

1 Benjamin L. Stock (SBN 208774)  
E-mail: bstock@bwslaw.com  
2 Eli J. Flushman (SBN 278209)  
E-mail: eflushman@bwslaw.com  
3 BURKE, WILLIAMS & SORENSEN, LLP  
181 Third Street, Suite 200  
4 San Rafael, CA 94901-6587  
Tel: 415.755.2600 Fax: 415.482.7542

**FILING FEE EXEMPT PURSUANT TO  
GOVERNMENT CODE § 6103**

5 Attorneys for Plaintiffs  
6 PEOPLE OF THE STATE OF CALIFORNIA; and  
7 CITY OF BENICIA

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF SOLANO**

10  
11 PEOPLE OF THE STATE OF  
CALIFORNIA; AND CITY OF  
12 BENICIA,

13 Plaintiffs,

14 v.

15 JASON DIAVATIS; and DOES 1  
through 50, inclusive,

16 Defendants.  
17

Case No. FCS056113

*Assigned for All Purposes to the Honorable  
Christine A. Carringer, Dept. 12*

**PLAINTIFFS' REPLY TO  
DEFENDANT'S RESPONSE TO  
PLAINTIFFS' MOTION FOR A  
PRELIMINARY INJUNCTION**

Date: June 16, 2021  
Time: 8:30 a.m.  
Dept.: 12

18  
19 Defendant Jason Diavatis ("Defendant") has filed a "Response" to the People of the State  
20 of California and Real Party in Interests, the City of Benicia's ("City") Motion for a Preliminary  
21 Injunction. The only issues raised in the "Response" were (1) a statement without any supporting  
22 evidence that the injunction will "severely harm the business," and (2) a request for a continuance  
23 to a date uncertain to "allow both parties to effectively resolve the issues surrounding the Loft."  
24 This Response fails to substantively address any of the legal or factual issues raised in the City's  
25 motion, and the City vehemently objects to delaying this action through a continuance as the City  
26 has already previously provided ample opportunities to reach a resolution.  
27  
28

1 **I. AN INJUNCTION WILL NOT CLOSE DEFENDANT’S BUSINESS, AND ANY**  
2 **HARM DEFENDANT MAY SUFFER IS BY HIS OWN DOING.**

3 Defendant claims, without any supporting evidence, that the effect of the injunction will  
4 close down his business. But this is simply not true. The injunction seeks to prohibit Defendant  
5 from the privilege offered by the City of encroaching on the public right-of-way. To put it  
6 plainly, if the injunction is issued, Defendant is not prohibited from operating in its entirety, as  
7 Defendant could offer take-out services and continue allowing indoor dining. As of June 1, 2021,  
8 the County of Solano has entered into the “Orange Tier” related to the Health and Safety Protocol  
9 surrounding COVID-19, which authorizes businesses, such as Defendant’s, to offer indoor dining  
10 at 50% capacity. (Plaintiff’s Supplemental Request for Judicial Notice in Support of Plaintiff’s  
11 Reply to Defendant’s Response (Hereafter “Reply RJN”), Exhibit I.) That is, at the time of filing  
12 the Response Defendant could offer indoor dining at 50% capacity. (*Id.*) Further, as the State  
13 approaches the June 15<sup>th</sup> reopening, there is an expectation that full capacity indoor dining will be  
14 authorized prior to the hearing on this motion. Finally, Defendant has for months already opened  
15 his doors to indoor dining, so any claim that his business will be shut down is not grounded in  
16 fact.

17 Even considering any reduced capacity for dining, Defendant has been offered numerous  
18 ways to lawfully operate in the public right-of-way, but has simply elected not to do so.  
19 Defendant’s refusal to comply is why the City has been forced to bring this lawsuit and resulting  
20 motion. It is a dubious position for Defendant to claim he will suffer harm if he is not allowed to  
21 continue to violate the law.

22 To be clear, and as stated in the City’s moving papers, the City has offered Defendant to  
23 use the public right-of-way under a COVID-19 Temporary Outdoor Activities and Encroachment  
24 Agreement, which Defendant elected not to pursue. (Declaration of Mario Giuliani in Support of  
25 Motion for Preliminary Injunction (hereafter “Giuliani Decl.”) ¶ 25.) Again, following an  
26 administrative appeal of the City’s decision to deny his encroachment permit, on February 8,  
27 2021, the City offered Defendant an option for operating in the public right-of-way, to which  
28 Defendant responded he would not comply. (Declaration of Erik Upson in Support of Motion for

1 Preliminary Injunction (hereafter “Upson Decl.”) ¶¶ 11 - 13, Exhibits E and F.) Now four months  
2 later, and days before facing a motion for Preliminary Injunction, Defendant claims it is this  
3 action that will harm his business and he needs more time. To the contrary, the harm suffered  
4 here is the City’s and any damage to Defendant’s business is his own doing.

5 To remind this Court about the harm suffered by the City, Defendant is obstructing the  
6 public right-of-way, making the sidewalk more unsafe in the heart of First Street in Downtown  
7 Benicia. Not only has Defendant’s action impeded the City’s right-of-way for his own private  
8 gain, but he has also harassed the HOA members who live above the restaurant with this outdoor  
9 structure. (See Memo of Points and Authorities in Support of Preliminary Injunction, pp. 11-12;  
10 see also Upson Decl., p. 83 [letter in support of administrative decision from HOA resident about  
11 Defendant’s use of social media to intimidate residence from complaining].) The harm to the  
12 public has been further amplified since filing this motion, when the neighbors were forced to  
13 obtain a temporary Civil Harassment Restraining Order against Defendant on May 6, 2021, after  
14 Defendant was standing on a ladder changing lights on his illegal encroachment, and vandalized  
15 the upstairs neighbor’s security camera while yelling expletives at the same neighbor. (Reply  
16 RJN, Exh. J.)

17 Even though Defendant has made no showing whatsoever to overcome the rebuttable  
18 presumption that the harm to the City and public outweighs any harm to Defendant’s interest (*IT*  
19 *Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 72), it is clear from the unrefuted  
20 evidence that Defendant’s own actions entitle the City and the public to the requested order.

21 **A. Defendant has failed to raise any substantive issues with the motion.**

22 Defendant’s “Response” is devoid of any supporting evidence, objections, or legal  
23 argument as to why a preliminary injunction should not be issued. Such a response fails to rebut  
24 the City’s presumption of harm where a public entity is seeking relief based on statutory  
25 authority. (*IT Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 69 – 72(hereafter “*IT*  
26 *Corp.*”).)

27 The City has shown with uncontroverted evidence that a statutory violation exists (see  
28 Motion for Points and Authorities (hereafter “MPA”), pg. 7 – 9), and that Defendant does not

1 have a permit and encroachment agreement that would authorize the use of the public right-of-  
2 way (MPA pg. 9 – 10). Defendant’s actions amount to a nuisance *per se* to which he has not  
3 offered any defense.

4 Further, as stated in the Memorandum of Points and Authorities, only “(i)f the defendant  
5 shows that it would suffer grave or irreparable harm from the issuance of the preliminary  
6 injunction, [must] the court examine the relative harm to the parties.” (*IT Corp.* 35 Cal.3d at 72.)  
7 Here, Defendant does not even allege “grave or irreparable harm.” Rather Defendant makes a  
8 conclusory statement supported by no evidence that the harm will be “severe.” This conclusory  
9 statement does not meet the standard required, and is not sufficient to then have the Court  
10 “examine the relative harm to the parties.” And even if the Court were to examine the relative  
11 harm, Defendant has offered no rebuttal evidence whatsoever or argument in response to the  
12 City’s motion and multiple supporting declarations. (MPA, pgs. 10 -13.) Making no objection or  
13 argument, Defendant waived such argument at the hearing. (*Interinsurance Exchange v.*  
14 *Collins* (1994) 30 Cal.App.4th 1445, 1448.)

15 **B. The City objects to any continuance as it would be inappropriate and would**  
16 **only serve to prolong the harm to the community.**

17 On February 4, 2021, the City issued its final administrative decision requiring the illegal  
18 encroachment be removed by February 18, 2021. The City waited patiently for Defendant to  
19 comply. He failed to do so. Further, he failed to file any writ of administrative mandamus within  
20 90 days of being served with the City’s final decision, the exclusive method for challenging any  
21 such decision. (Code Civ. Proc., §1094.6(b); *State of California v. Superior Court* (1974) 12  
22 Cal. 3d 237, 249.) Therefore, the City’s final administrative decision cannot be further  
23 challenged.

24 The City filed this motion for a preliminary injunction on April 8, 2021. The City was  
25 provided a hearing date over two months later. The City elected not to file a Temporary  
26 Restraining Order, even though with these facts it would likely receive an order. Instead, the City  
27 patiently waited for Defendant to comply; and still waits. This lawsuit followed roughly two  
28 years of considerable patience by the City trying to work with Defendant to resolve these issues,

1 as described in an email from the City’s engineer Daniel Sequeira. (See Declaration of Daniel  
2 Sequeira in Support of Motion for Preliminary Injunction, Exhibit T.)

3 Now Defendant has hired an attorney at the eleventh hour and claims he has not had  
4 ample time to prepare, and seeks a continuance to a date uncertain. Such a continuance will only  
5 act to prolong the harm to the community, and the confidence the community has in its City to  
6 enforce clearly established laws, confidence which has already been shaken. (Upson Decl. ¶ 8.)

7 Counsel for Defendant states that he is “confident that resolution is possible.” (Response,  
8 p. 3.) The City is less confident as Defendant has stated in no uncertain terms that he will “take  
9 his chances infant [sic] of a judge and the court of public opinion.” (Upson Decl., Exhibit F.)  
10 Defendant made that statement on February 8, 2021, and apparently did not hire an attorney until  
11 May 26, 2021. Defendant’s delay in preparing for litigation, which he dared the City to bring, is  
12 not a sufficient reason to continue this hearing.

13 At this point, the City seeks an adjudication of this motion at the time and place noticed.  
14 The City’s unrefuted motion demonstrates that is it reasonably likely that it will prevail on the  
15 merits, and Defendant’s last minute request for a continuance as a basis to oppose a motion is not  
16 only procedurally defective, but lacks merit.

17 If Defendant sought to avoid this hearing, he had several months, if not years, to act. The  
18 City’s position is clear: remove the encroachment and comply with the law. Defendant has not  
19 yet done either. The City seeks a ruling on this motion without further delay so that it can obtain  
20 an order from this Court, subject to contempt proceedings. Based on the history of this  
21 enforcement action, the City sees no other way to ensure compliance with its laws.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///


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

**II. CONCLUSION**

Defendant has had ample time and opportunity to prepare for a hearing he has dared the City to seek. The City requests that the Court carefully review of the City’s unrefuted motion and supporting declarations, and Defendant’s four page Response, and grant a preliminary injunction ordering Defendant to comply with the City’s clear rules and remove the illegal encroachment.

Dated: June 9, 2021

BURKE, WILLIAMS & SORENSEN, LLP

By:   
\_\_\_\_\_  
Benjamin L. Stock  
Eli J. Flushman  
Attorneys for Plaintiffs  
PEOPLE OF THE STATE OF  
CALIFORNIA and CITY OF BENICIA

1 **PROOF OF SERVICE**

2 I, Laura A. Montalvo, declare:

3 I am a citizen of the United States and employed in Alameda County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 1901 Harrison Street, Suite 900, Oakland, CA 94612-3501. On June 9, 2021, I served a copy  
6 of the within document(s):

7 ***PLAINTIFFS’ REPLY TO DEFENDANT’S RESPONSE TO PLAINTIFFS’  
8 MOTION FOR A PRELIMINARY INJUNCTION***

9  by placing the document(s) listed above in a sealed Federal Express envelope and  
10 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal  
Express Delivery agent for overnight delivery.

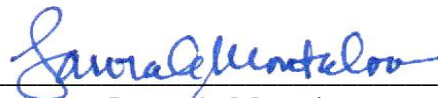
11  by transmitting via my electronic service address (lmontalvo@bwslaw.com) the  
12 document(s) listed above to the person(s) at the e-mail address(es) set forth below.

13 Steven C. Bailey, Esq.  
14 Bailey & Romero Law Firm  
15 680 Placerville Drive, Suite A1  
16 Placerville, CA 96667  
Tel: (530) 212-3407  
Email: [steven@stevenbailey.org](mailto:steven@stevenbailey.org)

Attorney for Defendant JASON  
DIAVATIS

17 I am readily familiar with the firm's practice of collection and processing correspondence  
18 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
19 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
20 motion of the party served, service is presumed invalid if postal cancellation date or postage  
21 meter date is more than one day after date of deposit for mailing in affidavit.

22 I declare under penalty of perjury under the laws of the State of California that the above  
23 is true and correct. Executed on June 9, 2021, at Brentwood, California.

24 

25 \_\_\_\_\_  
26 Laura A. Montalvo