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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARK A. GRANT,

Plaintiff,

v.

MICHAEL CORRAL, et al.,

Defendants.

No. 2:19-cv-01495-MCE-CKD (PS)

ORDER AND FINDINGS AND
RECOMMENDATIONS

(ECF Nos. 47, 50)

Plaintiff Mark Grant filed this action in August 2019 against defendants the City of Sacramento and two members of the City’s code enforcement division, Michael Corral and Jose Mendez.¹ (ECF No. 1.) Plaintiff’s claims relate to defendants’ attempt to abate alleged City nuisance code violations believed to be occurring on plaintiff’s property. (See generally, ECF Nos. 1, 17.)

On December 1, 2020, defendants moved for summary judgment, with a hearing on the motion noticed for January 20, 2021.² (ECF No. 47.) Plaintiff’s opposition was due no later than January 6, 2021, fourteen days before the hearing date. See E.D. Cal. R. 230(c). Having received

¹ Plaintiff is proceeding pro se, and this action is before the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Eastern District of California Local Rule 302(c)(21).

² Defendants initially incorrectly noticed their motion for summary judgment before the assigned District Judge. (ECF No. 45.) The motion was re-noticed before the undersigned, and this order and findings and recommendations refers only to the re-noticed motion (ECF No. 47).

1 no opposition by that date, the court took the motion under submission without oral arguments.
2 (ECF No. 49.) See E.D. Cal. R. 230(c) (“No party will be entitled to be heard in opposition to a
3 motion at oral arguments if opposition to the motion has not been timely filed by that party.”).
4 Plaintiff still has filed no opposition, but on January 20, 2021, he moved to suppress the transcript
5 of his oral deposition which had been filed in support of defendants’ motion for summary
6 judgment.³ (ECF No. 50.) Upon review of the record, the court now denies plaintiff’s motion to
7 suppress the deposition transcript, and recommends granting defendants’ motion for summary
8 judgment.

9 **BACKGROUND**⁴

10 **A. City Code Enforcement Procedure**

11 The City of Sacramento’s Community Development Department oversees enforcement of
12 the City’s municipal code to promote and maintain safe and desirable living and working
13 environments within the city limits. Enforcement is complaint driven, and complaints regarding
14 conditions of residential properties are routed to the Neighborhood Code Compliance Division.
15 (ECF No. 47.3, Mendez Decl. ¶¶ 5-6.) The Neighborhood Code Compliance Division then opens
16 a code enforcement case and assigns a code enforcement officer to conduct an initial site
17 inspection to determine if a code violation exists. (Id. ¶ 7.) Upon finding a code violation, the
18 enforcement officer may (1) issue a preliminary letter to the property owner requesting voluntary
19 abatement, or (2) commence nuisance abatement proceedings by issuing a “notice of violation
20 and order to abate (notice and order).” (Id. ¶ 7.) See Sacramento City Code (“SCC”)
21 §§ 8.04.110, 8.04.120.

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23 _____
24 ³ Plaintiff noticed his motion to suppress for a hearing on March 10, 2021. The court finds it
25 unnecessary to hear oral arguments on this motion and therefore takes the matter under
26 submission for resolution in conjunction with the pending motion for summary judgment. See
27 E.D. Cal. R. 230(g) (court may order motions submitted on the record and briefs on file).

28 ⁴ In the absence of any opposition from plaintiff, the background facts and evidence are
undisputed. To the extent that any material factual dispute exists, the court resolves the dispute in
plaintiff’s favor for the limited purpose of adjudicating the pending motion for summary
judgment.

1 A notice and order must be served on the property owner and must specify (among other
2 things) the conditions that constitute the public nuisance, the action required to eliminate the
3 public nuisance, and a set date by which the owner is to abate the nuisance. SCC § 8.04.120(B)-
4 (D). Under state law, at the time the notice and order is issued the City must also record with the
5 county recorder’s office a Notice of Pending Enforcement Proceeding or Action (“NOPEA”)
6 against the subject property. Cal. Health & Safety Code §§ 17980(a), 17985(a).

7 Within 30 days of service of the notice and order, a property owner may administratively
8 appeal the notice and order by filing a written appeal and paying the filing fee. SCC § 8.04.170.
9 Failure to timely appeal makes the notice and order final, but a properly filed appeal stays all
10 enforcement of the notice and order while the appeal is pending. SCC § 8.04.170(E) (failure to
11 timely appeal “shall constitute . . . a final adjudication of the notice and order”) & (G) (stay of
12 order under appeal). A timely appeal entitles the applicant to a hearing before a hearing examiner
13 who will take testimony from the owner and other persons regarding the condition of the
14 premises. SCC §§ 8.04.170(B), 8.04.180. If preponderant evidence shows that the condition of
15 the premises indeed constitutes a public nuisance, the hearing examiner issues a final written
16 decision requiring the owner to commence and complete the nuisance abatement within a certain
17 time. SCC § 8.04.260(A). That final administrative decision is then subject to judicial review.

18 **B. Code Enforcement Against Plaintiff’s Property**

19 Plaintiff has owned the subject residential property on Regatta Drive in Sacramento since
20 1998. (ECF No. 47.4 at 6, Depo. p. 12.⁵) On July 2, 2018, the City opened a code enforcement
21 case on plaintiff’s property after receiving a complaint about the lawn, a partial fence in the front
22 yard, boats and vehicles, and junk in the yard. (ECF No. 47.3, Mendez Decl. ¶ 13.) The case was
23 assigned to code enforcement officer Michael Corral, one of the named defendants. (*Id.* ¶ 14.)
24 Corral performed an initial site inspection on August 3, 2018, and determined that the property
25 was in violation of the City code. (*Id.* ¶¶ 14-15.) Corral opted to issue a notice and order, which
26 was sent to plaintiff by certified mail on August 7, 2018 and was physically posted on the subject

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28 ⁵ For the reasons discussed below, the court denies plaintiff’s motion to suppress his deposition
testimony.

1 property on August 9, 2018 (hereafter “the Notice & Order”). (Id. ¶¶ 15-16.) The Notice &
2 Order identified five violations of the City code: accumulation of trash, junk, and debris;
3 accumulation of inoperative vehicles; maintaining a dangerous condition on the property;
4 overgrown vegetation; and improper fence maintenance. (ECF No. 47.4 at 44, Depo. Ex. 2.) For
5 these violations, the City informed plaintiff that a \$575 fee was being charged against the
6 property, and advised him of certain other associated fees.⁶ (Id. at 42.) The City also informed
7 plaintiff that it had recorded a NOPEA (referred to in the letter as a “Declaration of Public
8 Nuisance”) with the Sacramento County Recorder’s Office. (Id.; ECF No. 47.4 at 86, Depo.
9 Ex. 9.)

10 Plaintiff received both copies of the Notice & Order, although in deposition he explained
11 that the Notice & Order did not include enough information for him to address the identified
12 violations. (ECF No. 47.4 at 8-11.) Therefore, he requested clarification and evidence of the
13 code violations, filed a petition for administrative review of the violation fees, and on
14 September 6, 2018 timely filed an administrative appeal, for which he paid a \$400 filing fee.
15 (ECF No. 47.4 at 50-84, Depo. Exs. 5-7.) Plaintiff also submitted discovery requests in an effort
16 to understand the basis for the violations, but the only response he received from the City was that
17 he should await the hearing itself. (ECF No. 47.4 at 12-13, Depo. pp. 35-38.) Plaintiff’s hearing
18 was scheduled for October 24, 2018, and plaintiff received advance notice of the hearing date.
19 (ECF No. 47.3, Mendez Decl. ¶ 20; ECF No. 47.4 at 12, Depo. p. 37.)

20 On the hearing date, plaintiff was met “at the front door” of the hearing site by a City
21 representative who informed him that his case was “dropped.”⁷ (ECF No. 47.4 at 13, Depo.
22 p. 39.) Several months later, the City refunded plaintiff the \$400 appeal fee and on January 6,
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24 ⁶ Plaintiff was never actually assessed, and never paid, the fees described in the initial letter from
25 the City. (ECF No. 47.4 at 13, Depo. p. 40.)

26 ⁷ According to plaintiff, he was told the case was dropped because Michael Corral “did not show
27 up” for the hearing. (ECF No. 47.4 at 13, Depo. p. 39.) According to defendants, “the case went
28 to hearing and City staff made the decision to dismiss the case.” (ECF No. 47.3, Mendez Decl.
¶ 20.) As the reason for the case’s dismissal is immaterial to plaintiff’s claims, the court need not
resolve these slightly differing accounts.

1 2019, the City recorded a “Termination of Declaration of Public Nuisance” with the Sacramento
2 County Recorder’s Office. (ECF No. 47.4 at 13, Depo. p. 40; ECF No. 47.3, Mendez Decl. ¶ 21.)
3 The recorded Termination includes a notarized declaration by defendant code enforcement
4 manager Jose Mendez, certifying that the prior recorded Declaration of Public Nuisance “is no
5 longer in force or effect.”⁸ (ECF No. 47.4 at 85, Depo. Ex. 8.)

6 Aside from the communications described above—and two previous complaints plaintiff
7 lodged against his neighbors’ properties—plaintiff had no contact with any City enforcement
8 personnel before, during, or after the above enforcement action. (ECF No. 47.4 at 7 (Depo p. 15),
9 19 (Depo. p. 62).)

10 **C. The Instant Suit**

11 In August 2019, plaintiff filed this suit under 28 U.S.C. § 1983, alleging that the City’s
12 actions violated his rights of due process and equal protection under the law. (ECF No. 1.) On
13 January 13, 2020, plaintiff filed the operative second amended complaint. (ECF No. 17.)
14 Although that complaint displays just two formally labeled causes of action, it contains three
15 identifiable claims. First, plaintiff asserts that defendant Michael Corral violated plaintiff’s equal
16 protection rights by citing him for the five allegedly non-existent code violations, while not citing
17 any other similarly situated properties in his neighborhood. (Id. at 13-21.) Second, imbedded
18 within this cause of action, plaintiff asserts that Corral (and by extension, the City) violated
19 plaintiff’s right to procedural due process by (a) not explaining in the Notice & Order the factual
20 basis for the identified violations or listing the specific steps needed to remedy them, and
21 (b) refusing to respond to plaintiff’s requests for discovery regarding the bases for the alleged
22 violations. (Id. at 16-19; see id. ¶¶ 16, 19, 20 (referencing Corral’s alleged violations of
23 plaintiff’s “procedural due process” rights).) Third and finally, plaintiff asserts a claim of
24 “Conspiracy in Violation of Equal Protection” against defendant Jose Mendez for participating in,
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26 ⁸ Although the difference in terminology is confusing, the record confirms that the Declaration of
27 Public Nuisance is the same as the recorded NOPEA. The recorded Termination refers to the
28 same document number assigned to the NOPEA and the same filing date of August 24, 2018.
(Compare ECF No. 47.4 at 86, Depo. Ex. 9 (NOPEA), with ECF No. 47.4 at 85, Depo. Ex. 8
(Termination).)

1 or not preventing, Corral’s enforcement steps. (Id. at 21-23.) Plaintiff seeks declaratory
2 judgment, statutory damages under California Civil Code § 52.1 (the Bane Act) and California
3 Government Code § 815.6, and punitive damages.⁹ (Id. at 23-24.)

4 **DISCUSSION**

5 Defendants move for summary judgment on all claims, arguing that plaintiff has failed to
6 adduce evidence to prove the required elements of the equal protection, procedural due process,
7 and conspiracy claims. (See generally ECF No. 47.1.) Plaintiff does not oppose the motion for
8 summary judgment, and his only response has been to file a motion to suppress the transcript of
9 his oral deposition. (ECF No. 50.) Defendants oppose the motion to suppress. (ECF No. 51.)
10 Because defendants’ summary judgment motion relies upon the deposition transcript, the court
11 first addresses the motion to suppress before proceeding to the motion for summary judgment.

12 **A. Motion to Suppress Deposition**

13 On July 31, 2020, plaintiff sat for his one-and-a-half-hour deposition by defense counsel
14 in this case. (ECF No. 47.4.) Plaintiff moves, under Federal Rule of Civil Procedure 32, to
15 suppress that deposition testimony because he claims he was not afforded the opportunity to
16 review and sign his deposition transcript under Rule 30(e). See Fed. R. Civ. P. 32(d)(4).

17 Plaintiff’s moving papers consist of a notice of motion and a two-sentence declaration in
18 which plaintiff avers that, upon completion of his deposition, the deposition officer (1) “failed to
19 notify [him] in compliance with Federal Rules [sic] of Civil Procedure 30,” and (2) “failed to
20 provide [him an] opportunity to view the transcripts in compliance with Federal Rules [sic] of
21 Civil Procedure 30.” (ECF No. 50 at 2.) This is far too flimsy a basis to support suppression.

22 Rule 30(e) indeed allows for deponents to review deposition transcripts, but only “[o]n
23 request by the deponent or a party *before the deposition is completed.*” Fed. R. Civ. P. 30(e)(1)
24 (emphasis added) (“On request by the deponent or a party before the deposition is completed, the
25 deponent must be allowed 30 days after being notified by the officer that the transcript or
26 recording is available in which: (A) to review the transcript or recording; and (B) if there are

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28 ⁹ The court does not construe plaintiff’s passing reference to damages under these statutes as
asserting separate state law claims arising thereunder.

1 changes in form or substance, to sign a statement listing the changes and the reasons for making
2 them.”). Since Rule 30(e)’s amendment in 1993,¹⁰ courts have strictly enforced this procedural
3 requirement—even against pro se parties. See Rios v. Bigler, 67 F.3d 1543, 1552 (10th Cir.
4 1995) (requesting transcript review is “an absolute prerequisite to amending or correcting a
5 deposition under Rule 30(e)”); Johnson v. Cate, No. 1:10-CV-02348-LJO, 2014 WL 5877846, at
6 *2 (E.D. Cal. Nov. 10, 2014) (denying pro se motion to suppress, stating that “[p]re-filing review
7 and correction of a deposition transcript occurs only when requested before completion of the
8 deposition.”); see also Blackthorne v. Posner, 883 F. Supp. 1443, 1454 n.16 (D. Or. 1995)
9 (rejecting deponent’s errata sheet where review of transcript was not requested before
10 deposition’s completion).

11 Plaintiff does not say whether or not he requested review of the deposition transcript
12 before the deposition’s completion. Defendants say that he did not (ECF No. 51 at 3); and the
13 complete deposition transcript itself contains no such request.¹¹ And the deposition officer’s
14 certificate of accuracy—sent to defense counsel 30 days after the deposition, see Fed. R. Civ.
15 P. 30(f)(1)—makes no mention of any request for review of the transcript. (ECF No. 47.4 at 20
16 (p. 67).) Plaintiff’s failure to show satisfaction of this prerequisite, alone, is reason enough to
17 deny his motion.

18 In addition, however, plaintiff fails to identify any errors in his deposition testimony, or
19 any prejudice resulting from his inability to a conduct a review of the transcript before its filing.
20 Nothing in the record suggests an error or irregularity as to how the deposition officer transcribed
21 and prepared the testimony. And even assuming plaintiff was not (and should have been) notified
22 of the transcript’s completion and availability for review, plaintiff has not shown that the drastic
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24 ¹⁰ “Until 1993, Rule 30(e) provided that when the testimony was fully transcribed the deposition
25 must be submitted to the witness for his or her examination and read to or by the witness, unless
26 examination and reading were waived by the witness and by the parties.” Wright & Miller, 8A
Fed. Prac. & Proc. Civ. § 2118 (3d ed.).

27 ¹¹ However, at two points during the deposition, defense counsel mentioned to plaintiff that he
28 would have an opportunity to review the deposition transcript. (ECF No. 47.4 at 6 (p. 11) & 9
(p. 23).)

1 remedy of suppression is warranted. See In re Sunset Bay Assocs., 944 F.2d 1503, 1509-10 (9th
2 Cir. 1991) (sworn answers to deposition testimony are admissible on summary judgment, whether
3 deposition is signed or unsigned). Plaintiff’s minimal motion simply does not provide enough
4 evidence or argument for the court to suppress his deposition testimony. Accordingly, plaintiff’s
5 motion to suppress is denied, and the court considers that testimony in assessing defendants’
6 motion for summary judgment.

7 **B. Motion for Summary Judgment**

8 Defendants seek summary judgment in their favor on all claims, arguing that plaintiff has
9 supplied no evidence to support the allegations in the operative complaint and that his claims
10 therefore fail as a matter of law. (ECF No. 47.1 at 5-10.)

11 **Legal Standard**

12 Federal Rule of Civil Procedure 56(a) provides that “[a] party may move for summary
13 judgment, identifying each claim or defense—or the part of each claim or defense—on which
14 summary judgment is sought.” It further provides that “[t]he court shall grant summary judgment
15 if the movant shows that there is no genuine dispute as to any material fact and the movant is
16 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).¹² A shifting burden of proof
17 governs motions for summary judgment under Rule 56. Nursing Home Pension Fund, Local 144
18 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010). Under
19 summary judgment practice, the moving party:

20 always bears the initial responsibility of informing the district court
21 of the basis for its motion, and identifying those portions of “the
22 pleadings, depositions, answers to interrogatories, and admissions on
file, together with the affidavits, if any,” which it believes
demonstrate the absence of a genuine issue of material fact.

23 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ.
24 P. 56(c)). “Where the non-moving party bears the burden of proof at trial, the moving party need
25 only prove that there is an absence of evidence to support the non-moving party’s case.” In re

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27 ¹² Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10, 2010.
28 However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, “[t]he
standard for granting summary judgment remains unchanged.”

1 Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 325); see also Fed. R.
2 Civ. P. 56 advisory committee’s notes to 2010 amendments (recognizing that “a party who does
3 not have the trial burden of production may rely on a showing that a party who does have the trial
4 burden cannot produce admissible evidence to carry its burden as to the fact”).

5 If the moving party meets its initial responsibility, the opposing party must establish that a
6 genuine dispute as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith
7 Radio Corp., 475 U.S. 574, 585-86 (1986). To avoid summary judgment, the opposing party
8 must demonstrate the existence of a factual dispute that is both material, i.e., it affects the
9 outcome of the claim under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S.
10 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc., 618 F.3d
11 1025, 1031 (9th Cir. 2010), and genuine, i.e., “the evidence is such that a reasonable jury could
12 return a verdict for the nonmoving party,” FreecycleSunnyvale v. Freecycle Network, 626 F.3d
13 509, 514 (9th Cir. 2010) (quoting Anderson, 477 U.S. at 248).

14 A party opposing summary judgment must support the assertion that a genuine dispute of
15 material fact exists by: “(A) citing to particular parts of materials in the record, including
16 depositions, documents, electronically stored information, affidavits or declarations,
17 stipulations . . . , admissions, interrogatory answers, or other materials; or (B) showing that the
18 materials cited do not establish the absence or presence of a genuine dispute, or that an adverse
19 party cannot produce admissible evidence to support the fact.”¹³ Fed. R. Civ. P. 56(c)(1)(A)-(B).
20 However, the opposing party “must show more than the mere existence of a scintilla of
21 evidence.” In re Oracle Corp. Sec. Litig., 627 F.3d at 387 (citing Anderson, 477 U.S. at 252).

22 In resolving a motion for summary judgment, the evidence of the opposing party is to be
23 believed. See Anderson, 477 U.S. at 255. Moreover, all reasonable inferences that may be drawn
24 from the facts placed before the court must be viewed in a light most favorable to the opposing
25 party. See Matsushita, 475 U.S. at 587; Walls v. Cent. Contra Costa Transit Auth., 653 F.3d 963,
26 966 (9th Cir. 2011). However, to demonstrate a genuine factual dispute, the opposing party

27 ¹³ “The court need consider only the cited materials, but it may consider other materials in the
28 record.” Fed. R. Civ. P. 56(c)(3).

1 “must do more than simply show that there is some metaphysical doubt as to the material
2 facts Where the record taken as a whole could not lead a rational trier of fact to find for the
3 non-moving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 586-87 (citation
4 omitted).

5 *Analysis*

6 Through the exhibits and declarations filed in support of their motion, defendants have
7 carried their summary judgment burden by proving that “there is an absence of evidence to
8 support [plaintiff]’s case.” See In re Oracle Corp. Sec. Litig., 627 F.3d at 387. By contrast,
9 plaintiff—having provided no opposition whatsoever—has not carried his. Finding no genuine
10 dispute of material fact as to any of plaintiff’s three discernable claims, the undersigned
11 recommends granting summary judgment for defendants.

12 *1. Class-of-One Equal Protection Claim*

13 Plaintiff asserts as his primary cause of action a violation of the Fourteenth Amendment’s
14 Equal Protection Clause by defendant Michael Corral, the code enforcement officer assigned to
15 plaintiff’s code enforcement case. (ECF No. 17 at 13-21.) Plaintiff styles this as a “class of one”
16 equal protection claim. (Id. at 1, 21, 26.) The Supreme Court has recognized Fourteenth
17 Amendment “equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that
18 [h]e has been intentionally treated differently from others similarly situated and that there is no
19 rational basis for the difference in treatment.” Vill. of Willowbrook v. Olech, 528 U.S. 562, 564
20 (2000) (per curiam). This is precisely what plaintiff asserts in his complaint. (See ECF No. 17
21 at 21 (alleging that Corral, on behalf of the City, “intentionally treated [plaintiff] differently from
22 others similarly situated,” without a rational basis for the difference in treatment).) But
23 defendants’ motion, nevertheless, treats this claim exclusively as a “selective enforcement claim.”
24 (ECF No. 47.1 at 5-7.)

25 The elements of these two types of equal protection claims differ significantly. Unlike a
26 typical selective enforcement claim, a class-of-one claim does not depend on the plaintiff’s
27 membership in a protected class or group; rather it consists of the claim that the plaintiff was
28 intentionally singled out for differential treatment. See Lazy Y Ranch Ltd. v. Behrens, 546 F.3d

1 580, 592 (9th Cir. 2008) (noting that class-of-one claims are “unusual” because the plaintiff “does
2 not allege that the defendants discriminate against a group with whom she shares characteristics,”
3 but rather that the defendants arbitrarily targeted her in particular). According to the Ninth
4 Circuit, to prevail on a class-of-one claim, a plaintiff must demonstrate that the governmental
5 defendants: “(1) intentionally (2) treated [plaintiff] differently than other similarly situated
6 property owners, (3) without a rational basis.” Gerhart v. Lake Cty., Mont., 637 F.3d 1013, 1022
7 (9th Cir. 2011).¹⁴

8 *a. Intentionality*

9 A class-of-one plaintiff “must show that the [state actors] intended to treat him differently
10 from other[s]” in his position. Gerhart, 637 F.3d at 1022. At the same time, such plaintiff need
11 not demonstrate that the government actors “were motivated by subjective ill will.” Id.

12 Plaintiff has failed to adduce even a scintilla of admissible evidence to suggest that
13 defendants intentionally directed differential treatment toward him. Nothing in the record
14 suggests that Corral or his manager Mendez were aware of the allegedly unenforced violations
15 plaintiff claims existed on his neighbors’ properties at the time Corral decided to cite plaintiff.
16 Cf. N. Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008) (concluding that facts
17 developed at trial did not show intentional singling out because the City “did not know [the
18 permitting condition at issue] had never been imposed on another development project”).

19 The undisputed evidence in the record demonstrates that the Notice & Order and the
20 recording of the NOPEA issued after defendants received a complaint, investigated the matter,
21 and discovered colorable violations of the City code. (See ECF No. 47.3, Mendez Decl.
22 ¶¶ 13-18.) Plaintiff provides no evidence that would raise a genuine factual dispute as to
23 defendant Corral’s awareness of how his treatment of plaintiff might differ from his treatment of
24 plaintiffs’ neighbors. No reasonable trier of fact could find that defendants intentionally directed
25 discriminatory treatment at plaintiff.

26
27 ¹⁴ As discussed below, plaintiff’s class-of-one claim fails essentially for the same reason that
28 defendants argue the claim fails under a selective enforcement theory: plaintiff provides no
evidence of differential treatment, whether viewed as a member of a class, or on his own.

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b. Unique Treatment

Plaintiff’s equal protection claim suffers most under this crucial prong of the test. A class-of-one plaintiff must show that he has been treated differently than other similarly situated individuals. Many courts have determined that this requirement should be enforced “with particular strictness when the plaintiff invokes the class-of-one theory rather than the more settled cognizable-group theory.” Warkentine v. Soria, 152 F. Supp. 3d 1269, 1294 (E.D. Cal. 2016) (citing JDC Mgmt., LLC v. Reich, 644 F. Supp. 2d 905, 926 (W.D. Mich. 2009)). “[U]nless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors.” Jennings v. City of Stillwater, 383 F.3d 1199, 1210-11 (10th Cir. 2004).

Accordingly, the Second Circuit has held that “class-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.” Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006). Similarly, the Seventh Circuit has held that a class-of-one plaintiff must be “prima facie identical in all relevant respects or directly comparable . . . in all material respects” to their comparators. United States v. Moore, 543 F.3d 891, 896 (7th Cir. 2008).

Here, plaintiff has failed to provide evidence establishing either (a) that his neighbors’ properties were never cited for similar violations, or (b) that the neighboring properties identified in his complaint were violating the City code in a manner substantially similar to plaintiff’s own cited violations. Plaintiff alleges in his complaint that five properties near his have been in violation of at least one of the same City code provisions for which he was cited—and not been cited for their violations. (ECF No. 17 at 19-21.) But the record before the court contains zero *proof* supporting these allegations. At his deposition, plaintiff admitted that he did not know for a fact that the City was not “micromanaging” other residents’ properties.¹⁵ (ECF No. 47.4 at 15-16,

¹⁵ The court finds the following dialogue particularly telling:

- A. I was being treated different from other residents.
- Q. Okay. And you believe the City was treating you differently because of what?
- A. They’re not micromanaging all the other properties.

1 Depo. pp. 49-50.)

2 Moreover, the evidence put forth by defendants largely contradicts these allegations.
3 According to the sworn declaration of Jose Mendez, the code enforcement manager, his search of
4 the City’s code enforcement cases revealed that between 2016 and February 2020 the City in fact
5 opened at least one enforcement case against most of the properties identified in plaintiff’s
6 complaint. (ECF No. 47.3, Mendez Decl. ¶¶ 22-25.) Overall, his search showed 12 code
7 enforcement cases opened for 8 properties in plaintiff’s neighborhood—excluding plaintiff’s—
8 during the same period. (Id.) Plaintiff puts forth no evidence to call Mendez’s declaration into
9 question, or otherwise demonstrate a genuine issue of material fact as to the City’s apparently
10 rather uniform enforcement of its nuisance code in plaintiff’s neighborhood. Plaintiff has failed
11 to develop the record on this point—that is, to create a triable issue of the degree of similarity
12 between his property conditions and his neighbors’ (or between the City’s treatment of those
13 properties). Based on the undisputed evidence of the City’s enforcement history, no reasonable
14 trier of fact could conclude that defendants treated plaintiff differently than other similarly
15 situated property owners.

16 *c. Rational Basis*

17 Finally, a class-of-one plaintiff must demonstrate that the state actors lacked “a rational
18 basis for treating [plaintiff] differently.” Gerhart, 637 F.3d at 1022-23 (emphasis omitted).
19 Having just concluded that there is no proof of any differential treatment, the court need not—and
20 indeed cannot—evaluate whether there was a rational basis for the alleged distinction. Id.
21 (explaining that the inquiry for this prong “turns on whether there is a rational basis for the
22 *distinction*, rather than the underlying government *action*). Accordingly, defendants are entitled
23 to summary judgment on plaintiff’s first cause of action, his class-of-one equal protection claim.

24 **2. Selective Enforcement Equal Protection Claim**

25 This first cause of action fares no better when construed as a selective enforcement claim,

26 _____
27 Q. Okay. And how do you know that?
28 A. I don’t.

(ECF No. 47.4 at 15-16, Depo. pp. 49-50.)

1 as defendants do (wrongly, in the court’s opinion). To prevail on an equal protection selective
2 enforcement claim, “a plaintiff must demonstrate that enforcement had a discriminatory effect
3 and the [enforcers] were motivated by a discriminatory purpose.” Lacey v. Maricopa Cty., 693
4 F.3d 896, 920 (9th Cir. 2012) (cleaned up). “In order to prove a discriminatory effect, the
5 claimant must show that similarly situated individuals were not prosecuted.” Id. (cleaned up).
6 And to show discriminatory motivation, the plaintiff must show that the state actor “decided to
7 enforce the law against him on the basis of an impermissible ground such as race, religion or
8 exercise of constitutional rights.” Id. (cleaned up).

9 The evidence adduced does not support either element of a selective enforcement claim.
10 As discussed, plaintiff has failed to adduce any *evidence* of others similarly situated, or a lack of
11 prosecution of those similarly situated. In addition, plaintiff does not even allege that—assuming
12 some differential treatment—he was treated differently because of some impermissible
13 discriminatory animus harbored against him.¹⁶

14 **3. Procedural Due Process Claim**

15 Defendants correctly identify within the first labeled cause of action a separate § 1983
16 cause of action for violation of the Fourteenth Amendment’s Due Process Clause. As described
17 above, at several points plaintiff alleges that defendants violated his procedural due process rights
18 by not sufficiently explaining the basis for the identified violations in the Notice & Order or in
19 response to the discovery requests. (ECF No. 17 at 16-19.)

20 “A procedural due process claim has two distinct elements: (1) a deprivation of a
21 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural
22 protections.” Roybal v. Toppenish Sch. Dist., 871 F.3d 927, 931 (9th Cir. 2017). The adequacy
23 of specific procedural protections may vary according to context. However, the Ninth Circuit has
24 explained that “[i]n the absence of extraordinary circumstances, procedural due process requires
25 notice and an opportunity to be heard before any governmental deprivation of a property interest.
26

27 ¹⁶ At his deposition, plaintiff steadfastly maintained that he “did not know” why he was being
28 treated differently, refusing to identify any particular type of impermissible discrimination at
play. (ECF No. 47.4 at 16, Depo. pp. 52-53.)

1 The form which those procedural protections must take is determined by an evaluation of all the
2 circumstances and an accommodation of competing interests.” Tom Growney Equip., Inc. v.
3 Shelley Irr. Dev., Inc., 834 F.2d 833, 835 (9th Cir. 1987) (citing Boddie v. Connecticut, 401 U.S.
4 371, 379 (1971)); see also McBride Cotton and Cattle Corp. v. Veneman, 290 F.3d 973, 982 (9th
5 Cir. 2005) (“Generally, the Due Process Clause requires ‘that individuals receive notice and a
6 meaningful opportunity to be heard before the government deprives them of property.’”) (quoting
7 James Daniel Good Real Prop., 510 U.S. 43, 48 (1993)).

8 The evidence before the court demonstrates that plaintiff cannot satisfy either element of a
9 procedural due process claim. First, the evidence does not show that plaintiff was deprived of
10 any property interest. He never paid the fines initially imposed with the Notice & Order (ECF
11 No. 47.4 at 13, Depo. p. 40); the City refunded his \$400 appeal filing fee (id.); and plaintiff
12 incurred no other fees in opposing the administrative enforcement action (ECF No. 47.4 at 17,
13 Depo. p. 54). The administrative enforcement case was dismissed before any hearing occurred,
14 and hence without the Notice & Order ever becoming final. (ECF No. 47.3, Mendez Decl. ¶ 20.)
15 See SCC § 8.04.280 (stating that a notice and order “become[s] final by failure to file a timely
16 appeal or after [the] hearing examiner’s decision on appeal is rendered”).

17 At most, plaintiff was practically restrained from selling his property while the NOPEA
18 (or *lis pendens*, in legal terms) was recorded against it for about four months from August 24,
19 2018 until January 6, 2019. (ECF No. 47.4 at 85-86, Depo. Exs. 8 & 9.) See Amalgamated Bank
20 v. Superior Court, 149 Cal. App. 4th 1003, 1011 (Cal. Ct. App. 2007) (“A *lis pendens* notice acts
21 as a cloud against the property, effectively preventing sale or encumbrance until the litigation is
22 resolved or the *lis pendens* is expunged.”) (cleaned up). But the majority view is that the filing of
23 a *lis pendens*—which imposes no *legal* restriction on the owner’s use of the property or right to
24 dispose of it—does not “deprive” the owner of the property for purposes of the Due Process
25 Clause. See Lemad Corp. v. Calfee, No. CV 08-0923-PHX-ECV, 2010 WL 11519238, at *4 (D.
26 Ariz. Feb. 23, 2010) (“Filing a *lis pendens* does not [a]ffect property interests enough to implicate
27 the Due Process Clause.”), aff’d, 461 F. App’x 576 (9th Cir. 2011); see also Diaz v. Paterson, 547
28 F.3d 88, 98 (2d Cir. 2008) (explaining that the effect of a *lis pendens* is “simply to give notice to

1 the world of the remedy being sought” in a pending lawsuit); United States v. Register, 182 F.3d
2 820, 837 (11th Cir. 1999) (“[A] filing of a *lis pendens* . . . does not constitute a ‘seizure’ and does
3 not affect property interests to an extent significant enough to implicate the Due Process Clause
4 of the Fifth Amendment.”) Without such a deprivation, plaintiff’s procedural due process claim
5 cannot succeed.

6 Second, even assuming there was a deprivation of property worked by the *lis pendens*
7 temporary practical restraint on the sale of plaintiff’s property, plaintiff has not identified how the
8 enforcement process was constitutionally inadequate in this case. “Generally, the Due Process
9 Clause requires that individuals receive notice and a meaningful opportunity to be heard before
10 the government deprives them of property.” McBride Cotton, 290 F.3d at 982 (cleaned up). That
11 is precisely what plaintiff was afforded here. In fact, plaintiff invoked the very procedural
12 protections afforded in the City’s nuisance code—namely the right to appeal a notice and order—
13 to successfully have his case dismissed, and thereby avoided any property deprivation.

14 The main concern underlying plaintiff’s procedural due process claim is that the Notice &
15 Order did not adequately advise him of the factual basis for each of the five cited violations.
16 (ECF No. 17 at 16-17; ECF No. 47.4 at 8-9 (Depo. 21:24-22:9).) The court agrees that several of
17 the five violation descriptions stated in the “Correction List” provided with the Notice & Order
18 were so generic that one cannot immediately discern from them what condition must be corrected.
19 (See ECF No. 47.4 at 44, Depo. Ex. 2 (describing one violation as “Cease maintaining any
20 dangerous, unsightly, or blighted condition which is detrimental to the health, safety, or welfare
21 of the public” and repeating the same in the “Comments” section).) Such a vague description
22 arguably falls short of City Code section 8.04.120’s requirement that a notice and order contain a
23 statement “specifying the conditions which constitute the nuisance” and “the action required to be
24 taken to eliminate the public nuisance.” SCC § 8.04.120(B)-(C). But even assuming a violation
25 of this municipal ordinance, that would not, alone, establish a violation of federal due process.
26 See Roybal, 871 F.3d at 933 (noting that public employer’s “failure to comply with [a
27 Washington state statute] does not resolve the issue currently before us: whether [the employer]
28 violated federal due process, a question of federal, not state, law”) (citing Cleveland Bd. of Educ.

1 v. Loudermill, 470 U.S. 532, 541 (1985)). As plaintiff has not elected to advance any argument
2 on this point, beyond the allegations of his complaint, the court does not find this a sufficient
3 basis for establishing a constitutionally inadequate process. Because the evidence is insufficient to
4 satisfy either element of a due process claim, defendants are entitled to summary judgment on the
5 second cause of action as well.

6 **4. Civil Rights Conspiracy Claim**

7 Finally, there is no evidence to support plaintiff's third claim—that defendants Corral and
8 Mendez conspired to violate plaintiff's constitutional rights. (ECF No. 17 at 21-23.) “To prove
9 conspiracy between [the defendants] under § 1983, an agreement or meeting of minds to violate
10 [plaintiff's] constitutional rights must be shown,” along with a resulting “actual deprivation of his
11 constitutional rights.” Woodrum v. Woodward Cty., 866 F.2d 1121, 1126 (9th Cir. 1989). On
12 the current record, plaintiff can prove neither. There is nothing but unsupported (and conclusory,
13 for that matter) allegations of these two defendants agreeing that plaintiff's property should be
14 cited for non-existent violations. (See, e.g., ECF No. 17 ¶ 42.) And, for the reasons explained
15 above, plaintiff has established no actual deprivation of either his equal protection or due process
16 rights. Therefore, the court should grant summary judgment for defendants on this final claim.

17 **ORDER**

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff's motion to suppress his deposition testimony (ECF No. 50) is DENIED;
- 20 2. The hearing on the motion to suppress set for March 10, 2021 is VACATED; and
- 21 3. In light of the following recommendations, all motion practice in this action is STAYED
22 pending resolution of these findings and recommendations. With the exception of
23 objections to the findings and recommendations and any non-frivolous motions for
24 emergency relief, the court will not entertain or respond to any motions and other filings
25 until the findings and recommendations are resolved.

26 ///

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1 **RECOMMENDATIONS**

2 In addition, IT IS HEREBY RECOMMENDED that:

- 3 1. Defendants’ motion for summary judgment (ECF No. 47) be GRANTED IN FULL;
4 2. Judgment be entered for defendants; and
5 3. The Clerk of Court be directed to close this case.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
8 days after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
11 shall be served on all parties and filed with the court within fourteen (14) days after service of the
12 objections. The parties are advised that failure to file objections within the specified time may
13 waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th
14 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

15 Dated: February 23, 2021

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17 _____
18 CAROLYN K. DELANEY
19 UNITED STATES MAGISTRATE JUDGE

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