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19 UNITED STATES DISTRICT COURT
20 SOUTHERN DISTRICT OF CALIFORNIA

21 SOUTHWEST KEY PROGRAMS,
22 INC.,

23 Plaintiff,

24 v.

25 CITY OF ESCONDIDO,

26 Defendant.

Case No. 15-CV-1115 H-BLM

**PLAINTIFF SOUTHWEST KEY
PROGRAMS INC.'S SURREPLY IN
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Judge: Hon. Marilyn L. Huff
Courtroom: 15A
Date: October 31, 2016
Time: 10:30 a.m.

1 Southwest Key respectfully submits this surreply and supporting exhibits to
2 address certain matters raised in the City's reply brief.

3 **A. A Reasonable Jury Could Find Southwest Key Suffered Damages.**

4 The City is mistaken that if it "had approved SWK's permit application,
5 SWK could not have opened the facility" and thus "suffered no damage." Reply
6 ISO Mot. for Summ. Judg. (Doc. No. 74) at 13 n.18 ("Reply"). The record
7 demonstrates at least a jury question whether the City caused damages to Southwest
8 Key. A reasonable jury could find the Office of Refugee Resettlement ("ORR")
9 would have funded the Escondido group home notwithstanding any temporary drop
10 in demand, because Southwest Key "had the same number of programs going into
11 fiscal year 2015 that [it] had in 2014" and "did get to keep every program," and
12 ORR did not say "we're going to cut a program and close it down." Rodriguez
13 30(b)(6) Dep. at 70:14-18, 71:20-24 (City Ex. 3 at 89-90). ORR "didn't decrease
14 beds systemwide" and "didn't eliminate the licensed beds," and thus the jury could
15 conclude "the Escondido program would not have been affected because every
16 other program ... did not decrease in their license capacity." *Id.* at 89:24-90:25
17 (SWK Ex. 11 at 424-25, attached hereto). Southwest Key "received the same level
18 of funding" except for its "Casa Phoenix" facility, which represented a unique
19 situation in which ORR asked Southwest Key "to have 50 beds during one part of
20 the year" and hold the remaining beds as "a surge site to go up to" the licensed
21 capacity of 420. *Id.* at 69:17-24 (City Ex. 3 at 88), 90:12-91:4 (SWK Ex. 11 at 425-
22 26, attached hereto). The jury could thus find ORR "would have paid for 96 more
23 beds in Escondido if [Southwest Key] had permits to open that up in October 2014
24 ... because that's what they did with all of our programs with the exception of Casa
25 Phoenix.... [S]ince we started running the programs, we haven't lost a program."
26 *Id.* at 93:11-94:1 (SWK Ex. 11 at 427-28, attached hereto).

27 Though the need for housing unaccompanied children can fluctuate, it has
28 consistently increased over time, as it continued to do in 2016. *Id.* at 68:22-69:4

(City Ex. 3 at 87-88); *id.* at 73:3-5 (SWK Ex. 2 at 66). To maintain capacity to meet increasing demand, ORR funds beds that may not be in use at all times. *Id.* at 73:19-20 (SWK Ex. 2 at 66) (“In every year they pay for every bed we have available, whether it’s filled or not.”); *id.* at 90:3-11, 200:9-10 (SWK Ex. 11 at 425, 429, attached hereto) (“they wanted to use that program as a surge program” and “[w]e get paid per bed whether a kid is sleeping in that bed or not”); SWK Ex. 10 at 358 (number of children placed by ORR “will fluctuate depending on the number” referred to ORR). On those facts, a reasonable jury could find that if the City had granted the permit, Southwest Key would have opened and operated a group home in Escondido regardless of any temporary drop in demand, and therefore the City’s refusal to grant the permit damaged Southwest Key.

B. This Case Presents Concrete Issues Ripe for Review.

This case is not “unripe,” because a reasonable jury could find there is nothing “hypothetical” or “speculative” about the likelihood that Southwest Key would have housed unaccompanied children in Escondido but for the City’s conduct. Reply at 12. From October 2015 to September 2016, Southwest Key “increased beds by 1,005.” Rodriguez 30(b)(6) Dep. at 73:3-5 (SWK Ex. 2 at 66). As of May 2016, “Southwest Key [was] opening up sites in different locations,” and “the needs for the beds are increasing at this moment.” Avilez Dep. at 243:2-21 (SWK Ex. 3 at 110). On August 31, 2016, ORR issued a “funding opportunity announcement” for “shelter care providers, including group homes and transitional foster care,” with estimated total funding of \$100,000,000 for 10 expected awards, each with “minimum capacity of 50 beds,” at an average of \$7,250,000 per budget period. SWK Ex. 10 at 357-58, 371. Based on this evidence, a reasonable jury could find that ORR’s demand for housing unaccompanied children has continued to increase despite a temporary drop, and if the City had not refused the permit, ORR would have placed children in an Escondido group home operated by Southwest Key. The record thus contains ample “evidentiary support” for a jury to

1 find the City's actions "actually ma[de] housing unavailable," Reply at 12, causing
 2 concrete harm that the Court can remedy. Accordingly, the case is ripe, because
 3 "the issues presented are definite and concrete, not hypothetical or abstract."
 4 *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (citation and quotation
 5 marks omitted).

6 For the first time on reply, the City cites *Hallmark Developers, Inc. v. Fulton*
 7 *County*, 466 F.3d 1276 (11th Cir. 2006), for the contention that a "waiting list" or
 8 "shortage of housing for which only a defined group qualified" is necessary. Reply
 9 at 12. The Ninth Circuit has specifically rejected *Hallmark* on that point. *Ave. 6E*
 10 *Investments, LLC v. City of Yuma*, 818 F.3d 493, 511 (9th Cir.), *cert. denied*, 2016
 11 WL 3486062 (U.S. Oct. 11, 2016) (rejecting claim that an "oversupply of homes," a
 12 "glut in the market," or "an adequate supply" of housing "foreclosed the possibility
 13 of any adverse impact," because "the *Hallmark* reasoning would threaten the very
 14 purpose of the FHA"). Accordingly, Southwest Key need not show "a complete
 15 absence of housing" for unaccompanied children. *Id.* at 509. The record permits a
 16 reasonable jury to find the City "contribute[d] to mak[ing] unavailable or deny[ing]
 17 housing to protected individuals," *id.*, which is all that is needed.

18 **C. A Fair Housing Plaintiff Need Not Pursue State Remedies, and No**
 19 **Available Property Existed for Southwest Key in the "Shelter**
 20 **Overlay" Zone.**

21 The City argues Southwest Key "could have filed a writ of mandate action"
 22 or "opened a facility in a part of the City where it is allowed by right." Reply at 1
 23 n.1. Southwest Key was not required to pursue state remedies before filing a fair
 24 housing case. *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 320-21
 25 (E.D.N.Y. 2012). The record shows there was no property available to Southwest
 26 Key in the "Emergency Shelter Overlay area." SWK Ex. 9 at 351. Southwest Key's
 27 real estate agent is experienced with residential care facilities, including children's
 28 group homes, and is familiar with state licensing requirements. Harmon Dep. at
 18:21-19:4, 22:18-23:14, 27:21-28:6, 29:3-21, 36:6-13, 41:22-42:9 (SWK Ex. 12

1 at 434-442, attached hereto). He “searched for properties” in Escondido’s “shelter
 2 overlay zone” but found none “available for lease to Southwest Key in that zone.”
 3 *Id.* at 156:11–157:18, 194:2-18 (SWK Ex. 12 at 444-46, attached hereto). “[E]ven if
 4 a property had been available for lease to Southwest Key in that shelter overlay, it
 5 would have been cost prohibitive for Southwest Key to lease and operate such a
 6 facility” due to the expense of “improvements and renovation” arising from “a
 7 complete construction build-out,” because “properties in the emergency shelter
 8 overlay for the most part are industrial buildings” without “facilities necessary for
 9 keeping children in there under a state license.” *Id.* at 194:16–195:12 (SWK Ex. 12
 10 at 446-47, attached hereto).

11 **D. Southwest Key’s Fulfillment of the Federal Mandate to Provide**
 12 **Housing for Unaccompanied Children Does Not Violate the Fair**
Housing Act.

13 The City is mistaken that the federal “eligibility requirements” for housing
 14 unaccompanied children are “at odds with fair housing laws” because they do not
 15 include “legal U.S. residents.” Reply at 11. In the exercise of “[f]ederal authority in
 16 the areas of immigration and naturalization,” *Tista v. Holder*, 722 F.3d 1122, 1126
 17 (9th Cir. 2013), Congress provided special protection for noncitizen children who
 18 seek “lawful immigration status” and lack an available parent or guardian in the
 19 United States. 6 U.S.C. § 279(g)(2). Without evidence that Congress intended to
 20 discriminate based on race or national origin or created an unjustified disparate
 21 impact—which the City did not and cannot produce—the federal decision to
 22 provide housing for certain noncitizen children does not violate the Fair Housing
 23 Act. *See Espinoza v Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (nothing in Title VII
 24 “makes it illegal to discriminate on the basis of citizenship or alienage” as such);
 25 *Office of General Counsel Guidance on Fair Housing Act Protections for Persons*
 26 *with Limited English Proficiency*, at 3 (Sept. 15, 2016) (classification based on
 27
 28

1 citizenship or “immigration status is not national origin discrimination, per se.”).¹
 2 The City’s unfounded accusation against Southwest Key’s fulfillment of a federal
 3 mandate cannot prevent a trial on the question whether the City intended to
 4 discriminate based on race or national origin or created an unjustified disparate
 5 impact in violation of fair housing laws.

6 **E. Southwest Key Complies with Relevant State Standards.**

7 Southwest Key provides licensed group homes, and unaccompanied children
 8 are not deprived of relevant “legal protections” in other group homes. Reply at 9.
 9 The state law right to a dependent child’s placement “in the county of residence of
 10 the child’s parent or guardian,” Cal. Welf. & Inst. Code § 362.1(g)(1), does not
 11 apply to a federal program and is not a licensing requirement for a group home
 12 under *Flores* or otherwise. Unaccompanied children “have a right to receive
 13 visitors.” SWK Ex. 10 at 369. The fact that visits “may need to occur” outside the
 14 group home “to ensure the safety and well-being” of the children, *id.*, does not
 15 conflict with the right to visits consistent with “the child’s needs and services plan.”
 16 22 Cal. Code Regs. § 84072(c)(5). Southwest Key may lock “exterior doors and
 17 windows” and establish “house rules for the protection of clients.” 22 Cal. Code
 18 Regs. § 84072(c)(24)(A). A “system to monitor ... unauthorized entrance and
 19 egress ... in compliance with state licensing standards” does not violate those
 20 standards, especially when it must “not pose a threat to the safety” of a child who
 21 “attempt[s] to flee.” SWK Ex. 10 at 360. The limit on “sustained interactions of the
 22 children with strangers,” Avilez Dec. ¶ 8, does not conflict with the right to
 23 appropriate “social contacts.” 22 Cal. Code Regs. § 84027(c)(27).

24 Dated: October 27, 2016

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25
 26 /s/ David Loy
 David Loy (229235)

27
 28 ¹ <http://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.