FILED
Superior Court of California
County of Los Angeles

SEP 27 2022

Sherri R. Carter, Executive Officer/Clerk of Court
By Leticia Gomez, Deputy

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Superior Court of California

County of Los Angeles

Department 50

GINA VIOLA, et al.

Plaintiffs,

vs.

CARUSO MANAGEMENT COMPANY, LTD., et al.

Defendants.

Case No.: 22STCV26403

Hearing Dates: September 22 & 26, 2022

Hearing Times: 2:00 p.m. and 9:30 a.m.

ORDER RE:

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Background

On August 16, 2022, Plaintiffs Gina Viola ("Viola"), Youth Climate Strike Los Angeles ("Youth Climate Strike"), and Sim Bilal ("Bilal") (collectively, "Plaintiffs") filed this action against Defendants Caruso Management Company, LTD. and GMF, LLC.[1] Caruso Management Company, LTD. and GFM, LLC are referred to jointly herein as "Defendants."

Plaintiffs' Complaint asserts causes of action for (1) violation of California Constitution, Article I, § 2 (as-applied content-and viewpoint-discrimination); and (2) violation of California Constitution, Article I, § 2 (facially unconstitutional rules and procedures for expressive activity).

In the Complaint, Plaintiffs allege that Rick Caruso ("Caruso"), a candidate running for Mayor of the City of Los Angeles, has his campaign headquartered at the Grove. (Compl., ¶¶ 19, 21-22.) The Grove, a shopping mall in the Fairfax District of Los Angeles, is one of Caruso's developments. (Compl., ¶ 19.) Defendants demand that persons seeking to engage in expressive

[1]On September 2, 2022, Plaintiffs filed an Amendment to the Complaint substituting the true name GFM, LLC in place of the incorrect name GMF, LLC.

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activity at the Grove (a) comply with the "RULES FOR NON-COMMERCIAL USE OF COMMON AREAS" (the "Rules"), and (b) comply with, complete and submit the "APPLICATION FOR ACCESS TO THE GROVE FOR NON-COMMERCIAL USE OF COMMON AREA" (the "Application"). (Comp., ¶ 30.)

On July 26, 2022, Viola completed an Application for the purpose of engaging in expressive activity at the Grove on August 9, 2022, or any date the following seven days. (Compl., ¶ 32.) Viola's Application stated that she sought to have ten to fifteen people "[m]arch in opposition to Rick Caruso's Mayor candidacy, especially with regard to his failures as President of the Police Commission." (Compl., ¶ 32.) On July 26, 2022, Bilal, on behalf of himself and Youth Climate Strike, completed an Application for the purpose of engaging in expressive activity at the Grove on August 8, 10, 13, or 14, 2022. (Compl., ¶ 33.) Bilal's Application stated that he and Youth Climate Strike sought to "[m]arch through the Grove with approximately 30–50 people opposing Rick Caruso's lack of a climate plan as part of his mayoral candidacy." (Compl., ¶ 33.) On August 3, 2022, Defendants responded to Plaintiffs denying both Applications on the ground that each request violated the Rules. (Compl., ¶ 34.)

Plaintiffs allege that the Rules and Application contain several unconstitutional provisions. (Compl., ¶ 37.) Plaintiffs also allege that Defendants allow, encourage, and facilitate noncommercial expressive activity at the Grove supportive of Caruso's candidacy for Mayor of Los Angeles, but do not allow Plaintiffs and other members of the public to engage in very similar noncommercial expressive activity at the Grove in opposition to Caruso's candidacy for Mayor. (Compl., ¶¶ 2-3.) Plaintiffs allege that because Defendants apply the Rules in a content- and viewpoint-discriminatory way, Defendants' enforcement of the Rules chills Plaintiffs' expressive activity, unlawfully constrains Plaintiffs from engaging in free speech, and otherwise prevents Plaintiffs and members of the public from exercising rights protected under state law. (Compl., ¶ 41.)

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Plaintiffs now move for an order "preliminarily enjoining Defendants and their officers, agents, employees, representatives, affiliates, and all persons acting in concert or participating with them, from prohibiting or interfering with Plaintiffs' and the general public's expressive activity in opposition to Rick Caruso's mayoral campaign on differential terms or treatment than Defendants apply to expressive activity in support of Rick Caruso's mayoral campaign." Defendants oppose.

Evidentiary Objections

The Court rules on Defendants' evidentiary objections as follows:

Objection 1: sustained as to the second and third sentences, overruled as to the first sentence.

Objection 2: sustained

Objection 3: sustained as to the third sentence, overruled as to the remainder.

Objection 4: sustained as to the fourth sentence, overruled as to the remainder.

Objection 5: overruled

Objection 6: overruled

Objection 7: overruled

Discussion

"In determining whether to issue a preliminary injunction, the trial court considers two related factors: (1) the likelihood that the plaintiff will prevail on the merits of its case at trial, and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction." (*Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171, 1177 [internal quotations omitted].) "[A]n order granting or denying a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until the merits of the action can be determined." (*White v. Davis* (2003) 30 Cal.4th 528, 554 [emphasis omitted].) "The trial court's determination must

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be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other…." (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251-1252.) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (*White v. Davis*, *supra*, at p. 554 [emphasis omitted].) The burden is on the party seeking injunctive relief to show all elements necessary to support issuance of a preliminary injunction. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

A. Likelihood of Success on the Merits

A preliminary injunction must not issue unless it is "reasonably probable that the moving party will prevail on the merits." (*San Francisco Newspaper Printing Co. v. Superior Court* (*Miller*) (1985) 170 Cal.App.3d 438, 442.) The "likelihood of success on the merits and the balance-of-harms analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary injunction." (*White v. Davis, supra,* 30 Cal.4th at p. 561.) "The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor." (*Ibid.*) However, this does not mean that a trial court may grant a preliminary injunction on the basis of the likelihood-of-success factor alone when the balance of hardships dramatically favors denial of a preliminary injunction. (*Ibid.*)

As an initial matter, Plaintiffs indicate that they seek preliminary injunctive relief only on their first cause of action for violation of California Constitution, Article I, § 2 (as-applied content-and viewpoint-discrimination), which alleges that "Defendants selectively enforce the Rules and Application against Plaintiffs' and other members of the public who seek to engage in non-commercial expressive activity at the Grove that is critical of Caruso's mayoral campaign." (Compl., ¶ 51.) Plaintiffs assert that they are likely to succeed on their first cause of action

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because the Grove's actions are viewpoint discriminatory as-applied to Plaintiff's intended speech.[2]

Article I, section 2(a) of the California Constitution provides that, "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 902, the California Supreme Court held that "the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution." The *Pruneyard* Court concluded that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Id.* at p. 910.) The Court reasoned that "[t]he California Constitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights." (*Ibid.*) The *Pruneyard* Court also noted that "[b]y no means do we imply that those who wish to disseminate ideas have free rein. We noted above Chief Justice Traynor's endorsement of time, place, and manner rules [in *In re Hoffman* (1967) 67 Cal.2d 845]." (*Ibid.*)

"Thus, [a] shopping mall is a public forum in which persons may reasonably exercise their right of free speech guaranteed by … the California Constitution. Shopping malls may enact and enforce reasonable regulations of the time, place and manner of such free expression to assure that these activities do not interfere with the normal business operations of the mall, but they may not prohibit certain types of speech based upon its content, such as prohibiting speech that urges a boycott of one or more of the stores in the mall." (*Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) 193 Cal.App.4th 168, 174-175 [internal quotations and citations omitted].) "A law found to discriminate based on viewpoint is an

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[2]The Court notes that "[o]n an as-applied challenge, the plaintiff must plead and prove the specific facts giving rise to the alleged constitutional violation. To prevail, the plaintiff must establish the particular application of the statute violates the plaintiff's constitutional rights." (*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal.App.4th 1135, 1145 [internal citations omitted].)

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egregious form of content discrimination, which is presumptively unconstitutional. At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." (*Matal v. Tam* (2017) 137 S.Ct. 1744, 1766.)

Plaintiffs provide evidence that Viola, Bilal, and Youth Climate Strike sought to engage in noncommercial expressive activity at the Grove that is critical of Caruso's mayoral campaign. (Viola Decl., ¶ 6; Bilal Decl., ¶ 4.) Viola and Bilal submitted the Grove's application – "Application for Access to the Grove for Non-Commercial Use of Common Areas," seeking to have marches with between ten and fifty people through the Grove in opposition to Caruso's campaign. (Viola Decl., ¶¶ 8-9, Ex. A; Bilal Decl., ¶¶ 6-7, Ex. A.) Viola and Bilal's applications were denied on the grounds that the applications did not comply with the Grove's rules. (Viola Decl., ¶¶ 10-11, Bilal Decl., ¶ 8.)

Plaintiffs also provide evidence that the concierge desk at the Grove displays a sign reading "Rick Caruso for Mayor. Join Our Team at CarusoCan.com." (Walker Decl., ¶ 5.) In addition, Plaintiffs provide evidence of people walking through the Grove displaying Caruso for Mayor signs without being stopped or instructed that they were not permitted to display such signs. (Spears Decl. ¶ 5; Sergienko Decl. ¶¶ 6, 8.) Plaintiffs indicate in the motion that the Grove was the site of certain events in support of Caruso's campaign, specifically, an event in which Los Angeles City Council Member Joe Buscaino dropped his own mayoral bid and endorsed Caruso, as well as the Caruso campaign's primary night election watch party. (Mot. at p. 1:26-2:28.) Plaintiffs contend that "[t]he Grove's differential treatment of pro- and anti-Caruso speech is textbook viewpoint discrimination." (Mot. at p. 5:10-11.)

Defendants counter that Plaintiffs cannot show a likelihood of success on the merits because they have not provided evidence demonstrating that Defendants engaged in viewpoint discrimination when they rejected Plaintiffs' Applications to use the Grove. Defendants provide evidence that the Grove received two applications (the "Applications") from Plaintiffs; one request sought to have "30-50 people" "[m]arch through…the Grove" and the other proposed for

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10-15 people to "march through the center." (Hutter Decl., ¶¶ 24, 25, Exs. D-E.) Defendants indicate that "[b]oth applications proposed activities that failed to comply with The Grove's Policies. For instance, the applications did not request to use one of the Policies' Designated Areas, as required, but rather proposed to have The Grove host a march through the center of the property. Inherently, a march would impede, obstruct, and interfere with patrons and tenants of The Grove, in violation of the Policies' conduct requirements. In addition, the applications proposed to have The Grove host more protesters than are allowed under the Policies." (Hutter Decl., ¶ 27.)

Defendants also contend that the bulk of Plaintiffs' proffered evidence of unequal treatment is evidence of "commercial transactions" between Defendants and the Caruso campaign. Defendants assert that "[t]he three uses of The Grove purported to be evidence of viewpoint discrimination—the endorsement event with City Council Member Joe Buscaino, the election night watch party, and the use of space at the concierge desk to distribute lawn signs—were all commercial rentals of space at The Grove that were paid for by the Campaign and that are incomparable to Plaintiffs' proposal to hold large-scale marches at The Grove free of charge." (Opp'n at p. 13:5-9.) Defendants indicate that the foregoing transactions were executed pursuant to standard contracts, fees were invoiced through Defendants' standard procedures, and the Caruso campaign paid fair market value for the space. (Watumull Decl., ¶¶ 15-17, 22.)

Plaintiffs counter that "Defendants exempt Caruso's campaign from following [the subject] policy even though a political campaign does not have a commercial purpose, while requiring strict adherence to the policy when Caruso's critics want to use the same public spaces for noncommercial expression." (Reply at p. 6:11-13.) In support of this assertion, Plaintiffs cite to *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC, supra*, 193 Cal.App.4th at pages 171-172, where the Court of Appeal considered whether "article I, section 2 of the California Constitution permits a privately owned shopping mall to enforce rules that give preferential treatment to labor speech and thereby discriminate against other types of speech." The Court of Appeal noted that the shopping mall's rules in that case "apply to

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noncommercial expressive activity such as *political* and religious speech, the request for signatures on petitions, the registration of voters and the dissemination of noncommercial leaflets or flyers." (*Id.* at p. 172 [emphasis added].) Indeed, Defendants do not appear to cite to legal authority to support their assertion that the subject political events related to the Caruso campaign are part of the "commercial operation" of the Grove.

Plaintiffs also assert that "[e]ven if Defendants' contention were correct – that their hosting political activity in the common areas of the Grove has no free speech implications because the Caruso campaign is a tenant and pays for use of the common areas – their actions would still be unconstitutional." (Reply at p. 6:16-19, emphasis omitted.) In support of this assertion, Plaintiffs cite to *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 473-474, where the Court of Appeal concluded that "the rules of a large regional shopping mall that prohibit peaceful, consensual, spontaneous conversations between strangers in common areas of the mall about topics that are not related to the activities of the mall, its tenants or the noncommercial sponsored activities of the mall or its tenants are content-based rules that do not withstand a strict scrutiny analysis." The *Snatchko* Court noted that "the Rules treat all applications for noncommercial expressive activity the same way, but the Rules are not content neutral because they prohibit or restrict speech unrelated to the mall's interests while permitting speech that is related to the mall's interest." (*Id.* at p. 487.) The *Snatchko* Court also noted that "the Rules do not apply to the mall or its merchant tenants. The mall and its tenants may engage in both commercial activity and sponsor noncommercial expressive activity with no requirement that they or the provider of their sponsored noncommercial activity submit an application for permission under the Rules." (*Id.* at p. 483.) Plaintiffs assert that the differential treatment invalidated in *Snatchko* is exactly what Defendants claim is lawful here.

Defendants also argue that granting the preliminary injunction would "chill Defendants' associational and expressive activities by compelling them to make equal opportunities available to third parties, based on their own transactions and expressive conduct, and interfere with their rights as property owners." (Opp'n at p. 14:11-13.) Defendants cite to *Pacific Gas & Electric Co.*

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v. Public Utilities Com. (1986) 475 U.S. 1, 4, where the question presented was "whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." The *Pacific Gas & Electric* Court concluded that "the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints." (*Id.* at p. 20-21.) Defendants also cite to *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo* (1974) 418 U.S. 241, which "involved a challenge to Florida's right-of-reply statute. The Florida law provided that, if a newspaper assailed a candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space." (*Pacific Gas & Electric Co. v. Public Utilities Com.*, *supra*, 475 U.S. 1, 9-10.) The *Tornillo* Court found that "the right-of-reply statute directly interfered with the newspaper's right to speak in two ways. First, the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message. The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression. [The Court] therefore concluded that a [government]-enforced right of access inescapably dampens the vigor and limits the variety of public debate." (*Pacific Gas & Electric Co. v. Public Utilities Com.*, *supra*, 475 U.S. 1, 10 [internal quotations, citations, and emphasis omitted].)

Plaintiffs counter that they "do not seek to restrict Defendants' rights to *themselves* support the Caruso campaign," but instead "claim that Defendants both allow and facilitate third-party noncommercial expressive activity in a viewpoint discriminatory way." (Opp'n at p. 2:21-23, emphasis in original.) Plaintiffs also note that in *Pruneyard*, the shopping center contended that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others," and also contended that "their First Amendment rights have been infringed in light of...*Miami Herald Publishing Co.* v. *Tornillo*,

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418 U.S. 241 (1974)." (*Pruneyard Shopping Ctr. v. Robins* (1980) 447 U.S. 74, 85, 87-88.) The United States Supreme Court in *Pruneyard* noted that "*Tornillo* struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper...the statute was found to be an intrusion into the function of editors. These concerns obviously are not present here." (*Id.* at p. 88 [internal quotations and citations omitted].) The United States Supreme Court in *Pruneyard* concluded that "neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property." (*Ibid.*)

Based on the foregoing, the Court finds that Plaintiffs have established a likelihood of success on the merits as to their first cause of action.

B. Interim Harm to the Parties

"To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis*, *supra*, at p. 554.) "In evaluating interim harm, the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the defendant is likely to suffer if an injunction is issued." (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633.)

As far as the balance of harms, Plaintiffs argue that "[t]he mayoral race...is in its final stretch. Every day that Plaintiffs are prevented from expressing their opposition to Caruso at the Grove—while the Grove allows and facilitates support for Caruso—is a lost opportunity to reach Voters ahead of the election." (Mot. at p. 9:5-9.) Plaintiffs cite to *Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439, 1465, where the Court of Appeal noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (Quoting *Elrod v. Burns* (1976) 427 U.S. 347, 373; *see also Best Friends Animal Society v. Macerich Westside Pavilion Property LLC*, *supra*, 193 Cal.App.4th at p. 185,

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"cases have repeatedly held that harms to speech rights for even minimal periods of time, unquestionably constitute[] irreparable injury supporting preliminary relief." [internal quotations omitted].)

Defendants counter that "Plaintiffs' bare assertion of constitutional injury does not satisfy their burden of showing irreparable harm given the absence of any viewpoint discrimination and Defendants' even-handed application of their Policies." (Opp'n at p. 18:7-9.) As set forth above, the Court finds that Plaintiffs have established a likelihood of success on the merits as to their first cause of action. Defendants also argue that the purported time-sensitivity of Plaintiffs' injuries is undermined by their own conduct, as Plaintiffs did not submit their Applications until more than five months after they requested a copy of the Grove's Policies. (Hutter Decl. ¶¶ 22-24.) Plaintiffs counter that "whether Plaintiffs' counsel requested updated policies from the Grove in February says nothing about Plaintiffs' choices." (Reply at p. 8:21-22, emphasis omitted.)

Defendants also assert that the injunction sought by Plaintiffs would pose clear and immediate hazards to Defendants, as it would throw into doubt the Grove's ability to implement its Policies and force the Grove to host large-scale marches, over the objections of experienced security and operations personnel who believe that such conduct would undermine the safety and well-being of tenants, patrons, and other visitors. (Hutter Decl. ¶¶ 11-13, 27-31; Watumull Decl. ¶ 30-32.) Defendants indicate that they "remain ready to work with Plaintiffs to reach a mutually agreeable solution to Plaintiffs' request, which could include making available alternative designated areas." (Opp'n at p. 19:8-9)

The Court finds that Plaintiffs have established that the balance of harms tips in their favor. Thus, the Court finds that Plaintiffs have demonstrated entitlement to injunctive relief. However, the Court agrees with Defendants that the proposed injunction is overbroad. Plaintiffs acknowledge in the reply that "Plaintiffs nowhere contest that malls are allowed to enforce

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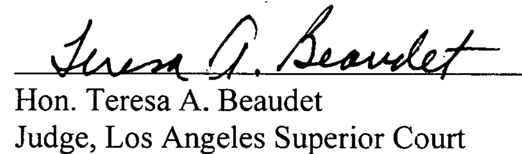
content-neutral time, place, and manner restrictions or—at least for this motion—the reasonableness of the Grove's time, place, and manner restrictions." (Reply at p. 1:26-28.)[3] The Court thus tailors the proposed language of the injunction as set forth below.

Conclusion

Based on the foregoing, Plaintiffs' motion for preliminary injunction is granted as set forth in the Preliminary Injunction filed concurrently herewith, conditional upon the posting of a bond by Plaintiffs in the amount of $400 prior to October 4, 2022.

Plaintiffs are ordered to provide notice of this ruling.

DATED: September 27, 2022



Hon. Teresa A. Beaudet
Judge, Los Angeles Superior Court

[3]The Court notes that the instant motion does not address Plaintiffs' second cause of action and thus does not contain arguments concerning the allegation that "[t]he Rules and Applications contain several provisions that violate Article I, § 2 of the California Constitution…" (Compl., ¶ 55.)

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