

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-016159

04/11/2022

HONORABLE BRADLEY ASTROWSKY

CLERK OF THE COURT
M. Corriveau
Deputy

MIRABELLA AT A S U INC, et al.

MATTHEW L JARVEY

v.

PEACOCKS UNLIMITED LLC, et al.

SCOTT H ZWILLINGER

JEAN JACQUES CABOU
JUDGE ASTROWSKY

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: PLAINTIFF'S REQUEST
FOR A PRELIMINARY INJUNCTION**

The Court conducted a multiple-day evidentiary hearing concerning Plaintiff's request for a preliminary injunction. The Court considered the testimony and evidence presented, the written arguments of the parties, and the parties' respective draft findings of fact and conclusions of law. After a careful consideration of same, the Court finds that the imposition of a preliminary injunction is warranted, however, not as specifically requested by Plaintiff. The Court's ruling and Orders are contained below.

FINDINGS OF FACT

1. Mirabella at ASU, Inc. operates a life plan community ("Mirabella") for individuals over the age of 62-years-old on the northwest end of the ASU campus in Downtown Tempe. [2/24/2022 Tr. ("TR-3") 11:13-22.] It is a high-rise residential building consisting of 297 total apartments, 239 of which are independent living units. [Id.] Mirabella opened on December 28, 2020. [TR-3 12:8-10.]

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2. Edward Kavazanjian, Sharon Murry, Barbara Shirley, Mel Kessler, and Gail Fisher (the “Individual Plaintiffs”) are Mirabella residents who moved in between December 2020 and April 2021. [2/22/2022 (“TR-1”) 29:14-23; id. 46:4-8, 48:13-15; id. 84:24-85:25, 86:11-16; Shirley Dep. 6:24-7:4, 9:3-8;]
3. Defendant Peacocks Unlimited, LLC d/b/a Shady Park operates a restaurant that also hosts live-music events—mainly electronic dance music (“EDM”) concerts. [3/1/2022 Tr. (“TR-5”) 85:8-10; TE 104.]
4. Shady Park and Mirabella are located across the street from one another in Downtown Tempe on University Drive. TE 148. The immediate surrounding area is “mainly hotels, residential living, apartments, [and] student housing.” [TR-3 12:11-18; see TR-1. 103:15-22; TE 148.] There is also a commercial Wells Fargo Bank building and a Pita Jungle to the west, and a Salvation Army to the east, of Shady Park. [Id.]
5. On September 25, 2015, the ASU Foundation sent out “Request for Qualifications/Proposals” for the development and operation of a university-based retirement housing community on ASU’s Tempe campus, which became Mirabella. [TR-3 63:8-20, 63:21-23, 66:7-10; TE 49 at Mirabella000462.] ASU selected the location of the proposed community, which is where Mirabella stands today [TR-3 65:10-11, 66:11-13; TE 49 at Mirabella000468, 478.]
6. The City of Tempe (“City”) was involved in the bid process for the project and participated in the joint review committee that ultimately approved the development plan for Mirabella. [TR-3 67:12-21; TE 114 at TempeSDT-01-000108; TE 116 at TempeSDT-01-001102.]
7. Shady Park began hosting outdoor concerts in 2015. [TR-5 95:1-2.]
8. During the COVID-19 Pandemic, Shady Park stopped playing concerts. [TR5 84:14-22.] Shady Park’s concerts resumed in May 2021—more than four months after Mirabella opened. [TR-1 31:5-14; id. 48:17-20; TR-3 12-25-13:4.] The concerts typically take place on Friday and Saturday nights from 9:00 p.m. to 2:00 a.m., and on Sundays from 3:00 p.m. to 9:00 p.m. [TR-1 31:16-20; id. 48:21-24; id. 87:24-88:3.]
9. Within weeks of Shady Park’s concerts resuming, the City sent Shady Park a Correction Notice for violating a condition in its use permit (present since 2015)—prohibition on advance ticket sales for its concerts. [TR-5 94:9-14; TE 102-03, 110, 112.]

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10. Following the Correction Notice, Shady Park successfully negotiated a settlement with the City, where it agreed to construct a “canopy” over part of its dance space if the City agreed to modify the use permit to allow Shady Park to sell advance tickets to its concerts. On June 21, 2021, the City issued the modified use permit. [2/28/2022 Tr. (“TR-4”) 121:15-124:11; Huellmantel Dep. 36:20-37:16; TE 113, 201.] Scott Price, Shady Park’s owner, admitted that Shady Park’s violation of its use permit may not “have been resolved without the canopy.” [TR-5 02:20-103:14.]

11. Shady Park paused its concerts in early July 2021 while the canopy was constructed. [TR-3 15:9-23.] The canopy has a hole in the middle, holes where trees grow through the top, and wood slats with openings on the sides. [TR-3 17:11-19; TR-1 73:25-74:12; id. 87:17-23; TR-5 89:18-90:1; Almond Dep. 25:1-9, 35:3-8, 38:1-4, 51:16-23, 63:8-17.]

12. Mr. Price—who has no background in sound engineering or acoustics—designed the canopy, with assistance from Almond. [TR-5 87:20-89:15; Almond Dep. 40:16-23.] In doing so, Shady Park never consulted an acoustical engineer or acoustic consultant. [TR-5 87:20-89:15; Almond Dep. 44:9-16; 45:3-9; TE 92 at TEMPE000042.] Further, Shady Park did not perform any testing to determine how effective the canopy was at containing sound. [TR-3 Tr. 151:15-23; Almond Dep. 63:21-64:1.]

13. With the canopy in place, Shady Park’s concerts resumed again on September 10, 2021. [TR-3 15:9-23, 16:1-4.]

14. When Shady Park’s concerts first resumed in May 2021, Mirabella residents voiced their concerns to Mirabella management, the City, and the City police immediately. [TR-3 13:5-11; TE 105 at Tempe000554-55.]

15. Between the time Shady Park paused its concerts in July 2021 and when it resumed its concerts on September 10, 2021, Mirabella management did not receive a single noise complaint from Mirabella residents. [TR-1 107:6-20; TR-3 16:5-8.] That is because the noises coming from University Drive do not significantly disturb Mirabella residents, as those noises are occasional and expected. [TR-1 34:1-9; id. 90:2-6.] And Mirabella is quiet when no concerts are playing. [TR-3 12:19-23.]

16. Complaints from Mirabella residents resumed immediately following the September 10, 2021 concert. [TR-3 19:4-17; id. 44:3-7; TE 18, 23-45, 54, 57-70, 74, 99.]

17. Mirabella residents described the noise and bass coming from Shady Park’s concerts—both before and after the canopy—as “incessant” and “unrelenting,” explaining that the concerts grow louder as the night goes on, reaching their loudest point after 1:00 a.m. [TR-1 31:24-25,

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32:13-19; id. 49:7-11; id. 70:14-71:16; 88:20-89:2; id. 106:22-107:5, id. 110:5-12; Shirley Dep. 11:23-12:4; TR-3 13:19-14:5.]

18. Residents experience the adverse effects of Shady Park's concerts nearly every weekend. [TR-1 52:15-20; id. 70:12-13.] These effects include the following:

a. Residents are unable to get a full night of sleep on the weekend, either awakening them or preventing them from falling asleep until the concerts end. [TR-1 33:4-10; id. 49:19-50:1; id. 71:21-72:2; id. 88:20-89:10; id. 110:5-15, 113:3-12; id. 150:14-24, 151:2-9; Shirley Dep. 12:5-10.] For some residents, these effects persist even when they use brown noise, earplugs, and sleeping pills. [Shirley Dep. 11:1-12:10.] By contrast, residents are able to sleep on non-concert nights. [TR-1 51:7-11; id. 73:16-18.]

b. Residents find it difficult to work, study, watch television, have conversations, or use their balconies during concerts. [TR-1 33:11-15; id. 49:19-50:4; id. 71:21-72:2; id. 113:3-8; id. 151:3-9; Shirley Dep. 46:6-12.]

c. Residents do not invite friends/family members over on weekends. [TR-1 33:16-22; id. 72:9-17; id. 90:7-13; id. 113:3-19; Shirley Dep. 46:20-47:12.]

d. Three residents were forced to move out of their chosen homes. [TR1 35:25-36:6, 43:8-12; TR-3 50:25-51:4; Shirley Dep. 12:23-13:16, 21:19-22:4.]

e. Residents have had to move to hotels, guest apartments at Mirabella, or places in other cities on the weekends to avoid Shady Park's concerts. [TR-3 22:25-23:11.]

19. Every single resident on the north, Shady Park-facing side of Mirabella has complained to Tom Dorough, Executive Director of Mirabella, about Shady Park's concerts. [TR-1 21:12-22:1.] Such complaints total in the hundreds. [Id. 22:2-5.]

20. Contrary to the inference Shady Park desired the Court to accept, this is not a so-called "get off my lawn" case. The adverse effects of Shady Park's concerts are not limited to the senior residents of Mirabella. For instance, Lindsay Myers, a 23-year-old graduate student at ASU who lived on the 19th Floor of the Union apartments near Shady Park in 2019 and 2020, suffered "a lot of sleepless nights" due to Shady Park's concerts. [TR-2 47:1-24, 48:6-16.] She could feel the noise emanating from Shady Park on a weekly basis [id. 48:22-49:14], and thus, often could not sleep until after 2:00 a.m. [Id. 51:21-25.]

21. Shady Park's noise disrupted Ms. Myers's ability to hear her television, host guests at her apartment, and study for exams. [TR-2 49:15-50:6, 51:12-25.] Ms. Myers added that Shady

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Park's bass was "really hard to shut out." [Id. 50:7-23.] The vibrations were so intense that she had to pull her desk away from her apartment window during concerts because they would shake a vase on her desk. [Id. 51:1-11.] She called Shady Park several times, as well as the police and her building's management, to seek help in resolving the disruption—all to no avail. [Id. 52:1-55:6.]

22. Another example is Caitlyn Finnegan, a 20-year-old recent graduate from ASU who has lived in the oLiv apartments near Shady Park since August 2020. [TR-2 61:21–62:9.] The bass from Shady Park's concerts penetrates the walls of her apartment and shakes her bed. [Id. 62:18-21, 63:5-64:2.] Shady Park's concerts make sleeping nearly impossible and affect her ability to think, study, and work. [Id. 63:5-14, 64:22-65:8.]

23. Ms. Finnegan used earplugs, headphones, and even slept in her roommate's room in an effort to get farther away from Shady Park's noise. [TR-2 64:6-11, 67:1-10.] None of these solutions were effective. [Id. 67:11-14.] At times, she even left her apartment when Shady Park hosts concerts just to avoid the noise. [Id. 67:1-10.]

24. Ms. Finnegan does not invite people over on the weekends, including her parents, due to the noise from Shady Park. [Id. 64:12-21.] Ms. Finnegan called the police multiple times, as well as her apartment's management, in an attempt to find a solution to Shady Park's noise—to no avail. [Id. 65:5-8, 68:19-69:9; TE 84.]

25. The evidence also included credible testimony and documents from management at the Canopy Hotel. [TR-2 14:17-19; TE 86, 148.] Shady Park's concerts shake the walls of guests' rooms and cause vibrations in the hotel's stairwells. [TR-2 17:12-18:4, 19:23-20:6; TE 86, 88.] Guests of the Canopy Hotel complain about Shady Park's concerts every time they occur; the hotel responds by relocating and compensating its guests for the trouble. [TR-2 21:5-10, 44:9-11; Klein Dep., 40:5-23; 55:17-24; see TE 125-27.] The Canopy Hotel also attempts to place guests in rooms that do not face Shady Park on nights when Shady Park hosts concerts. [Klein Dep. 39:5-9; TE 142.]

26. Management at the Westin Tempe testified that, on average, it receives between six and nine complaints from guests about Shady Park noise every weekend. [1/31/2022 Kirby Dep. 12:5-25.] To avoid that noise, Westin guests have requested to be moved away from the Shady Park side of the hotel. [2/3/2022 Kirby Dep. 45:20-25.]

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27. Mike Dickerson of MD Acoustics (“MD”) testified that “relatively small changes in volume produce a relatively large effect in the human ear.” [TR-2 91:2-5.] A change in volume of 3 decibels (dB(A)) can be perceived by the human ear. A change of 5 dB(A) is noticeably different. A 10 dB(A) increase “would sound twice as loud.” A 20 dB(A) difference “would sound four times as loud.” [TR-2 90:6-91:1.]
28. Mike Dickerson of MD Acoustics (“MD”) testified that “relatively small changes in volume produce a relatively large effect in the human ear.” [TR-2 91:2-5.] A change in volume of 3 decibels (dB(A)) can be perceived by the human ear. A change of 5 dB(A) is noticeably different. A 10 dB(A) increase “would sound twice as loud.” A 20 dB(A) difference “would sound four times as loud.” [TR-2 90:6-91:1.]
29. Mirabella units “peering right into Shady Park” having “the more direct line of sight” into Shady Park will be affected by its music. [TR-2 161:18-162:4; TE 118.] Todd Beiler, Shady Park’s expert, agreed, acknowledging that Mirabella residents will hear Shady Park’s music based on “the direct line of sight that someone might have from their balcony to the dance floor.” [TR-5 56:8-57:15.]
30. MD’s analysis of the 63 hertz one-third octave band shows that Shady Park is the cause of the decibel level rise at Mirabella on weekends. [TR-2 122:15-123:6; see also id. 135:11-14; TE 119.] MD found an average rise of 10 to 18 dB(A) on Shady Park music nights (compared to non-music nights) when measuring sound at 63 hertz in the one-third octave band. [TR-2 142:19-143:11; TE 119.] By contrast, Mr. Beiler did not conduct a low-frequency analysis. [TR-5 42:10-19.]
31. The factors in Section 20-11 of the Tempe Noise Code provide a standard by which to assess the reasonableness of Shady Park’s noise.
32. MD credibly testified that Shady Park’s music implicates the vast majority of the 14 factors outlined in Section 20-11(b): loudness; unusual in nature; unnatural; a higher volume and intensity compared to the volume and intensity of the background noise; in close proximity to sleeping facilities; exceeds the community noise standard normally applicable to a commercially-zoned area; played in an area where there is high density of inhabitation; takes place at night and early morning hours; long in duration; played recurrently, intermittently, and constantly; produced by commercial activity; contains pure tonal aspects; and constitutes an impulse noise. [Id. 138:22-142:6.] Mr. Beiler, by contrast, did not analyze of these 14 factors. [TR-5 18:24-19:1.]
33. Shady Park has the ability to reduce the above-described effects on its neighbors by turning down, or containing, the volume and bass of its concerts. [TE 119.]

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34. Shady Park’s efforts to mitigate the adverse effects of its concerts are wanting. Shady Park’s canopy has openings in the roof and sides where noise escapes into the open air and reaches Mirabella. [TR-2 146:24-149:14; TE 120.] A roof canopy that remains open simply will not contain Shady Park’s sound. [Id. 160:9-24.]

35. No credible evidence was presented to support the conclusion that the installation of the canopy had any impact on mitigating the volume and bass emanating from Shady Park. To the contrary, the testimony of Mirabella residents, residents of neighboring apartments, and guests and management of neighboring hotels strongly suggests that the canopy had little-to-no impact on noise and bass levels. [TR-1 35:2-20; id. 51:17-20; id. 74:16-20; id. 90:19-91:1; id. 149:15-150:6; TR-3 19:1-3, 19:12-17; id. 72:2-4; TR-2 67:15-68:9.] In fact, some witnesses perceived that the noise and bass increased after the canopy was installed. [TR-1 107:21- 108:6; Shirley Dep. 15:11-25.]

36. Even Shady Park’s consulting sound engineer, Jared Jackson, acknowledged that there was more that could be done to mitigate sound at Shady Park, but that Mr. Price instructed him to “freeze” mitigation efforts. [TR-3 142:14–144:8, 147:3-17, 161:23-163:7, 164:21-165:11.] Mr. Beiler similarly admitted that Shady Park could undertake various measures to lower the impact of the low frequency sounds on nearby residents, including via speaker adjustments and architectural changes. [TR-5 55:1-12.]

37. The absence of citations to Shady Park under Section 20-11 does not mean that there haven’t been any violations of the code, as the evidence suggests that the City almost never enforces Section 20-11 either. In total, three police officers with a combined 39 years of experience on the force testified and could only recall three businesses that have ever been cited. [Conway Dep. 5:12-18, 36:4-37:7; Despain Dep. 5:13-19; 55:3-22; Garcia Dep. 45:2-6, 46:20-47:2.] Moreover, Tempe’s Code Compliance Division (“Division”) only enforces Section 20-11 during business hours, which would make it impossible for the Division to investigate Shady Park’s concerts, which occur on the weekends or late at night. [TR-4 40:5-22.] So it is not surprising that Shady Park has not been cited for violating the Tempe Code. Next-to-no businesses have been.

38. The evidence revealed that the City has a lack of interest in enforcing the Tempe Code against Shady Park. First, it is clear that there is a special or preferential relationship between the City and Shady Park compared to the relationship between the City and Mirabella. Rosa Inchausti is the Deputy City Manager. She testified that Mr. Price tried to be a good neighbor by volunteering to build a sound canopy to mitigate the noise from the EDM concerts even though there were no noise citations or violations. This testimony demonstrates bias as the canopy built by Shady Park is not a “sound canopy” as it contains a plethora of openings through which sound

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can escape. Furthermore, Ms. Inchausti is aware of the City's lack of enforcement and citations to ANY businesses concerning noise ordinance violations. Further evidence of bias from this witness was her admission that she is friends with both Mr. Price and Mr. Huelmantel. Ms. Inchausti even directed a text message to Mr. Price concerning her fondness for Mr. Price's mother and that "the apple doesn't fall far from the tree." Exh. 90. In addition, it was clear from this witness' demeanor that she had a bias in favor of Shady Park. She was unnecessarily difficult during the examination by Plaintiff's counsel, and appeared to intentionally not answer simple and direct questions from Plaintiff's counsel. Contrarily, she had no similar difficulties with Defendant's counsel.

39. Ms. Inchausti acknowledged that when the City has special event such as concerts or other public shows that involve noise, the City requires a special permit which includes a cut-off time, i.e. a time at which the concert must end; the clear inference from this is that the City understands that loud noise from outdoor events needs to be terminated at a reasonable time in order to protect the interests of the community.

40. The City's bias is also seen in their effort to repeal Section 20-6 of the City Code. That Code contains specific decibel limits for noise within the City. Only after this Court's hearing on Plaintiffs' Motion for TRO in November 2021, the City began the process of repealing Section 20-6 at the urging of Shady Park's representatives. [Huellmantel Dep. 24:13-21, 26:15-28:13.]

41. Jared Jackson works in the music industry as a sound engineer, tour manager, touring musician, and a producer of electronic music. He has performed at Shady Park as a DJ and even installed the current sound rig at the venue. He testified that at peak time during a show at Shady Park the goal is 100 dB(A) maximum because this is what will sound the best while not being ear piercing. He credibly testified that there is more that Shady Park can do to limit the impact of the concert sound levels on the community. For example, Shady Park could increase the number of subwoofers and, in turn, lower the volume of the low frequency noise. In addition, the placement of subwoofers, e.g. closer to the concert-goers, can also lessen the impact of the low frequency noise on the neighbors. Shady Park has yet to take these measures at the instruction of Mr. Price.

42. Todd Beiler is the President and owner of Senseo, an acoustical consulting firm. He testified on behalf of Shady Park. Based upon his noise study, the average ambient noise level on weeknights was 63 dB(A), and on weekend nights it was 67 dB(A). He credibly testified that the use of "c" weighting was not appropriate in the context of this case. He agreed with Mr. Jackson that if Shady Park increased the amount of subwoofers could lower the volume of bass frequencies. He testified that the low end of a typical sound level at the venue during an EDM concert is 97dB(A).

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43. Imposing a decibel limit on Shady Park “can help the courts . . . establish a baseline . . . or a decibel limit which then can be measured against in the future.” [TR-278:17-23.] However, the Court finds that MD’s recommendations are not appropriate as their measurement of the ambient sound did not as accurately capture the appropriate ambient sound level as compared to Defendant’s expert.

44. The Court found Mr. Beiler’s testimony more credible than MD Acoustic’s testimony concerning the appropriateness of the use of db(C) measurement of Shady Park’s concerts’ noise.

45. The Court finds that Shady Park is an important part of the Valley’s music community and the local community of Tempe. However, its importance does not provide it with the permission to annoy its neighbors, which comprise of hotel guests, apartment residents, and Mirabella residents. Based upon the totality of the evidence, the Court finds that the nuisance created by Shady Park is best mitigated, at this time, by limiting the hours of the concert (so neighbors may enjoy a peaceful rest and their weekend enjoyment of their outdoor patios), by limiting the noise level (as measured from within the venue), and by requiring Shady Park to do more to mitigate noise (such as the subwoofer measures addressed by Mr. Beiler and Mr. Jackson).

CONCLUSIONS OF LAW

1. The Court may issue a preliminary injunction after considering “four traditional equitable criteria: 1) A strong likelihood that [Plaintiffs] will succeed at trial on the merits; 2) The possibility of irreparable injury to [Plaintiffs] not remediable by damages if the requested relief is not granted; 3) A balance of hardships favors [Plaintiffs]; and 4) Public policy favors the injunction.” *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). These criteria fall on a sliding scale. A preliminary injunction is thus warranted on a showing of “either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and ‘the balance of hardships tip sharply’ in [Plaintiffs’] favor.” *Id.* Plaintiffs are entitled to preliminary injunctive relief under either of these tests.

2. First, Plaintiffs have demonstrated probable success on the merits of their private and public nuisance claims and the possibility of irreparable injury.

a. Regarding Plaintiffs’ private nuisance claim, Plaintiffs have demonstrated probable success in showing that the noise emanating from Shady Park’s concerts unreasonably interferes with the Plaintiffs’ use and enjoyment of their property. See, e.g., *Graber v. City of Peoria*, 156 Ariz. 553, 555 (App. 1988); *Armory Park Neighborhood Ass’n v. Episcopal Community Services*

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in Arizona, 148 Ariz. 1, 8 (1985). The Individual Plaintiffs who reside at Mirabella are unable to use or enjoy their homes for hours on end and late into the night during Shady Park's concerts—so much so that the concerts unreasonably disrupt routine daily activities like thinking, sleeping, conversing, working, studying, and enjoying family and friends, all of which a person should reasonably be able to enjoy inside of his or her home. Moreover, Shady Park's concerts unreasonably disrupt Mirabella's administration of its residential community, its ability to market and sell units, and to retain residents, particularly on the north side of the building.

b. Plaintiffs have similarly demonstrated probable success on their public nuisance claim because the evidence shows that Shady Park's nuisance is not limited to a few residents of Mirabella, but rather disrupts the surrounding community at large, including a considerable number of other Mirabella residents and guests and residents in nearby hotels and apartment buildings, in ways similar to those in which Plaintiffs are disrupted. See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 183 (1972)(noting that “[t]he difference between a private nuisance and a public nuisance is generally one of degree” and that “[a] private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public”).

c. The Court also finds that Plaintiffs have demonstrated probable success on their claims in light of the various nuisance factors set forth in *McQuade v. Tucson Tiller Apartments, Ltd.*, 25 Ariz. App. 312, 314 (App. 1975):

Locality and character of the surroundings. The Court finds that, although Shady Park is located in a college town, its particular location is in the center of numerous hotels and residences, as well as a few non-music businesses (a restaurant, a bank, and a Salvation Army), making the character of Shady Park's surroundings principally residential and non-music commercial.

Nature of the Defendant's business and the manner in which it is conducted and value to the community of the Defendant's activities. While music venues are valuable, the question in this case is whether the excessive, nuisance-level noise is sufficiently valuable to weigh against the injunctive relief sought. Notably, Plaintiffs do not ask the Court to shut Shady Park down or to enjoin Shady Park from its work with the community; they ask only to enjoin excessive noise. The evidence does not show that Shady Park needs to produce noise at a particular decibel level or that it needs that noise to escape its premises in order to conduct its business or add value to the community.

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Defendant's ability to reduce the harm. The evidence demonstrates that Defendant has the ability to reduce the harm its concerts create. It can turn down the volume of those concerts, as well as potentially implement numerous other structural or nonstructural solutions that its own sound engineer posited, but which it never implemented.

Extent to which the defendant would be damaged by an injunction and the plaintiff damaged by the failure to enjoin. Plaintiffs have made a substantial showing of harm caused by Shady Park's concerts. On the other hand, the evidence does not establish anything more than speculative harm to Shady Park if required to turn down its music or acoustically seal Shady Park with an enclosure.

Priority of use. Although Mirabella was constructed after Shady Park first began holding concerts, the project that became Mirabella was bid on and approved by the City in 2015—the same year Shady Park's concerts began. Moreover, the evidence demonstrates that there have been prolonged periods of time during which Shady Park has not held concerts, including during the period of time when Mirabella opened its doors to residents in late 2020. Accordingly, this factor does not strongly favor either side.

d. The nuisance from Shady Park's concerts is sufficiently recurrent to warrant injunctive relief. Shady Park hosts concerts virtually every Friday, Saturday, and Sunday, for at least 5 to 6 hours at a time. The Friday and Saturday concerts last until 2:00 a.m. This is more than sufficient to warrant injunctive relief. See, e.g., *McQuade*, 25 Ariz. App. at 314 (affirming injunction prohibiting concerts, of which only 5 to 10 had been held over a two-year period); *Armory Park*, 148 Ariz. at 3 (affirming an injunction abating a nuisance created where a food bank "provided one free meal a day" for an hour); Restatement (Second) of Torts § 821F cmt. g (1979) ("If the defendant's interference . . . causes significant harm and his conduct is otherwise sufficient to subject him to liability for a nuisance, liability will result, however brief in duration the interference or the harm may be.").

e. The evidence demonstrates that Shady Park's noise is sufficient to disturb or annoy a person of normal and reasonable sensitivities. Notably, the evidence showed that Shady Park's noise disturbs not only Mirabella's residents but also many neighboring residents and hotel guests, including current and recently graduated ASU students in their early 20s.

f. Plaintiffs have demonstrated the possibility of irreparable injury. In particular, the routine disruption of the Individual Plaintiffs' daily activities—especially sleep—constitutes irreparable harm. See *Samar v. Grady*, 48 Pa. D. & C. 5th 203, at *4 (Pa. Com. Pl. June 2, 2015). So too does the reputational and existential threat to Mirabella and its ability to market and sell its residences. See, e.g., *IB Prop. Holdings, LLC v. Rancho Del Mar Apartments Ltd. P'ship*, 228

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Ariz. 61, 65 (App. 2011); *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991); *Berry v. Foster*, 180 Ariz. 233, 236 (App. 1994).

3. Second, and alternatively, Plaintiffs have, at a minimum, demonstrated the presence of serious questions as to the merits, and that the balance of hardships tip sharply in Plaintiffs' favor. The evidence established that Shady Park's concerts substantially interfere with fundamental aspects of the Individual Plaintiffs' lives and pose a potentially existential threat to Mirabella. Those hardships far outweigh the speculative hardships to Shady Park of reducing or containing the level of noise from its concerts.

4. Public policy favors preliminary injunctive relief for multiple reasons. First, the Court recognizes that, as a matter of law, injunctive relief is a well-established remedy to abate a nuisance. See *McQuade*, 25 Ariz. App. at 314; *Armory Park*, 148 Ariz. at 3.

5. The Court's conclusions are not altered by the fact that the City has gutted Section 20-6. Claims for common-law nuisance, like those Plaintiffs assert here, do not depend on demonstrating violations of any ordinance. Moreover, there are no separation of powers concerns in nuisance cases, as "[t]he equitable power of the judiciary exists independent of statute," and regardless of whether a business complies with a statute or the executive branch enforces that statute, "the judgment concerning the manner in which that business is carried out [i.e., whether it is a nuisance] is within the province of the judiciary." *Armory Park*, 148 Ariz. at 8-9. Although a city might set public policy by adopting or repealing ordinances, "it cannot limit the power of the superior court to fashion a remedy in actions for injunctive relief against nuisances[.]" *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 189 (App. 2008). The Court thus concludes that no separation of powers issues are implicated by issuing an injunction here.

THEREFORE, IT IS ORDERED granting Plaintiffs' request for preliminary injunctive relief. Until further order of the Court, Defendant is hereby enjoined as follows:

- A. Defendant shall not begin its outdoor concerts prior to 7:00 p.m. on Friday and Saturday night and shall terminate its outdoor concerts no later than 11:00 p.m. on Friday and Saturday nights. Defendant shall not begin its outdoor concerts prior to 2:00 p.m. on Sundays and shall terminate its outdoor concerns no later than 7:00 p.m. on Sundays. Defendant shall not begin any outdoor concerns on any other day of the week prior to 7:00 p.m. and shall terminate any outdoor concerts no later than 11:00 p.m. on those evenings.

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- B. Defendant shall limit its noise level to no greater than 97 db(A) as measured from Shady Park's concert stage.
- C. Defendant shall comply with the recommendations of Mr. Beiler and Mr. Jackson concerning the use and positioning of extra subwoofers and the use of cardioid subwoofers.
- D. Defendant shall make available to Plaintiffs a method for live-monitoring of the sound level measurements during the entirety of Defendant's outdoor concerts. The parties shall meet and confer to develop a mutually agreeable method by which Plaintiffs may obtain the live sound monitoring. The parties shall file a joint notice of the results of their conferral no later than **5:00 p.m. on April 20, 2022**. The Court will either adopt the parties' stipulated Order, or the parties shall file a joint position statement (containing each party's separate proposal), which the Court will review prior to entering its own Order concerning the method for live-monitoring.
- E. Failure to abide by the terms of this preliminary injunction could result in the Court imposing sanctions or holding Defendant in contempt of Court.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court.

DATED this 12th day of April, 2022

/s/ Brad Astrowsky
HONORABLE BRAD ASTROWSKY
JUDICIAL OFFICER OF THE SUPERIOR COURT