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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KBS HOLDCO, LLC,
Plaintiff,
v.
CITY OF WEST HOLLYWOOD, *et al.*,
Defendants.

Case No. 2:22-cv-05750-FLA (GJSx)

**ORDER GRANTING IN PART AND
DENYING IN PART THE CITY OF
WEST HOLLYWOOD’S MOTION
TO DISMISS THE FIRST AMENDED
COMPLAINT [DKT. 52]**

1 **RULING**

2 Before the court is Defendant City of West Hollywood’s (the “City”) Motion to
3 Dismiss (Dkt. 52, “Motion”) the First Amended Complaint (Dkt. 36, “FAC”).¹
4 Plaintiff KBS Holdco, LLC d/b/a Regency Outdoor Advertising (“Plaintiff” or
5 “Regency”) opposes the Motion. Dkt. 53 (“Opp’n”). On July 5, 2023, the court took
6 the Motion under submission, finding the matter appropriate for decision without oral
7 argument. Dkt. 70; *see also* Fed. R. Civ. P. 78(b); Local Rule 7-15.

8 For the reasons stated herein, the court GRANTS in part the Motion and
9 DISMISSES the third, fourth, and fifth causes of action with 21 days’ leave to amend.
10 The motion is otherwise DENIED.

11 **BACKGROUND**

12 On April 1, 2019, the City passed, approved, and adopted Ordinance No. 19-
13 1063 (the “Ordinance”), which amended sections of Title 19 of the West Hollywood
14 Municipal Code (the “Zoning Code”) and the City’s existing Sunset Specific Plan
15 regarding off-site signage in the Sunset Specific Plan Area (the “Sunset Strip”). Dkt.
16 52-4 (“Ordinance”) at 1, § 2. The amendments to the Sunset Specific Plan (the
17 “Amended Billboard Plan”) include “new standards and guidelines to regulate the
18 distribution, size, location, and operation of new and modified billboards and tall
19 walls,” and design principles intended to “ensure high-quality signage projects that are
20 creative, contextual for Sunset Boulevard, and sensitive to adjacent land uses.” *Id.*
21 Under the Amended Billboard Plan, applications for new off-site signs must be
22 “screened for design excellence in accordance with a process and procedures
23 established by the City Manager, or designee” and granted concept awards, before
24 applicants may apply for development agreements with the City. *Id.* at 11. According
25 to Plaintiff, the City Manager or his or her designees created the Sunset Arts and
26

27 ¹ The court cites documents by the page numbers added by the court’s CM/ECF
28 System, rather than any page numbers listed natively.

1 Advertising Program to conduct the screening process and delegated all discretion and
2 decision-making authority to the Design Excellence Screening Committee (the
3 “Screening Committee”). FAC ¶¶ 26–28.

4 On September 24, 2021, the City published a submission guide (the
5 “Submission Guide”) for the second round of submissions for the Sunset Arts and
6 Advertising Program (“Round 2”). Dkt. 52-5 (“Submission Guide”). Regency and
7 Defendant Orange Barrel Media, LLC (“Orange Barrel”) were among the companies
8 that submitted applications during Round 2. FAC ¶ 39. Defendant David Ehrlich
9 (“Ehrlich”) was a member of the Screening Committee. *Id.* Ultimately, both of
10 Plaintiff’s applications were denied. *Id.* ¶ 52. Plaintiff contends the screening process
11 was arbitrary and based on subjective standards for which the City provided no real
12 guidance, and that it gave the Screening Committee unbridled discretion in choosing
13 which billboard operators were allowed to apply for and obtain new billboard sites on
14 the Sunset Strip. *Id.* ¶¶ 2, 29.

15 On April 12, 2023, Plaintiff filed the operative FAC, asserting five causes of
16 action against the City for: (1) declaratory relief for violation of the First Amendment;
17 (2) injunctive relief; (3) violation of procedural due process based on a sham
18 application process; (4) violation of procedural due process for constructive
19 debarment; and (5) declaratory relief for violation of procedural due process. FAC ¶¶
20 61–97. Plaintiff also asserts six causes of action against Defendants Ehrlich and
21 Orange Barrel which are not at issue on the subject Motion. *Id.* ¶¶ 98–141.

22 **REQUEST FOR JUDICIAL NOTICE**

23 The City requests the court take judicial notice of and/or find incorporated by
24 reference: (1) provisions of the City of West Hollywood’s Municipal Code; (2) the
25 Sunset Specific Plan; (3) the Ordinance; (4) the Submission Guide; and (5) Plaintiff’s
26 Round 2 applications. Dkt. 52-7. Plaintiff does not oppose the request.

27 The court may take judicial notice of facts not subject to reasonable dispute
28 because they are either: (1) generally known within the trial court’s territorial

1 jurisdiction, or (2) capable of accurate and ready determination from sources whose
2 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). “Incorporation-by-
3 reference is a judicially created doctrine that treats certain documents as though they
4 are part of the complaint itself.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988,
5 1002 (9th Cir. 2018). A document may be deemed incorporated by reference “if the
6 plaintiff refers extensively to the document or the document forms the basis of the
7 plaintiff’s claim.” *Id.* (quotation marks omitted).

8 Having reviewed and considered the request and finding good cause therefor,
9 the court takes judicial notice of these documents and/or finds they are incorporated
10 by reference into the FAC.

11 DISCUSSION

12 **I. Legal Standard**

13 Under Fed. R. Civ. P. 12(b)(6) (“Rule 12(b)(6)”), a party may file a motion to
14 dismiss a complaint for “failure to state a claim upon which relief can be granted.”
15 The purpose of Rule 12(b)(6) is to enable defendants to challenge the legal sufficiency
16 of the claims asserted in the complaint. *Rutman Wine Co. v. E. & J. Gallo Winery*,
17 829 F.2d 729, 738 (9th Cir. 1987). A district court properly dismisses a claim under
18 Rule 12(b)(6) if the complaint fails to allege sufficient facts “to state a cognizable
19 legal theory or fails to allege sufficient factual support for its legal theories.” *Caltex*
20 *Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016).

21 “To survive a motion to dismiss, a complaint must contain sufficient factual
22 matter ... to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
23 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
24 (2007)). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
25 need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of
26 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
27 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555
28 (citations and brackets omitted). “Factual allegations must be enough to raise a right

1 to relief above the speculative level on the assumption that all the allegations in the
2 complaint are true (even if doubtful in fact).” *Id.* (citations and parentheticals
3 omitted). “Determining whether a complaint states a plausible claim for relief is ‘a
4 context-specific task that requires the reviewing court to draw on its judicial
5 experience and common sense.’” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir.
6 2016) (quoting *Iqbal*, 556 U.S. at 679).

7 When evaluating a complaint under Rule 12(b)(6), the court “must accept all
8 well-pleaded material facts as true and draw all reasonable inferences in favor of the
9 plaintiff.” *Caltex*, 824 F.3d at 1159. Legal conclusions “are not entitled to the
10 assumption of truth” and “must be supported by factual allegations.” *Iqbal*, 556 U.S.
11 at 679. The court need not accept as true allegations that contradict matters properly
12 subject to judicial notice or established by exhibits attached to the complaint.
13 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on*
14 *other grounds*, 275 F.3d 1187 (9th Cir. 2001). “Nor is the court required to accept as
15 true allegations that are merely conclusory, unwarranted deductions of fact, or
16 unreasonable inferences.” *Id.* A court must normally convert a Rule 12(b)(6) motion
17 into a motion for summary judgment under Fed. R. Civ. P. 56 if it considers evidence
18 outside the pleadings. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).
19 “A court may, however, consider certain materials—documents attached to the
20 complaint, documents incorporated by reference in the complaint, or matters of
21 judicial notice—without converting the motion to dismiss into a motion for summary
22 judgment.” *Id.* at 908.

23 **II. Analysis**

24 **A. The Amended Billboard Plan and Round 2 Submission Process**

25 The Amended Billboard Plan requires all applications for new off-site signs to
26 be “screened for design excellence” and “evaluated based on the specific design
27 principles” of:

28 ///

- 1 • Design Quality: (a) Design Excellence, (b) Innovative Design, and
- 2 (c) Context & Compatibility Design;
- 3 • Adaptable & Sustainable Strategies: (d) Adaptability and (e) Sustainable
- 4 Practice; and
- 5 • Lasting Value: (f) Economic Development and (g) Community Benefits.

6 Ordinance at 8–9, 11. Neither the Ordinance nor the Amended Billboard Plan identify
7 the weight each “design principle” should receive in the evaluation. “Qualifying
8 submissions are granted a concept award, valid for a period of 2 years, [which make]
9 the applicant eligible to apply for a development agreement.” *Id.* at 11. Applicants
10 are prohibited from erecting or installing new off-site signs absent a concept award
11 and development agreement with the City. *Id.*

12 Round 2 applications were reviewed and scored by the Screening Committee on
13 ten “evaluative criteria” stated in the Submission Guide. Submission Guide at 11.
14 Applications were required to receive an average weighted score of 225 out of 250
15 points to secure a concept award. *Id.* at 9. These criteria and their associated point
16 values were:

- 17 1) “Is the design exceptional (see Section 2.1 ‘Design Quality’ of
- 18 the 2019 Billboard Policy)” – 50 points;
- 19 2) “Does the project create a unique opportunity for the display and
- 20 experience of public art?” – 30 points;
- 21 3) “Does the project showcase a commitment and sensitivity to the
- 22 importance of diversity in the architectural design and/or
- 23 advertising industry?” – 30 points;
- 24 4) “Does the project create and sustain a positive land use outcome?
- 25 (New development project, rehab of building, preserve an
- 26 important building or use)” – 30 points;
- 27 5) “Does the project add value to the public realm, the experience of
- 28 place, and the pedestrian experience along Sunset?” – 25 points;
- 6) “Does the project create valuable signage that reinforces Sunset
- as the premier destination for creative advertising?” – 25 points;
- 7) “Does the project create positive economic development
- outcomes on the Sunset Strip?” – 25 points;

- 1 8) “Does the project align with the City of West Hollywood’s
- 2 ongoing and future initiatives toward sustainability and best
- 3 green practices?” – 15 points;
- 4 9) “Does the project build on the historic and cultural aspects of the
- 5 Sunset Strip?” – 10 points; and
- 6 10) “Is there a positive relationship between the proposed sign and
- 7 existing or other proposed signage projects?” – 10 points.

8 *Id.* at 11.

9 The Submission Guide also included an “Evaluation Criteria Explanation

10 Handout” with additional explanations for each criterion. *Id.* at 14–18. While the

11 Submission Guide stated these “criteria and weighting (points) were formulated based

12 on the policy’s design principles adopted by the City Council” (*id.* at 3), it did not

13 explain specifically how each of these criteria mapped or embodied the seven design

14 principles.

15 As the number of concept awards available during Round 2 was limited, the

16 Selection Committee granted concept awards only to those applications with the

17 highest average score in each submission category, with tiebreakers favoring the

18 project with the higher average score in “the Design Quality.” *Id.* at 6, 8–9. The

19 Submission Guide did not define the term “Design Quality” or explain whether it

20 referred to the first criterion only (*see id.* at 11) or the design principles stated in the

21 Amended Billboard Plan under this label: (a) Design Excellence, (b) Innovative

22 Design, and (c) Context & Compatibility Design) (Ordinance at 8). According to the

23 Submission Guide, “the [Selection Committee’s] collective decision shall be the final

24 decision and function as an appeal.” Submission Guide at 8.

25 **B. Plaintiff’s First and Second Causes of Action for Violation of the**

26 **First Amendment**

27 Plaintiff alleges the Amended Billboard Plan facially violates the First

28 Amendment as an unconstitutional, content based prior restraint on commercial

speech. FAC ¶ 63. The City contends the Amended Billboard Plan is a constitutional,

content neutral time, place, and manner restriction because it “does not describe

1 speech by content, nor does it ‘discriminate based on the topic discussed or the idea or
2 message expressed.’” Mot. at 16–17. Based on the facts pleaded or judicially
3 noticeable on the subject Motion, the court finds the Amended Billboard Plan and
4 Round 2 screening process constitute an unconstitutional, content based regulation
5 that delegates overly broad licensing discretion to the City Manager and members of
6 the Screening Committee.

7 “A regulation of speech is facially content based under the First Amendment if
8 it targets speech based on communicative content—that is, if it applies to particular
9 speech because of the topic discussed or the idea or message expressed.” *City of*
10 *Austin v. Reagan Nat. Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (quotation
11 marks and brackets omitted). Content based restrictions are subject to strict scrutiny
12 and must further a compelling governmental interest and be narrowly tailored to
13 achieve that interest to survive constitutional challenge. *Reed v. Town of Gilbert,*
14 *Ariz.*, 576 U.S. 155, 171 (2015).

15 A regulation is content neutral if it is “agnostic as to content.” *City of Austin*,
16 596 U.S. at 69. “[R]estrictions on speech may require some evaluation of the speech
17 and nonetheless remain content neutral,” so long as they do not “discriminate based on
18 the topic discussed or the idea or message expressed.” *Id.* at 72–74 (quotation marks
19 omitted). Content neutral restrictions are subject to the less onerous standard of
20 intermediate scrutiny and must be narrowly tailored to serve a significant
21 governmental interest to survive constitutional challenge. *Id.* at 76. Accordingly, the
22 Ninth Circuit has held “[t]ime, place, or manner restrictions are reasonable if they are
23 (1) justified without reference to the content of the regulated speech; (2) narrowly
24 tailored to serve a significant governmental interest; and (3) leave open ample
25 alternative channels for communication of the information.” *Real v. City of Long*
26 *Beach*, 852 F.3d 929, 936 (9th Cir. 2017) (quotation marks and brackets omitted).

27 “A reasonable time, place, and manner restriction for a traditional public forum
28 can include permitting requirements.” *Kaahumanu v. Hawaii*, 682 F.3d 789, 803 (9th

1 Cir. 2012) (quotation marks omitted). However, “[s]uch a scheme may not delegate
2 overly broad licensing discretion to a government official.” *Id.* (quotation marks
3 omitted). “[A] permitting scheme is not ‘content neutral’ if it vests unbridled
4 discretion in a permitting official.” *Epona, LLC v. County of Ventura*, 876 F.3d 1214,
5 1225 (9th Cir. 2017) (citations omitted). “While permitting guidelines need not
6 eliminate all official discretion, they must be sufficiently specific and objective so as
7 to effectively place some limits on the authority of City officials to deny a permit.”
8 *Id.* at 1222 (citations and quotation marks omitted). “A law subjecting the exercise of
9 First Amendment freedoms to the prior restraint of a license, without narrow,
10 objective, and definite standards to guide the licensing authority, is unconstitutional.”
11 *Id.* (brackets and quotation marks omitted).²

12 As pleaded here, the Amended Billboard Plan and Round 2 submission process
13 require applications for new off-site signs to be evaluated based on broad, subjective
14 and indefinite criteria including whether the designs proposed are “exceptional,”
15 “create a unique opportunity for the display and experience of public art,” “add value
16 to the public realm, the experience of place and the experience along Sunset Blvd,”
17 and “create valuable signage that reinforces Sunset as the premier destination for
18 creative advertising.” *See* Submission Guide at 11. These evaluation criteria vest
19 unbridled discretion on the members of the Screening Committee to deny applications
20 and are insufficiently narrow, specific, and objective to survive constitutional review.
21 *See Spirit of Aloha Temp. v. County of Maui*, 49 F.4th 1180, 1191 (9th Cir. 2022)
22 (collecting cases and noting “a sign ordinance that required signs to have no ‘harmful
23 effect upon the [city’s] health or welfare’ and no damage to the ‘aesthetic quality’ of
24

25 ² The City cites cases including *Hunt v. City of Los Angeles*, 638 F.3d 703, 718 n. 7
26 (9th Cir. 2011), to argue “[i]t is an open question whether the prior restraint doctrine
27 even applies to commercial speech.” Mot. at 23. The Ninth Circuit cases cited
28 predate *Epona* and *Kaahumanu*, which applied the prior restraint doctrine to
commercial activities that implicate the First Amendment. The City, thus, fails to
establish the doctrine is inapplicable here.

1 neighboring areas was too ‘ambiguous and subjective’ and placed ‘no limits’ on
2 official discretion” (citing *Desert Outdoor Advert. v. City of Moreno Valley*, 103 F.3d
3 814, 818–19 (9th Cir. 1996))).

4 The unbridled nature of the discretion and decision-making authority the City
5 vested in the Screening Committee is demonstrated by the first criterion alone, which
6 the Submission Guide explains as follows:

7 IS THE DESIGN EXCEPTIONAL?

8 Innovative media formatting integrated with excellent building
9 design

- 10 • Size, proportion, display materials/methods differentiates
11 from standard billboard formats and display methods.
- 12 • Is there a consistency of style, a cohesive approach between
13 the proposed sign and development? This includes: vertical
14 orientation, curved or multi-planar surfaces, and/or non-
15 standard proportions to which create an original and
16 imaginative sign.
- 17 • Creatively uses the latest in technology to ensure digital
18 image quality.
- 19 • Durable, functional, beautiful, harmonious with context.

18 Timeless design approach that contributes to the iconic nature of
19 Sunset Blvd

- 20 • Simple, durable, classic proportions, minimal, relatively
21 unadorned.

21 Quality of design approach for the billboard, building architecture,
22 public spaces

- 23 • Such as architectural lighting elements, green walls, or other
24 innovative design features. Especially those that
25 complement, integrate, or operate with any proposed off-site
26 signage and public art.

26 Responds to topography and curves of the street

- 27 • Aligns to curves and topography creating focal points, visual
28 surprise and interest.

1 Quality & cohesion of creative features, signage, and architecture
2 integration

- 3 • How well do the features integrate into the overall project?
- 4 • Is there a cohesive design approach through materials, style,
5 colors, lighting, texture, and other features?

6 *Id.* at 14 (errors in original).

7 Most if not all of the elements of this explanation (such as whether the design is
8 “innovative,” “excellent,” “beautiful,” “harmonious with context,” “[c]reatively uses
9 the latest in technology,” or reflects a “[t]imeless design approach that contributes to
10 the iconic nature of Sunset Blvd”) are so vague, indefinite, and subjective as to vest
11 unbridled discretion on the individual evaluators. These statements and questions do
12 not give either applicants or evaluators a clear idea of what would merit a full score of
13 50 points for a design, rather than 25 points or 0.

14 It is also unclear whether each of these five sub-criteria must be evaluated
15 separately and the weight each should receive, or whether evaluators simply assign a
16 single point value for this criterion while keeping all these disparate statements and
17 questions in mind. Accordingly, it is impossible for a court to review the score given
18 by an evaluator and decide objectively whether he or she applied the design principles
19 stated in the Amended Billboard Plan correctly to grant or deny a concept award.
20 Given that this criterion is worth 50 points, an average score of less than 25 on this
21 criterion alone would be sufficient to bring the total score below the 225-point
22 threshold for a concept award, rendering the applicant ineligible to apply for a
23 development agreement or obtain a permit to erect the proposed sign. *See* Submission
24 Guide at 9. The other criteria are no better.

25 This issue is also demonstrated by the scores Plaintiff allegedly received on one
26 of its submitted applications: 230, 211, 191, 188, 168, and 95. FAC ¶ 56 (organized
27 from highest to lowest score). It is unclear why the highest scoring evaluator believed
28 the application merited a 230 (92%)—which reflects a determination that the design
was “one of the highest top-scoring projects within the designated submission

1 category” (*see* Submission Guide at 9)—while another evaluator believed it merited
2 only a 95 (38%). Tellingly, the single score of 95 alone would have been sufficient to
3 bring the average score for the application below the 225-point threshold for a concept
4 award, even if all five other evaluators gave the application perfect scores.

5 The subjective nature of these criteria and unbridled nature of the discretion
6 granted are compounded by the fact that the applications are evaluated and compete
7 against other applications for a limited number of concept awards—requiring the
8 Screening Committee to decide not only whether an application meets these criteria
9 but whether it does so better or worse than other applications. It is also unclear who
10 selected these criteria and related explanations, determined the weight each should
11 receive, or decided the threshold score to secure a concept award. To the extent these
12 actions were taken by the City Manager or Screening Committee rather than through
13 an ordinance enacted by the City, this would further demonstrate the City delegated
14 overly broad and unbridled discretion and decision-making authority to the City
15 Manager and Screening Committee.

16 The City contends the Amended Billboard Plan and Round 2 screening process
17 provide “adequate standards to guide” discretion and “cabins discretion far more than
18 the Supreme Court and Ninth Circuit have required in other cases.” Mot. at 25 (citing
19 *Outdoor Media Grp. v. City of Beaumont*, 506 F.3d 895, 904 (9th Cir. 2007) & *G.K.*
20 *Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1083 (9th Cir. 2006)). The court
21 disagrees. Unlike in the cases cited, the Amended Billboard Plan and Round 2
22 screening process do not establish clear standards to cabin the licensing official’s
23 discretion to grant or deny applications based on specific objective and measurable
24 criteria established by ordinance. *Cf. City of Beaumont*, 506 F.3d at 904–05 (finding a
25 regulation constitutional where the ordinance “delineate[d] fairly specific criteria
26 regarding the relationship between the sign and the site” and the licensing official’s
27 “discretion [was] not unlimited, but cabined by specific findings regarding the
28 relationship of the sign to the site, the freeway, and other signs in the area”); *City of*

1 *Lake Oswego*, 436 F.3d at 1083 (finding a regulation constitutional where “[t]he City
2 [could] deny permits only when the sign [did] not comport with the Code’s reasonably
3 specific size and type criteria or [was] not compatible with the surrounding
4 environment” based on “a limited and objective set of criteria” explicitly established
5 by the ordinance, “namely ‘form, proportion, scale, color, materials, surface treatment,
6 overall sign size and the size and style of lettering’”).

7 In sum, the court finds the Amended Billboard Plan and Round 2 submission
8 process unconstitutionally delegate overly broad and unbridled discretion and
9 decision-making authority to the City Manager and Screening Committee, as pleaded
10 in the FAC. The court, therefore, DENIES in part the City’s Motion as to the first and
11 second causes of action. Having found Plaintiff has alleged sufficient facts to plead
12 the Amended Billboard Plan and Round 2 submission process violated the First
13 Amendment on this basis, the court need not address the parties’ remaining arguments
14 regarding these claims.

15 **C. Plaintiff’s Third, Fourth, and Fifth Causes of Action for Violation of**
16 **Due Process**

17 Plaintiff’s third, fourth, and fifth causes of action allege the City denied
18 Plaintiff due process by creating a sham application process designed to benefit
19 specific candidates favored by the City. FAC ¶¶ 75–76, 86, 95. The City moves to
20 dismiss these causes of action on the grounds that Plaintiff has not and cannot plead a
21 valid property interest that the Constitution protects. Mot. at 28.

22 “The requirements of procedural due process apply only to the deprivation of
23 interests encompassed by the Fourteenth Amendment’s protection of liberty and
24 property.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972). “Property
25 interests ... are not created by the Constitution.” *Id.* at 577. “Rather, they are created
26 and their dimensions are defined by existing rules or understandings that stem from an
27 independent source such as state law....” *Id.* “California has recognized a protected
28 property interest in billboard construction only ‘[o]nce a permit has been issued.’”

1 *City of Beaumont*, 506 F.3d at 903. As it is undisputed Plaintiff did not obtain
2 billboard permits during the Round 2 screening process, the City argues Plaintiff lacks
3 a vested property right sufficient to assert due process claims. Mot. at 28–29

4 With respect to the third cause of action, Plaintiff contends it has adequately
5 pleaded a property interest in the non-refundable application fee of \$10,362 it was
6 required to pay the City for each Round 2 application. Opp’n at 24. Plaintiff cites
7 *MKay, Inc. v. City of Huntington Park*, Case No. 2:17-cv-01467-SJO (AFMx), 2017
8 U.S. Dist. LEXIS 230049, at *34–36 (C.D. Cal. July 14, 2017)), to argue that
9 allegations the government took possession of money through a fraudulent and corrupt
10 process are sufficient to support a due process claim, because money constitutes a
11 protected property interest. Opp’n at 24–26. Plaintiff, however, did not pray for
12 damages against the City and requested only injunctive relief against this Defendant.
13 See FAC ¶¶ 74–84, Prayer ¶¶ 1–4. Plaintiff does not cite any legal authority to
14 establish that an applicant’s property interest in an application fee (*i.e.*, money) is
15 sufficient to support a due process claim regarding the alleged deprivation of a
16 separate, unvested property right (*i.e.*, the denial of a permit). The court, therefore,
17 finds Plaintiff fails to state a valid due process claim on this basis.

18 With respect to the fourth and fifth causes of action, Plaintiff contends it has
19 adequately pleaded it was constructively debarred from applying for and obtaining
20 billboard sites on the Sunset Strip. Opp’n at 24–25. Plaintiff cites cases including
21 *Mitchell Engineering v. City and County of San Francisco*, Case No. 3:08-cv-04022-
22 SI, 2011 U.S. Dist. LEXIS 165979, at *10 (N.D. Cal. Feb. 14, 2011), to argue
23 “[d]ebarment from eligibility to bid on public contracts implicates a liberty interest
24 protected by the Due Process Clause.” Opp’n at 25.

25 Debarment is a sanction that excludes an individual or entity from doing
26 business with the government for a defined period, usually a number of years. *Golden*
27 *Day Sch. v. State Dep’t of Educ.*, 83 Cal. App. 4th 695, 703 (2000). “[G]overnment
28 debarment of a contractor, at least one that has an established record of doing business

1 with the government, implicates a liberty interest.” *Id.* at 707. However, “[i]t is the
2 right to be considered for, not to receive, a government contract,” as “broadly
3 speaking, ... no citizen has a ‘right,’ in the sense of a legal right, to do business with
4 the government.” *Id.* at 705–06 (citing *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C.
5 Cir. 1964)). “[A] government action that potentially constrains future business
6 opportunities must involve a tangible change in status to be actionable under the due
7 process clause.” *Kartseva v. Dep’t of State*, 37 F.3d 1524, 1527 (D.C. Cir. 1994). A
8 simple denial or nonrenewal of a government contract is insufficient to constitute
9 debarment. *Golden Day*, 83 Cal. App. 4th at 705–06.

10 Courts have concluded there are two ways in which government action may
11 result in a change of status sufficient to implicate a liberty interest. *Id.* at 707 (citing
12 *Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1506 (D.C. Cir. 1995)). “One is by
13 action that formally or automatically excludes the plaintiff from work on a category of
14 future public contracts or government employment opportunities.” *Id.* “The other is
15 by action that precludes the plaintiff from so broad a spectrum of opportunities that it
16 interferes with the right to follow a chosen profession or trade.” *Id.* Plaintiff has not
17 pleaded sufficient facts to establish that either situation applies here. *See* FAC. While
18 Plaintiff contends the City’s denial of concept awards renders it “ineligible to apply
19 for a development agreement with the City for a new offsite sign on the Sunset Strip
20 until the City opens the next round of submissions” (*id.* ¶ 60), Plaintiff does not plead
21 facts to establish it has formally been or will automatically be excluded from
22 consideration in the future. Plaintiff’s allegations that the City and Screening
23 Committee favor Orange Barrel over other applicants (*id.* ¶¶ 43–53), is insufficient to
24 establish that *Plaintiff* has suffered a tangible change of status sufficient to constitute
25 debarment. Plaintiff, thus, fails to establish it has a protectable liberty interest due to
26 constructive debarment.

27 In sum, the court finds Plaintiff has failed to plead sufficient facts to support the
28 third, fourth, and fifth causes of action for violation of procedural due process and


1 GRANTS in part the Motion as to these claims.

2 **CONCLUSION**

3 For the aforementioned reasons, the court GRANTS in part the Motion and
4 DISMISSES the third, fourth, and fifth causes of action with 21 days' leave to amend.
5 The Motion is otherwise DENIED.

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7 IT IS SO ORDERED.

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9 Dated: July 8, 2024

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12 _____
13 FERNANDO L. AENLLE-ROCHA
14 United States District Judge
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