ATTACHMENT 23

Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-012879

12/03/2019

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

KIP M MICUDA, et al.

KIP M MICUDA
16509 E LONE MOUNTAIN RD
SCOTTSDALE AZ 85262

v.

DAMON BRUNS, et al.

DAVID AARON BROWN

KENT MILLWARD
JUDGE KILEY

UNDER ADVISEMENT RULING

I. Conclusions of Law

1. "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 1867 (1997) (citation and internal quotations omitted).

2. Generally, when considering whether to issue a preliminary injunction, "a court must consider whether the moving party has shown: (1) a strong likelihood of success at trial on the merits, (2) the possibility of irreparable injury not remediable by damages, (3) a balance of hardships in its favor, and (4) public policy favoring the injunction." *Apache Produce Imports, L.L.C. v. Malena Produce, Inc.*, 247 Ariz. 160, 164, 447 P.3d 341, 345 (App. 2019), *citing Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). "The critical element in this analysis is the relative hardship to the parties." *Shoen*, 167 Ariz. at 63, 804 P.2d at 792.

3. A court need not weigh or consider the four traditional equitable factors, however, when the activity to be enjoined is expressly proscribed by statute. *See Ariz. St. Bd. of Dental Examr's v. Hyder*, 114 Ariz. 544, 546, 562 P.2d 717, 719 (1977) (violation of statute prohibiting unauthorized practice of dentistry is a nuisance *per se* that may be enjoined without a showing of irreparable harm; "The showing of irreparable harm is not here a condition precedent to the granting of equitable relief. Harm is conclusively presumed from the legislative declaration."); *Burton v. Celentano*, 134 Ariz. 594, 596, 658 P.2d 247, 249 (App. 1982) ("[W]hen the acts sought to be enjoined have been declared unlawful...plaintiff need show neither irreparable injury nor a balance of hardship in his favor.") (citation and internal quotations omitted).

4. A "private nuisance" is "an interference with a person's interest in the enjoyment of real property." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985). *See also* Restatement (2nd) Torts § 821D ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.").

5. A "public nuisance," by contrast, is "not limited to an interference with the use and enjoyment of the plaintiff's land," but "encompasses any unreasonable interference with a right common to the general public." *Armory Park*, 148 Ariz. at 4, 712 P.2d at 917. *See also Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, 400-01, 430 P.3d 362, 365-66 (2018) (public nuisance claim requires a showing, *inter alia*, of "an unreasonable interference with a right common to the general public that affects a considerable number of people.") (citation and internal punctuation omitted).

6. A private litigant may maintain a public nuisance claim "if his or her damage is different in kind or quality from that suffered by the public in common." *Hopi Tribe*, 245 Ariz. at 400, 430 P.3d at 365 (citation and internal quotations omitted). *See also* Restatement (2nd) Torts § 821C (to maintain "individual action for a public nuisance," plaintiff must show that he or she has "suffered harm of a kind different from that suffered by other members of the public exercising the [same public right]").

7. The "so-called 'special injury' requirement," though sometimes referred to as a matter of standing, is "[m]ore precisely" characterized as "a requisite element of a private plaintiff's *prima facie* public nuisance claim." *Hopi Tribe*, 245 Ariz. at 400, 430 P.3d at 365 (citation and internal quotations omitted).

8. The "special injury" element of a public nuisance claim serves to "relieve[] defendants and the courts of the multiple actions that might follow if every member of the public were allowed to sue for a common wrong," as well as to "ensure[] that harms affecting all members of the public equally are handled by public officials rather than by courts in private litigation." *Hopi Tribe*, 245 Ariz. at 400, 430 P.3d at 365 (citation and internal punctuation omitted).

9. The "special injury" element of a public nuisance claim is established, *inter alia*, when traffic and noise from an alleged nuisance interfere with a homeowner's use and enjoyment of his or her property. *See Blanchard v. Show Low Planning and Zoning Comm'n*, 196 Ariz. 114, 118, 993 P.2d 1078, 1082 (App. 1999) (holding that evidence supported trial court's conclusion that owner of property adjacent to property rezoned to accommodate a Wal-Mart Supercenter would "suffer special damages" from the resulting "traffic, litter, drainage, and noise from the project" that "will be more substantial than those suffered by the community at large").

10. A landowner's use of, or construction on, his or her real property in violation of applicable statutes or ordinances constitutes a nuisance. *See Cochise County v. Broken Arrow Baptist Church*, 161 Ariz. 406, 408, 778 P.2d 1302, 1304 (App. 1989) (affirming issuance of injunction barring further use of building constructed without a building permit, and holding that, without the required building permit, "the building and its use are a nuisance as a matter of law.").

11. A.R.S. § 11-815 provides in part, "*It is unlawful to* erect, construct, reconstruct, maintain or *use any land* in any zoning district *in violation of* any regulation or *any ordinance pertaining to the land* and *any violation constitutes a public nuisance*." A.R.S. § 11-815(C) (emphasis added).

12. A.R.S. § 11-815 goes on to provide that, "[i]f...any land is...used in violation of this chapter or any ordinance, regulation or provision enacted or adopted by the [county board of supervisors] under the authority granted by this chapter,...any adjacent or neighboring property owner who is specially damaged by the violation...may institute injunction...proceedings to prevent, abate or remove the unlawful...use." A.R.S. § 11-815(H).

13. Article 1502.2 of the Maricopa County Zoning Ordinance ("Article 1502.2") virtually mirrors A.R.S. § 11-815(C), providing, "*It shall be unlawful to* erect, construct, reconstruct, alter or *use any land* within a zoning district *in violation of* any regulation or *any provision of any Ordinance pertaining thereto*." Article 1502.2 (emphasis added). Like A.R.S. § 11-815(C), Article 1502.3 of the Maricopa County Zoning Ordinance ("Article 1502.3") provides, "*Any such violation shall constitute a public nuisance*." Article 1502.3 (emphasis added).

14. Article 1503.3 of the Maricopa County Zoning Ordinance ("Article 1503.3") provides,

> OTHER REMEDIES: *If* any building or structure is or is proposed to be erected, constructed, reconstructed, altered, maintained or used or *any land is* or is proposed to be *used in violation of any Ordinance*, regulation, or provision enacted or *adopted by the Board of Supervisors* under ARS Title

> 11 Chapter 6 County Planning and Zoning, the Board of Supervisors, County Attorney, Zoning Inspector, or *any adjacent or neighboring property owner who is specially damaged by the violation*, in addition to the other remedies provided by law, *may institute injunction*, mandamus, abatement or any other appropriate action or *proceedings to prevent or abate or remove the unlawful* erection, construction, reconstruction, alteration, maintenance or *use*.

Article 1503.3 (emphasis added).

15. When the existence of a public nuisance has been established, a court has no discretion to refuse to enjoin it. *See State ex rel. Sullivan v. Phoenix Sav. Bank & Trust Co.*, 68 Ariz. 42, 46, 198 P.2d 1018, 1020 (1948) ("[W]hen a proper case for injunction exists, such as the existence of a nuisance per se, the injunction must issue as a matter of right and to refuse to issue it amounts to a mistake of law."); *Cactus Corp. v. State ex rel. Murphy*, 14 Ariz.App. 38, 41, 480 P.2d 375, 378 (App. 1971) ("[U]nder Arizona law, upon a determination that an activity is a public nuisance per se, the trial court has no discretion but to abate the activity by injunction.").

II. Findings of Fact

1. Plaintiffs Kip Micuda ("Micuda") and Ann Haugen ("Haugen") (Micuda and Haugen collectively, the "Plaintiffs") own, and reside at, a lot in an unincorporated area of Maricopa County in the Rio Verde foothills ("RVFH") with a mailing address of 16509 E. Lone Mountain Road in Scottsdale, Arizona.

2. The Plaintiffs purchased their lot in May 2016 and moved in a few months later.

3. Micuda and Haugen both testified that they purchased their home in the RVFH area because they wanted to live in a rural setting and, as Micuda stated, to "get away from urban life." Micuda testified, "Being outside and seeing the critters is important to me." Haugen similarly testified, "We moved away from an urban environment...because we wanted peace and quiet, to hear the birds, see the critters." Among other things, the Plaintiffs testified, they intended to make daily use of their new home's outdoor patio, spending time together outside talking, relaxing, and enjoying their surroundings. Their home, Haugen testified, "was going to be our little sanctuary."

4. Haugen testified that the Plaintiffs purchased their home in the RVFH area despite the fact that she works in downtown Phoenix and would, therefore, have to endure a lengthy daily commute to and from work. She testified that, although she "spend[s] at least three hours a day in [her] car," she was willing to accept the lengthy commute in order to enjoy the "peace and

quiet" of rural life. Despite the distance from her office, she stated, living in the rural RVFH area "was going to be worth it."

5. Defendant Granite Mountain Investments, LLC, ("Granite Mountain") is an Arizona limited liability company that is owned by Defendants Damon Bruns ("Bruns"), Holly Bruns, Richard Bruns, and Claudette Bruns.

6. Granite Mountain owns a 5-acre lot with a mailing address of 31222 N. 166th Street in Scottsdale, Arizona (the "Property"). The Property is adjacent to the lot owned by the Plaintiffs. Granite has owned the Property since 2015.

7. The Property is zoned as "rural/residential" under the Zoning Ordinance. Presently on the Property are three horse corrals and a large barn that was built in late 2016 or 2017. Additionally, a 1,300-square-foot residence is under construction on the Property.

8. Defendant Dynamite Water, LLC ("Dynamite Water") is an Arizona limited liability company that is owned by Bruns and his wife, Defendant Holly Bruns.

9. Most RVFH area residents rely exclusively on hauled water to meet their household water needs. Dynamite Water is one of three companies that supplies potable water to RVFH area residents, the others being Rio Verde Water and Water Express.

10. In addition to supplying potable water for household use, Dynamite Water also provides water for fire suppression purposes. Dynamite Water maintains a relationship with the Rio Verde Fire District and Rural/Metro to provide water for such purposes.

11. As Bruns testified, Dynamite Water owns a total of eight water trucks, but only "two or three" are used for potable water delivery on a daily basis. The remaining trucks are dedicated for use in connection with fire suppression services, and are used to deliver household water only when they are needed to take the place of a potable water delivery truck that is out of operation because it is undergoing repairs or maintenance.

12. The Plaintiffs purchased their household water from Dynamite Water for approximately three years, until July 2019.

13. The Plaintiffs have been disturbed by noise from Dynamite Water's water delivery trucks, and by the dust that is generated when the trucks drive along Lone Mountain Drive (which, like all roads in the area, is an unpaved dirt road). They find the noise and dust so objectionable that they no longer sit outside on their patio, except when Haugen steps outside to smoke in the pre-dawn hours before Dynamite Water begins operations for the day. Due to the noise and dust, they no longer even open the windows of their home. Both Plaintiffs indicated in

their testimony that they would not have purchased their property if they had known they would be subjected to noise and dust from Dynamite Water's trucks going to and from the adjacent Property.

14. Micuda testified that, although he was aware that some type of commercial activity was occurring on the Property, it was not until "late 2017 or early 2018," when he began looking into the matter, that he realized that it was the Plaintiffs' own water supplier, Dynamite Water, that was operating on the Property. Until then, Micuda testified, although the Plaintiffs had "been getting water from" Dynamite Water, "We didn't have any idea that that's actually where they were operating from." Despite coming to this realization in late 2017 or early 2018, the Plaintiffs continued to purchase their water from Dynamite Water.

15. In June, 2019, Micuda noticed the construction of another structure on the Property, and became concerned that the building being constructed was intended for use in connection with Dynamite Water's business. (The Defendants subsequently presented evidence showing that the structure being built on the Property is, in fact, a residence and not a commercial building, but that information was not known to Micuda at the time.)

16. On June 6, 2019, Micuda emailed Bruns to say that he objected to what he believed to be an expansion of the commercial use of the Property. The email reads as follows:

> I have resisted for some time writing you about your business running next to our property. The new construction forces me act. I insist you cease construction of your new industrial building. First, your property is not zoned for a business or the buildings. Second, your business asking for "donations" for water is an apparent effort to avoid taxes. If we do not reach a resolution on your new construction, I will have no choice but to contact the County, IRS and Arizona Dept. of Revenue. You obstruct our view and hurt property values. You ask too much. I would like your response by Monday. Thxs,
>
> Kip Micuda, Esq.

Exhibit 61 at pp. BRUNS000056 – BRUNS000057. Two days later, Bruns responded to Micuda's email, asking him to call. *Id.* at p. BRUNS000056.

17. On or about June 9, 2019, Micuda and Bruns spoke by phone. During their conversation, Micuda expressed concern about what he believed to be an expansion of the commercial activity on the Property. According to Micuda, Bruns replied that the new construction was for storage space for Dynamite Water's vehicles. Exhibit 1 at p. PLAINTIFF000005. Micuda further stated

that Bruns told him "that his trucks were, in essence, exempt from the Zoning Code because of a certification he obtained from the Arizona Department of Transportation." *Id.*

18. Via text message, Micuda and Bruns subsequently discussed meeting in person. *See* Exhibit 99. Because they could not agree on a meeting place - - Bruns was unwilling to allow Micuda onto the Property, while Micuda wanted the meeting to take place there - - no in-person meeting ever took place. Finally, on or about June 22, 2019, Bruns asked Micuda to cease further communications, stating, "This will be my last communication on this issue, anything moving forward will be considered harassment." *Id.* at p. BRUNS000168.

19. Micuda submitted a complaint regarding the commercial activity on the Property to the Maricopa County Department of Planning and Development (the "County"), which the County accepted on June 28, 2019. Exhibit 2. Micuda testified that the basis for his complaint was that the Defendants "are operating an illegal business on the [Property]."

20. The County verified the zoning complaint on July 10, 2019, finding "the following conditions during the verification inspection": "Multiple water trucks, other equipment on site. Commercial Business Operation in a Rural/Residential Zoning District without the Proper Zoning Entitlement." Exhibit 1, Attachment F at p. PLAINTIFF000031.

21. The County sent Bruns and Granite Mountain a Notice and Order to Comply on July 10, 2019, giving them a deadline of August 12, 2019 in which to correct the conditions constituting the zoning violation. Exhibit 1, Attachment G at p. PLAINTIFF000033.

22. On or about July 13, 2019, Micuda drove to the Property and began taking pictures of the commercial activity that was occurring there. Bruns was not present at the time; he was at work on behalf of his employer, the Phoenix Fire Department. An unidentified individual who was present on the Property, however, confronted Micuda and complained that he considered Micuda's taking of pictures to be harassment.

23. Shortly thereafter, Bruns decided to terminate water delivery to the Plaintiffs' home. He testified that he made that decision because, "with everything that was going on" between the parties, he considered it "better just to stop" their business relationship. Without notice to the Plaintiffs, a Dynamite Water driver, acting at Bruns's direction, went to the Plaintiffs' lot and removed the water meter from the Plaintiff's residential water tank. Several days later, on or about July 19th, the Plaintiffs discovered, to their surprise, that their water tank had run dry and they were without a source of water for their household. Micuda quickly contacted John Hornewer ("Hornewer"), the owner of Rio Verde Water, and arranged for Rio Verde Water to immediately deliver water to the Plaintiffs' home.

24. The parties dispute whether, at the time Dynamite Water discontinued water delivery services, the Plaintiffs were current in their monthly payments to Dynamite Water. A Dynamite Water invoice dated July 8, 2019 that was admitted at an evidentiary hearing on November 21, 2019, indicates that the Plaintiffs owed a past due balance of $160.00 as of that date. Exhibit 45 at p. PLAINTIFF000222. Micuda testified, however, that, at the time water services were terminated, the Plaintiffs "weren't behind" in their payments, and that the balance due that appears on the invoice was the result of an accounting error on Dynamite Water's part.

25. In the Court's view, whether the Plaintiffs' account with Dynamite Water was, in fact, in arrears in July 2019 is irrelevant to the issues in dispute here. Bruns did not claim that Dynamite Water terminated its business relationship with the Plaintiffs because of any arrearage. Instead, he testified that he made the decision to cease doing business with the Plaintiffs because he wanted to sever all ties with the Plaintiffs due to the dispute that had arisen between the parties.

26. Bruns obtained an Injunction Against Harassment against Micuda on July 15, 2019. Exhibit 47 at p. PLAINTIFF000228. In his Petition for Injunction Against Harassment, Bruns alleged that, two days earlier, Micuda had "harass[ed] workers" at the Property, and that, prior to that, Micuda had sent "threatening text messages" to Bruns "stating," *inter alia*, that "he had contacted the County...to stop construction on" the Property. *Id.* at p. PLAINTIFF000230. The Injunction Against Harassment was quashed after a hearing on August 7, 2019. Exhibit 46.

27. In response to the Notice and Order to Comply, Bruns entered into a Compliance Agreement with the County. *See* Exhibit 64. The Compliance Agreement identifies the violation as "Commercial business operation/land use established without property zoning entitlement," and states that "[t]he Respondent [*i.e.*, Bruns] admits to responsibility for the Violation" and agrees to "bring[] the Property into compliance." *Id.* at p. BRUNS000060. The Compliance Agreement bears Bruns's signature. *Id.* at p. BRUNS000062.

28. The Compliance Agreement establishes the following compliance deadlines:

> Critical deadline #1: By December 30, 2019, the Respondent shall cease and desist all use of the property other than for a single-family residence unless application for other zoning entitlement has been successfully submitted to the Maricopa County Planning and Development Department ("Department").
>
> Critical deadline #2: The Respondent shall bring the Property into compliance by August 17, 2020. By this time all use of the property shall be consistent with the use regulations of the Rural-43 zoning district unless

> other zoning entitlement has been approved and the use established by a completed construction permit.

Exhibit 64 at p. BRUNS000060.

29. Upon learning of the Compliance Agreement, Plaintiffs contacted the County by email on August 12, 2019, stating, "I learned this morning that the Department entered a CA with Mr. Bruns last week. Please confirm...I will ask for specific information as to why and how the department is allowing this industrial use in a residential area, especially when the department is aware of objection. Please inform of my rights to appeal the Department as well." Exhibit 65.

30. Darren Gerard of the County replied to Micuda's email the same day, stating in part, "Yes, we have entered into a compliance agreement which is standard operating procedure to seek compliance. There is no appeal process on [*sic*] this matter. Should they pursue special use permit/rezoning, rather than an exit strategy, that is a public hearing matter and you are encourage [*sic*] to provide input." Exhibit 65.

31. The Plaintiffs filed their Complaint for Nuisance and Injunction in this matter, along with a Motion for Preliminary Injunction and other related filings, on September 20, 2019. Asserting that the "Defendants' conduct" in conducting business operations on the Property constitutes both "a public nuisance" and "a private nuisance," the Plaintiffs seek "[p]reliminary and permanent" injunctive relief as well as damages and other relief. Amended Complaint for Nuisance and Injunction at pp. 15-17.

32. An Order to Show Cause hearing was held on October 21, 2019, and the preliminary injunction hearing (the "Hearing") was held on November 21, 2019.

33. At the Hearing, Micuda testified that Dynamite Water trucks going to and from the Property have substantially interfered with the Plaintiffs' use and enjoyment of their home, stating, "Our use and enjoyment is basically gone." The trucks, Micuda testified, "start up as early as 5:15 in the morning, and they run as late as 10 o'clock at night." He went on to explain that the trucks are "extremely loud," and that, due to the "extreme" noise level, the Plaintiffs no longer sit outside on their patio. "We used to spent lots of time on our patio in the morning and the evening, and then throughout the day on the weekend," Micuda stated. "We don't do that anymore. We haven't done that in a year." Even when inside their home, Micuda testified, the Plaintiffs "can feel the vibrations" made by the large water trucks.

34. Haugen, too, testified that the "noise and vibration" from Dynamite Water's water trucks is "offensive."

35. The Plaintiffs also testified that the Dynamite Water trucks generate a "significant" amount of dust. In part because of the dust, Micuda testified, "We haven't opened our windows in a year." Haugen, too, testified that, due to the dust generated by the trucks, "it's just unpleasant" to be outside, explaining, "You feel dirty." She further echoed Micuda's testimony that the Plaintiffs no longer open the windows to their home due to the noise and dust outside.

36. Micuda testified that the Plaintiffs purchased their property specifically "for the outdoor use and enjoyment," and that, in light of the business activity on the Property, the Plaintiffs "would not buy" their home "today." Haugen similarly testified that the Plaintiffs' property "was supposed to be our dream home," but "I don't want to live there anymore."

37. Micuda testified at the Hearing that the Plaintiffs "regularly saw five to six" water trucks on the Property in late 2018/early 2019, but that, "most recently," they have seen only "two to three" trucks on the Property. He attributed the decrease in the number of trucks on the Property to the pendency of this case, stating, "But for this action, I have no doubt in my mind there would be eight trucks on that property running from five in the morning until ten in the evening."

38. The Plaintiffs' testimony about the noise and dust generated by Dynamite Water's water trucks was corroborated at the Hearing by Hornewer, owner of Rio Verde Water. Hornewer testified that Rio Verde Water has trucks that are the same size and year as Dynamite Water's trucks, and that those trucks are "very loud" and "kick up" a lot of dust when traveling on the RVFH area's dirt roads.

39. When asked at the Hearing if he would consider the operation of only one or two water trucks on the Property to be a nuisance, Micuda testified that he would. He went on, however, to pose the question, "If it was one or two trucks, would we be here? Would my wife and I be here? The answer to that I think is probably no." He explained that the Plaintiffs are "not interested in putting water haulers in the area out of business. They're essential." Instead, Micuda testified, the Plaintiffs would like to "find a compromise that works for everybody, without having an industrial complex in the middle of a rural, residential area."

40. Micuda went on to testify that the Plaintiffs would not object if Dynamite Water conducted its business on the Property using only one or two water trucks. In fact, he stated, he has already proposed that idea to County officials. He stated,

> We're realistic. So if the County adopts a provision that says a water hauler can park one or two trucks on his or her lot to continue the services that they are providing, I'm going to agree with that. I'm the one who floated that idea. So I'm not going to complain about one or two trucks when I floated the idea of trying to create an exception for one or two trucks.

41. Several other RVFH area residents testified that they are not disturbed by Dynamite Water's operation of its business on the Property. Heather Webb ("Webb"), Gerald Fleming ("Fleming"), and Holly Wagner ("Wagner") all testified that they do not find Dynamite Water's trucks to be offensively loud. Fleming, for example, who works at night and generally sleeps during the day, testified, "If I'm awake, I can hear" the trucks, but that the noise is not "obtrusive at all to me."

42. Likewise, Webb, Fleming and Wagner all testified that Dynamite Water's trucks generate little, if any, dust. They testified that, on the contrary, the slow rate of speed at which Dynamite Water's trucks travel on the local roads minimizes the amount of dust they generate.

43. Although the Plaintiffs suggested at the Hearing that Wagner's testimony may have been influenced, consciously or unconsciously, by her relationship with Bruns (including the fact that they are both active in a nonprofit organization called Rio Verde Foothills Volunteer Fire Support and Emergency Services and the fact that Bruns has allowed her to board horses on the Property at no charge), the Plaintiffs identified no basis on which to believe that Webb or Fleming has any relationship to any of the Defendants that might create a bias in the Defendants' favor.

44. Several other RVFH area residents provided testimony pursuant to affidavits that were admitted at the Hearing by stipulation. *See generally* Exhibit 118. Robert Allen, for example, stated in his affidavit, "I have observed Dynamite Water trucks on multiple occasions traveling at a low speed to minimize their dust trail." *Id.* at p. 1. Likewise, Jason Stasiuk stated,

> This is a community built on dirt roads. Every vehicle raises some dust. Dynamite is conscious about their speed + I have even seen on several occasions them watering roads.

Id. at p. 9.

45. Some of the RVFH area residents who provided testimony by affidavit also spoke of the importance of Dynamite Water to the RVFH community. Walter Stone, for example, stated,

> Dynamite Water is a great value to our community and enhances my property values – as I rely upon hauled water with many of my neighbors. The owner is a Good Samaritan + firefighter. A true neighbor.

Exhibit 118 at p. 12. Nancy Randle expressed a similar view more succinctly, stating,

I value them! I need them!!!!

Id. at p. 4.

A. Jurisdiction Over the Plaintiffs' Claims

Noting that the Compliance Agreement that Bruns entered with the County establishes compliance deadlines that have not yet passed, the Defendants accuse the Plaintiffs of "attempting" an improper "end-run" around "the zoning process they initiated," and urge the Court to "defer to the County under the principles of exhaustion [of administrative remedies] and [the doctrine of] primary jurisdiction." Defendants' Response Opposing Plaintiffs' Motion for Preliminary Injunction at pp. 2, 4.

For two reasons, the Court rejects the Defendants' assertion that the doctrine of "exhaustion of administrative remedies" applies in this case.

First, while the doctrine of exhaustion of remedies requires parties to "avail themselves of all administrative remedies before seeking judicial relief," *Bailey-Null v. ValueOptions*, 221 Ariz. 63, 67, 209 P.3d 1059, 1063 (App. 2009), a non-party to an administrative proceeding who has no right to participate in the administrative process cannot be required to exhaust non-existent remedies. *Ross v. Blake*, __ U.S. __, __, 136 S.Ct. 1850, 1858 (2016) (holding that prison inmate asserting claim governed by Prison Litigation Reform Act "must exhaust available remedies, but need not exhaust unavailable ones"). Here, as the County has informed the Plaintiffs, they have no right to appeal the County's decision to enter into the Compliance Agreement with the Defendants. *See* Exhibit 65 ("There is no appeal process on [*sic*] this matter."). Although the Plaintiffs, like all other members of the public, would have the right to voice their objections at a public hearing of the County's Planning and Zoning Commission and Board of Supervisors if the Defendants were to file an application for a special use permit, no such permit application has been filed, and no other proceedings are ongoing in which the Plaintiffs have the right to participate or be heard.

Second, the requirement that a party exhaust administrative remedies does not apply where, as here, a statute expressly authorizes a party to seek judicial relief. *See Coconino County v. Antco, Inc.*, 214 Ariz. 82, 87, 148 P.3d 1155, 1160 (App. 2006) (holding that "exhaustion of remedies" doctrine did not bar county from bringing action to enjoin composting business as a "per se public health nuisance" because, although business was regulated by Department of Environmental Quality ("ADEQ"), county had "statutory right to initiate...enforcement actions independently" of ADEQ). After all, the "exhaustion of remedies" doctrine applies only if "an administrative agency has original jurisdiction over the subject matter of the claims," and such original jurisdiction will only be found if the agency is "specifically empowered to act by the

Legislature." *Bailey-Null*, 221 Ariz. at 67, 209 P.3d at 1063. Where the Legislature has, by statute, authorized a private litigant to seek judicial relief on his or her claim, the Legislature cannot be said to have conferred original jurisdiction on an administrative agency, and so the "exhaustion of remedies" doctrine does not apply. *Antco*, 214 Ariz. at 87, 148 P.3d at 1160. *See also Bailey-Null*, 221 Ariz. at 68-69, 209 P.3d at 1064-65 (holding that exhaustion of remedies doctrine did not apply to bar vulnerable adult's claims against provider of behavioral health services because, although provider had established an administrative grievance and appeal process, Legislature also enacted statutes authorizing "a vulnerable adult" to "file an action in superior court").

In the alternative, the Defendants assert that the "doctrine of primary jurisdiction" bars the Plaintiffs from maintaining this action. Amended Joint Pretrial Statement at p. 56. In support of their position, the Defendants contend that, "[h]aving initiated an enforcement process, the County must be permitted to complete the process," and that the County "is better situated" than this Court "to balance interests, invite public comment, and weigh public policy considerations." *Id.*

Again, the Court disagrees. While application of the doctrine of primary jurisdiction may be appropriate if a case requires resolution of "a particularly complicated issue" that has been "committed" by statute "to a regulatory agency," the doctrine is not implicated merely because "a case presents a question...over which" an agency "could have jurisdiction." *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). Further, the doctrine does not apply "if the administrative agency has already acted or otherwise been given an opportunity to determine matters within its special expertise or explicit jurisdiction prior to judicial review." *Antco*, 214 Ariz. at 89, 148 P.3d at 1162. Here, the County has already had the opportunity to address the issue of the business operations occurring on the Property, and has chosen to enter into a Compliance Agreement with the Defendants rather than to shut the Defendants' operations down. Because the County has had the opportunity to act, the doctrine of primary jurisdiction does not apply to deprive the Plaintiffs of their right to pursue their statutory remedies. *Id.* at 89-90, 148 P.3d at 1162-63 (doctrine of primary jurisdiction did not prevent county from bringing statutory action to enjoin composting business after state environmental regulatory agency "was given ample opportunity to" investigate alleged violations and decide whether to take action).

The Court therefore finds that the fact that Bruns has entered a Compliance Agreement with the County which establishes compliance deadlines that have not yet passed is irrelevant to the Plaintiffs' right to seek judicial relief to enjoin the business operations on the Property.

B. Public Nuisance

There can be no dispute that the activity on the Property violates applicable provisions of statute and the Zoning Ordinance; Bruns admitted as much when he entered the Compliance Agreement. *See* Exhibit 64 at p. BRUNS000060 ("The Respondent admits to responsibility for the Violation and for bringing the Property into compliance."). The Arizona Legislature and the Maricopa County Board of Supervisors have both determined that such a violation constitutes a public nuisance. *See* A.R.S. § 11-815(C) ("It is unlawful to erect, construct, reconstruct, maintain or use any land in any zoning district in violation of any regulation or any ordinance pertaining to the land and *any violation constitutes a public nuisance.*") (emphasis added); Article 1502.3 (*"Any such violation shall constitute a public nuisance."*) (emphasis added). Because the Court is bound by that legislative determination, the Court has no choice but to find that Dynamite Water's use of the Property constitutes a public nuisance.

The Court must then turn to whether the Plaintiffs have established that they will suffer a "special injury" as a result of the nuisance on the Property. *Hopi Tribe*, 245 Ariz. at 400-01, 430 P.3d at 365-66 ("[S]pecial injury is a requisite element of a private plaintiff's prima facie public nuisance claim…").

The "special injury" required to maintain a public nuisance claim is defined as "damage that is different in kind or quality from that suffered by the public in common." *Hopi Tribe*, 245 Ariz. at 398-99, 430 P.3d at 363-64 (citation and internal punctuation omitted). Interference with the plaintiff's use and enjoyment of his or her own property satisfies the "special injury" requirement. *See Armory Park*, 148 Ariz. at 3, 5, 712 P.2d at 916, 918 (affirming preliminary injunction granted to residential neighborhood association enjoining nuisance created by non-profit's provision of free meals to indigent persons, which attracted transient individuals who "frequently trespassed onto residents' yards" and engaged in other offensive behavior; "[B]ecause the acts allegedly committed by the [transient visitors] affected the residents' use and enjoyment of their real property, a damage special in nature and different in kind from that experienced by the residents of the city in general, the residents of the neighborhood could bring an action to recover damages for or enjoin the maintenance of a public nuisance."). *See also Hopi Tribe*, 245 Ariz. at 401, 402, 430 P.2d at 355, 367 ("[T]he only public nuisance cases in which we have recognized special injury involved property or pecuniary interests," and "damage to or interference with such an interest.").

Here, Micuda and Haugen both testified that they purchased their property in order to enjoy the peace and quiet of outdoor rural life but that, due to the noise and dust generated by Dynamite Water's trucks, they now spend their time, when at home, indoors with the windows shut. The Court finds their testimony to be credible. Moreover, the Plaintiffs' testimony about the loud noise generated by Dynamite Water's trucks is corroborated by the testimony of Fleming, who acknowledged at the Hearing that he can hear noise from those trucks when inside his home (although, unlike the Plaintiffs, he doesn't seem to mind).

Numerous other RVFH area residents testified at the Hearing that they are not bothered by the commercial activity on the Property and do not find Dynamite Water's trucks to be offensively noisy or to generate excessive dust. The fact that these other RVFH area residents are not bothered by Dynamite Water's business activities does not, however, undermine the Plaintiffs' claim to have suffered injury as a result of noise and dust generated by Dynamite Water's illegal use of the Property. To maintain a public nuisance claim, a plaintiff need only establish a special injury beyond that suffered by the public at large. The relevant comparison, in other words, is between the plaintiff and the public at large, not between the plaintiff and other neighboring property owners. *See Buckelew v. Town of Parker*, 188 Ariz. 446, 452, 937 P.2d 368, 374 (App. 1996). In *Buckelew*, Buckelew, the owner of property adjacent to a recreational vehicle ("RV") park, brought suit alleging a zoning violation when the owner of the RV park began allowing residents to reside there on year-round (rather than merely part-time) basis. In support of his claim, Buckelew asserted that he "suffered from special damage from the changed use of the RV park." *Id.* at 449, 937 P.2d at 371. Evidently accepting the defendants' argument that Buckelew lacked standing because he "suffered the same damage as all of the other neighboring landowners," the trial court dismissed the complaint. *Id.* at 449-50, 937 P.2d at 371-72. The Court of Appeals reversed, holding that Buckelew was required only to "plead damage from an injury peculiar to him or at least more substantial than that suffered *by the general public*." *Id.* at 452, 937 P.2d at 374 (emphasis added). In so holding, the *Buckelew* court found irrelevant the question of how Buckelew's injury compared to that of his immediate neighbors. Instead, the Court concluded that the harm alleged by Buckelew satisfied the requirement of "injury peculiar to himself" because the harm "is both peculiar to Buckelew and more substantial than that sustained by the public," irrespective of whether "neighboring landowners" suffered "the same or similar damage." *Id. See also Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., LLC*, 2019 WL 4415682 at *21 (W.D.N.Y., Sept. 16, 2019) ("The proper inquiry is not whether Plaintiffs have alleged an injury different in kind from other property owners, but rather, it is whether Plaintiffs have alleged an injury different in kind from the community at large.") (citation and internal punctuation omitted).

The Court finds that the Plaintiffs have credibly testified that their use and enjoyment of their home has suffered as a result of the noise and dust generated by Dynamite Water's trucks, and therefore have established the "special injury" element of their public nuisance claim. No further showing is required to justify an order enjoining a public nuisance. *See Cactus Corporation*, 14 Ariz.App. at 41, 480 P.2d at 378 ("[U]pon a determination that an activity is a public nuisance per se, the trial court has no discretion but to abate the activity by injunction.").

At the Hearing, the Defendants asserted that the four traditional equitable criteria set forth in *Shoen* and other cases must be established before a court enjoins a public nuisance. Acknowledging that some courts have enjoined nuisances without considering the four

traditional criteria, the Defendants argued at the Hearing that these cases are distinguishable because they are all "vice cases brought by public authorities." As an example, the Defendants cited *Engle v. Scott*, 57 Ariz. 383, 114 P.2d 236 (1941). *See id.* at 387, 389, 114 P.2d at 237, 238 (affirming order enjoining operation of horse race betting establishments despite absence of evidence of "interfer[ence] with the public enjoyment of life and property" or other harm to the public; "When anything is a nuisance per se, all that is necessary to establish the right of public authorities to demand the proper remedy is to prove the act which, as a matter of law, constitutes the nuisance.").

The Defendants' argument that a public nuisance cannot be enjoined without a showing of "irreparable harm" and "balance of hardships" except in "vice cases brought by public authorities" is inconsistent with *Burton v. Celentano*, 134 Ariz. 594, 658 P.2d 247 (App. 1982). In *Burton*, the claim for injunctive relief was not brought by a governmental entity, nor was the nuisance in that case alleged to be a vice or other offense against public morals. Instead, the plaintiffs in *Burton* were private landowners who sought a preliminary injunction requiring neighboring landowners to remove a wooden wall that they had erected on their property in violation of applicable floodplain regulations. In affirming the trial court's granting of the requested preliminary injunction, the *Burton* court rejected the defendants' challenge to the sufficiency of the plaintiffs' showing of irreparable injury and the balance of hardships, holding that no such showing was required. In so holding, the *Burton* court stated that

> *when the acts sought to be enjoined have been declared unlawful...*, [*a*] *plaintiff need show neither irreparable injury nor a balance of hardship in his favor.* This is especially true when a statute expressly authorizes interlocutory injunctive relief.

Id. at 596, 658 P.2d at 249 (emphasis added, citation and internal quotations omitted). *Burton* thus establishes that, if the conduct sought to be preliminarily enjoined is in violation of statute, irreparable harm and a balance of hardships need not be shown even if the action is brought by private litigants rather than a government entity.

At the Hearing, the Defendants attempted to distinguish *Burton* by pointing to the *Burton* court's description of the statute at issue in that case as "a statute [that] expressly authorizes interlocutory injunctive relief." *Burton*, 134 Ariz. at 596, 658 P.2d at 249 (citation and internal quotations omitted). The Defendants argued that this language indicates that the statute at issue in *Burton* contained a provision expressly authorizing the issuance of preliminary injunctive relief, and that *Burton* is inapposite here because the relevant provisions of A.R.S. § 11-815 and the Zoning Ordinance do not expressly authorize preliminary injunctive relief.

The Court finds the Defendants' efforts to distinguish *Burton* unpersuasive. The statute at issue in *Burton* provided in pertinent part that

> *any person who may be damaged* as a result of the diversion, retardation or obstruction of a watercourse *shall have the right to* commence, maintain and prosecute any appropriate action *or pursue any remedy to enjoin*, abate or otherwise prevent *any person from violating or continuing to violate any provision of this section.*

Burton, 134 Ariz. at 596, 658 P.2d at 249 (emphasis added). Although the statute thus authorized injunctive relief, it makes no express reference to preliminary injunctive relief. *See id.* The analogous provision of A.R.S. § 11-815 is quite similar, providing in pertinent part that,

> [*i*]*f*...*any land is*...*used in violation of* this chapter or *any ordinance*, regulation or provision enacted or *adopted by the board* under the authority granted by this chapter,...any *adjacent or neighboring property owner who is specially damaged by the violation*...*may institute injunction*...*proceedings to prevent*, abate or remove *the unlawful*...*use*.

A.R.S. § 11-815(H) (emphasis added). Likewise, Article 1503.3 provides in pertinent part that

> *any adjacent or neighboring property owner who is specially damaged* by [a Zoning Ordinance violation]...*may institute injunction*, mandamus, abatement or any other appropriate action or *proceedings to prevent* or abate or remove *the unlawful* erection, construction, reconstruction, alteration, maintenance or *use*.

Article 1503.3 (emphasis added).

A comparison of the three enactments thus shows that the statute at issue in *Burton* is like A.R.S. § 11-815(H) and Article 1503.3 in all material respects. Like the statute at issue in *Burton*, A.R.S. § 11-815(H) and Article 1503.3 authorize injunctive relief in favor of private litigants with no express reference to preliminary as opposed to permanent injunctive relief. Because of the similarity of the statute at issue in *Burton* to A.R.S. § 11-815(H) and Article 1503.3, the Court does not find the Defendants' attempt to distinguish *Burton* to be persuasive. On the contrary, the Court finds *Burton* to be directly on point.

Because Dynamite Water is operating on the Property in violation of statute and the Zoning Ordinance, the Court is constrained to find that Dynamite Water's business operations on the Property constitute a public nuisance. The Court further finds that the Plaintiffs have made the requisite showing that they have suffered a special injury as a result of the operations on the Defendants' Property. Under the circumstances, the Court lacks discretion to deny the requested

preliminary injunction on the Plaintiffs' public nuisance claim. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 187, 181 P.3d 219, 234 (App. 2008) ("Our supreme court has held that the failure to enjoin a nuisance per se is an error of law.").

C. Private Nuisance

To obtain a preliminary injunction on a private nuisance claim, a plaintiff must "establish [the] four traditional equitable criteria." *Shoen*, 167 Ariz. at 63, 804 P.2d at 792. As noted above, the plaintiff may meet its burden by establishing 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 his favor." *Id.* (citation and internal quotations omitted). The "critical element," however, is the balance of hardships. *Id.* The "balance of hardships" is sometimes referred to as the "balance of equities," and both terms are used to express the idea that an injunction must do more good than harm. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133 (9th Cir. 2011) ("[T]o support equitable relief,...the injunction must do more good than harm[,] which is to say that the balance of equities favors the plaintiff.") (citation and internal punctuation omitted). S*ee also Maxim Integrated Products, Inc. v. Quintana*, 654 F.Supp.2d 1024, 1036 (N.D.Cal. 2009) ("A court balancing the equities will look to the possible harm that could befall the various parties.").

Here, much of the evidence presented at the Hearing supports the Defendants' position that the balance of hardships tips in their favor. The preliminary injunction that the Plaintiffs seek would, after all, compel the cessation of Dynamite Water's business operations on the Property, and it can hardly be disputed that the hardship to Dynamite Water of being forced to discontinue operations is substantial. *See, e.g., NaturaLawn of Am., Inc. v. West Group, LLC*, 484 F.Supp.2d 392, 403 (D.Md. 2007) (weighing the "balance of harms" in considering request for preliminary injunctive relief, the Court found that the "Defendants will be greatly burdened if forced to shut down their business altogether during the pendency of this case"). Although, in his testimony at the Hearing, Bruns did not attempt to quantify Dynamite Water's potential losses in monetary terms, he credibly testified that the harm to Dynamite Water of being forced to discontinue its operations at the Property would be "catastrophic." The Court finds that being required to cease operations would be a substantial hardship to the Defendants.

By contrast, a complete cessation of Dynamite Water's operations on the Property is not necessary to protect the Plaintiffs' interest in the peaceful enjoyment of their home. Micuda testified that he would support an amendment to the Zoning Ordinance that would permit Dynamite Water to maintain "one or two" water trucks on the Property. Indeed, he asserted, he is "the one who floated that idea." Micuda's testimony on this point makes clear that what the Plaintiffs find objectionable is not the *fact* that Dynamite Water conducts business operations on the Property, but the *size* of those operations. This, in turn, indicates that the Plaintiffs would

suffer no unreasonable hardship if Dynamite Water were allowed to continue its operations, but on a smaller scale. Because the Plaintiffs would suffer no unreasonable hardship if Dynamite Water were allowed to continue its operations on the Property on a smaller scale, a preliminary injunction shutting down Dynamite Water's operations in their entirety would impose a greater hardship on the Defendants than is necessary to accomplish the Plaintiffs' objectives. *See, e.g., Federal Trade Comm'n v. Vemma Nutrition Co.*, 2015 WL 11118111 at *8 (D.Ariz., Sept. 18, 2015) ("[I]njunctive relief...should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.") (citation and internal quotations omitted).

The interests of the public, too, weigh against the requested injunction. The interests of the public must, of course, be taken into account in any balancing of hardships. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 376-77 (2008) ("In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief" and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citation and internal quotations omitted); *Branstad v. Glickman*, 118 F.Supp.2d 925, 942 (N.D. Iowa 2000) ("[T]he 'balance of harms' analysis examines the harm of granting or denying the injunction upon both of the parties to the dispute *and upon other interested parties, including the public, as well.*") (emphasis added). The evidence presented at the Hearing establishes that the RVFH area has no water piping infrastructure, and so is entirely dependent on hauled water for fire suppression purposes. The loss of Dynamite Water's participation in fire suppression efforts could prove detrimental, to say the least, to the RVFH area. Although Dynamite Water is not the only hauled water company in the area, the evidence presented at the Hearing gives no cause for confidence that all of the RVFH area's fire suppression needs could be satisfactorily met without Dynamite Water's participation. On the contrary, Bruns, Wagner, and other witnesses credibly testified that, due to its relationship with the Rio Verde Fire District and Rural/Metro, Dynamite Water serves a key role in the RVFH area's fire suppression infrastructure. Their testimony on that point was corroborated, at least to some extent, by Hornewer, a witness called by the Plaintiffs. Hornewer testified that his company, Rio Verde Water, responds to the scene of a possible fire "maybe a couple of times a year," and that, "If we see smoke, any available resource, water hauler, we just naturally go to the scene to see what we can do to help the situation out." He further testified, "At the first sign of smoke, it's all hands on deck." Based on testimony presented by the Defendants, as well as Hornewer's testimony that "the first sign of smoke" creates an "all hands on deck" emergency for all local water companies, the Court finds that fire suppression efforts in the area would suffer without the participation of Dynamite Water.

Finally, any balancing of hardships must take into account the fact that the Plaintiffs themselves were customers of Dynamite Water for approximately three years. While Micuda testified, and the Court accepts, that it was not until late 2017 or early 2018 that the Plaintiffs

realized that Dynamite Water was using the Property to conduct its operations, the fact that the Plaintiffs continued to do business with the Defendants for over a year and a half after coming to that realization weighs against the Plaintiffs in any "balance of hardships" analysis. A plaintiff's complaints about a neighbor's operation of a business in a residential neighborhood become decidedly less compelling when the plaintiff turns out to have been a longtime customer of that business. *Cf. Friedman v. Rozzle*, 2013 WL 6175318 at *4, 5 (Tex.App., Nov. 21, 2013) (affirming trial court's ruling that homeowner waived her right to enforce restrictive covenant barring short-term rental of residences within subdivision because homeowner "engaged in conduct inconsistent with claiming any right to enforce the short-term rental provision," in part by "short-term rent[ing] her own [residence]")[1]; *Crawford v. Magnolia Petroleum Co.*, 62 S.W.2d 264, 267 (Tex.App. 1933) (pursuant to "the general principle that one may not recover damages for an injury received at the hands of another with his own consent,...one may not complain of a nuisance the creation of which he concurred in or countenanced") (citation and internal quotations omitted).

The Defendants argue that the Plaintiffs "are estopped from complaining in court" about Dynamite Water's business operations on the Property because the Plaintiffs "bought their water from Dynamite for nearly three years." Amended Joint Pretrial Statement at p. 52. The Plaintiffs deny that estoppel applies here, but acknowledge that their former customer relationship with Dynamite Water may be "factored in the court's balancing test to determine whether injunction is appropriate relief." *Id.* at p. 41. The Court agrees with the Plaintiffs on both points: their status as a longtime (though not current) Dynamite Water customer does not estop them from maintaining their claims in this case, but is nonetheless a factor that weighs against them in a balancing of the relative hardships to the parties.

While all of this evidence supports the Defendants' position regarding the balance of hardships, the fact remains that Dynamite Water's operations are in violation of the Zoning Ordinance. The balance of hardships necessarily tips in a plaintiff's favor "when a prospective injunction would do no more than require [the defendant] to comply with" the law. *Dish Network L.L.C. v. Ramirez*, 2016 WL 3092184 at *7 (N.D.Cal., June 2, 2016) (citation and internal quotations omitted). Here, Dynamite Water's use of the Property violates A.R.S. § 11-815 and Article 1502.2, and the Plaintiffs' requested injunction would do no more than require the Defendants to comply with their legal obligations pursuant to those enactments. For this reason, and for this reason alone, the Court finds that the balance of hardships favors the Plaintiffs on their private nuisance claim. *See also WHICH LLC v. NextGen Labs.*, Inc. 341 F.Supp.3d 1147,

[1] Although *Friedman* is designated as a "memorandum opinion," it may be cited and relied upon pursuant to Rule 47.7 of the Texas Rules of Appellate Procedure ("TRAP"). *See* Comment to TRAP 47.7 ("All opinions and memorandum opinions in civil cases issued after the 2003 amendment have precedential value.").

1165 (D.Haw. 2018) ("[G]enerally the balance of hardships tips in a plaintiff's favor when an injunction would do no more than require [the defendant] to comply with federal and state laws.") (citation and internal quotations omitted).

Two of the other traditional equitable factors - - *i.e.*, likelihood of success on the merits and possibility of irreparable harm, *Shoen*, 167 Ariz. at 63, 804 P.2d at 792 - - weigh in favor of the Plaintiffs. The evidence presented at the Hearing establishes that Dynamite Water's use of the Property has had a negative impact on the Plaintiffs' use and enjoyment of their home, which establishes at least some likelihood of success on the merits of their private nuisance claim. Moreover, this interference with the Plaintiffs' use and enjoyment of their home is not remediable by damages and therefore constitutes irreparable harm. *See Badke v. USA Speedway, LLC*, 139 So.3d 1117, 1128, 1129 (La.App. 2014) ("irreparable harm to the plaintiffs" established by commercial business's "interfere[nce] with the use and enjoyment of their property" by generating "dust" and "noise" that prevented plaintiffs "from peacefully watching television, listening to music, or talking on the phone" while at home). *See also Shoen*, 167 Ariz. at 63, 804 P.2d at 792 (irreparable harm is harm not remediable by damages).

The final equitable factor - - *i.e.*, whether public policy favors the injunction, *Shoen*, 167 Ariz. at 63, 804 P.2d at 792 - - does not clearly favor either side's position. While the public interest is generally served by enjoining activity that violates applicable statutes, *see, e.g., Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015), shutting down Dynamite Water's operations runs counter to the RVFH area's strong interest in maintaining all available fire suppression resources.

After considering all of this evidence, but particularly the evidence that the balance of hardships - - which, per *Shoen*, is the "critical element" - - tips in the Plaintiffs' favor, the Court finds that the Plaintiffs have met their burden of establishing their entitlement to a preliminary injunction on their private nuisance claim.

The only matter remaining to be determined is the appropriate amount of the bond required for a preliminary injunction to issue. *See* Ariz.R.Civ.P. 65. Accordingly,

IT IS ORDERED granting the Plaintiffs' request for a preliminary injunction enjoining the continued use of the Property for the operation of Dynamite Water's business.

IT IS FURTHER ORDERED setting a telephonic Status Conference on **December 11, 2019** at **9:30. a.m. (15 minutes allotted)** before this Division to discuss the scheduling of further evidentiary proceedings to determine the appropriate amount of a bond. Counsel for Plaintiff shall initiate the joint call to the Court at (602) 372-3839.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-012879 12/03/2019

NOTE: All court proceedings are recorded digitally and not by a court reporter. Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is $140 for a half-day and $280 for a full day.