indicated
9 at the hearing, portions of Mr. Wofsy's declaration are
10 argumentative. But, rather than ruling on each individual
11 objection, the Court has self-policed in reviewing and
12 considering its contents. The Court did not find merit to the
13 objection for lack of foundation because Mr. Wofsy has personal
14 knowledge of the facts to which he attested. The Court
15 approached Mr. Leake's declaration similarly. The Court's ruling
16 on the motion does not rely upon any of the declarants'
17 statements that are argumentative or lack foundation.

18 C. Analysis

19 This case presents unique legal and factual circumstances.
20 Neither party directed the Court to a case with analogous facts
21 and theories of relief. The merits analysis, thus, does not
22 clearly favor either party. The Court's analysis, instead, turns
23 on whether Plaintiff has shown irreparable harm is likely in the
24 absence of a preliminary injunction with respect to the units.

25 1. 616 Marin and the Occupied Units

26 Plaintiff argues that a loss of interest in real property,
27 even rental rights, constitutes an irreparable injury. Mot. at
28 22. City Defendants concede that deprivation of property

1 interests constitutes irreparable harm, but argue that the
2 doctrine of unclean hands bars relief. Opp'n at 19. Plaintiff
3 concedes that it has access to its properties and thus the only
4 present deprivation to Plaintiff is rental income. See Mot. at
5 10-11. If City Defendants evict tenants from the Occupied Units,
6 the same deprivation will result.

7 The Court finds Plaintiff's lost rental income does not
8 constitute irreparable harm. "[E]conomic injury alone does not
9 support a finding of irreparable harm[] because such injury can
10 be remedied by a damage award." Rent-A-Center, Inc. v. Canyon
11 Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir.
12 1991). Lost rental income may be remedied through damages and,
13 therefore, is not irreparable harm. See Gerber-Williams v.
14 Aurora Loan Services, LLC, No. C11-5393BHS, 2011 WL 2357644, at
15 *2 (W.D. Wash. June 13, 2011) (finding the loss of rental income
16 is not irreparable harm); Park v. Wachovia Mortg., FSB, No.
17 10CV1547-WQH-RBB, 2010 WL 5088826 (S.D. Cal. Dec. 7, 2010)
18 (same); Rhodes v. Wells Fargo Home Mortg., Inc., No. 09-CV-1042 W
19 (CAB), 2009 WL 10672064 (S.D. Cal. June 3, 2009) (same). The
20 Court cannot award preliminary relief on this basis.

21 Plaintiff also argues that City Defendants' conduct harms
22 Plaintiff's business reputation as landlord of the Subject
23 Properties. With respect to 616 Marin Street and the Occupied
24 Units, Plaintiff only offers Mr. Wofsy's conclusory statements in
25 support. See Wofsy Decl. ¶ 56. "Although evidence of loss of
26 control over business reputation and damage to goodwill could
27 constitute irreparable harm, the moving party may not rely on
28 unsupported and conclusory statements regarding harm the party

1 might suffer." iFreedom Direct Corp. v. McCormick, No. SACV 16-
2 470-JLS (KESx), 2016 WL 9049647, at *5 (C.D. Cal. June 15, 2016)
3 (quoting Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc, 736
4 F.3d 1239, 1250 (9th Cir. 2013)) (internal quotation marks
5 omitted). The Court finds Plaintiff's evidence fails to
6 establish that irreparable harm to its business reputation and
7 goodwill is likely rather than speculative as to these units.

8 2. 624 Marin Street

9 In contrast, the Court finds the evidence sufficient to
10 support an injunction with respect to 624 Marin.

11 First, Plaintiff has at least a fair chance of success on
12 the merits on his claims regarding this unit. While the
13 residential use Mr. Sproete observed during his inspection may
14 have justified an emergency evacuation, City Defendants have
15 failed to justify the continued deprivation and limitations on
16 use of this property. See Wofsy Decl. ¶ 38, Exh. X (giving all
17 units, including 624 Marin, fire clearance after the April 7,
18 2017, re-inspection). The property is a commercial unit and the
19 additional requirements City Defendants have sought to impose on
20 the unit pertain to residential units or units that have
21 undergone a change in use. See Wofsy Decl. ¶¶ 44-50, Exh. Y
22 (letter regarding all units, indicating that because the units
23 are being used for residential purposes, they must meet 2016 code
24 requirements); Sproete Decl. ¶¶ 9-10 (attesting that he noticed
25 emergency summary abatement for 624 Marin and secured the
26 property after observing individuals residing there), Exh. A
27 (Fire & Life Safety Inspection Report listing 624 Marin as "Type
28 of Business: B - vacant store"), Exh. C (Emergency Summary

1 Abatement notice for 624 Marin, noting a change in use due to
2 residential occupancy and additional requirements). The evidence
3 shows Plaintiff has a fair chance of success in prevailing on its
4 claims with respect to 624 Marin Street. See Sierra On-Line,
5 Inc., 739 F.2d at 1421.

6 Second, Plaintiff has shown that irreparable harm is likely.
7 Plaintiff has already missed out on business opportunities,
8 including signing a lease with a commercial tenant and securing a
9 business license, due to City Defendants actions. See Wofsy Decl.
10 ¶¶ 44-50. The restrictions on the unit continue to preclude such
11 opportunities. Id. Although lost rental income is quantifiable
12 in damages, harm to potential business relationships and lost
13 business opportunities—in the present circumstances—are not. See
14 Celsis In Vitro, Inc. v. CellzDirect, Inc., 664 F.3d 922 (Fed.
15 Cir. 2012) (affirming district court's finding of irreparable
16 harm based on price erosion, damage to ongoing customer
17 relationships, loss of customer goodwill, and loss of business
18 opportunities).

19 Finally, the balance of the equities and public interest
20 favor issuing a preliminary injunction. The emergency situation
21 abated when the City evicted the occupants from the premises.
22 See Sproete Decl. ¶ 9; Wofsy Decl. ¶ 50. City Defendants have
23 offered no other evidence that the unit is a residential space
24 that should be subject to the same requirements as the other
25 units or that the unit otherwise contains fire hazards. See
26 Wofsy Decl. Exh. X (giving the unit fire clearance). As long as
27 this situation persists, the property will remain a vacant space
28 instead of housing a business that Vallejo residents can

1 frequent. Wofsy Decl. ¶ 49. Defendants have failed to show any
2 justification for keeping the property in this state. The Court
3 finds a preliminary injunction is warranted as to 624 Marin
4 insofar as Plaintiff continues to use it only for commercial
5 purposes.

6 D. Motion to Dismiss

7 At the November 7th hearing, the Court ruled on Defendants'
8 (other than ECS) motion to dismiss. The Court affirms its ruling
9 granting this motion with respect to the Occupied Units on
10 Plaintiff's first, second, fourth, and fifth claims. It denies
11 the motion with respect to 616 and 624 Marin on all claims (other
12 than Plaintiff's Fifth Amendment due process claim which is
13 dismissed because Defendants are not federal actors). The Court
14 also denies the motion to dismiss with respect to the Occupied
15 Units on the third claim for declaratory relief. The Court
16 permitted Plaintiff to submit additional briefing on whether the
17 individual defendants sued in their official capacity should be
18 dismissed from the action. Plaintiff did not submit further
19 briefing on the issue. ECF No. 28.

20 Official-capacity suits are treated as suits against the
21 entity. See Herrera v. City of Sacramento, No. 2:13-cv-00456
22 JAM-AC, 2013 WL 3992497, at *3 (E.D. Cal. Aug. 2, 2013).

23 "Therefore, if individuals are being sued in their official
24 capacities as municipal officials and the municipal entity itself
25 is also being sued, then the official capacity claims against the
26 individuals are redundant and should be dismissed." Id.

27 Accordingly, the claims against the City officials in their
28 official capacities are dismissed with prejudice. This ruling

1 does not bar amendment, upon proper motion, to add any of these
2 defendants in their individual capacities at a later date.

3 III. ORDER

4 For the reasons set forth above, the Court GRANTS
5 Plaintiff's Motion for Preliminary Injunction in part:

6 During the pendency of this litigation, Defendant City of
7 Vallejo is ORDERED AND ENJOINED to remove the Emergency Summary
8 Abatement issued concerning 624 Marin on May 31, 2017, to restore
9 utility service to 624 Marin, and to take no further action to
10 enforce that Emergency Summary Abatement or otherwise to
11 interfere with Sunrise's commercial use and enjoyment of that
12 property based on that Emergency Summary Abatement or the grounds
13 stated therein without further order of this Court. This order
14 does not prohibit the City of Vallejo from the ordinary
15 enforcement of applicable law with respect to this property based
16 on facts arising subsequent to the issuance of this order and
17 consistent with the City of Vallejo's legal and constitutional
18 obligations.

19 The remainder of Plaintiff's Motion is DENIED.

20 Defendants Motion to Dismiss is GRANTED in part and DENIED
21 in part as set forth above. Individual Defendants Vincent
22 Sproete, Jack McArthur, Daniel E. Keen, Lonell Butler, Robert
23 Chambers, and Michelle Hightower are hereby DISMISSED from this
24 action.

25 IT IS SO ORDERED.

26 Dated: November 27, 2017

27
28 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE