SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: June 4, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

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Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	22CV397470	Hai Nguyen et al vs Ramesh Balakrishnan et al	Defendant's motion for summary judgment is DENIED, their motion for summary adjudication as to the first cause of action is DENIED, but is GRANTED as to all other causes of action. Scroll to line 1 for complete ruling. Court to prepare formal order.
2	20CV366973	Louis Tran vs Lisa Tran et al	Parties are ordered to appear and present legal authority for the appropriate measure of the undertaking pending Defendant's appeal.

Calendar line 1
Case Name: *Hai T. Nguyen, et al. v. Ramesh Balakrishnan, et al.*
Case No.: 22CV397470

Defendants and Cross-Complainants Ramesh Balakrishnan ("Ramesh") and Shradha Balakrishnan ("Shradha") (collectively, "Defendants") move for summary judgment, or in the alternative, summary adjudication against plaintiffs Hai T. Nguyen ("Hai") and Tien Nguyen ("Tien") (collectively, "Plaintiffs").[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This action arises out of a dispute between neighbors. Plaintiffs own and reside in a home at 659 Springer Terrance in Los Altos, while Defendants own and reside in a home at 667 Springer Terrace in Los Altos. (Complaint, ¶¶ 1-2. 4.) Two heating/air-conditioning pumps (mechanical units) were installed in and remain on the side of Defendants' property next to Plaintiffs' residence. (Complaint, ¶ 4.) The mechanical units are only about 16 feet away from Plaintiffs' primary bedroom. (*Ibid*.) The noise and vibrations that emanate from Defendants' mechanical units are so loud and disturbing that they wake Plaintiffs up every night, which has forced them to abandon their bedroom and sleep in another room farther away from the mechanical units. (*Ibid*.)

Plaintiffs informed Defendants of the mechanical units' noise and vibration, in addition to the impact on their ability to sleep in their bedroom and they requested Defendants take steps to rectify the issues. (Complaint, ¶ 5.) After Defendants ignored Plaintiffs' requests, they reported the issue to the Los Altos Police Department, the City of Los Altos (the "City"") Code Enforcement and other departments within Los Altos. (*Ibid*.) The noise output was determined to exceed the permissible limits of the City's noise ordinances during the relevant hours. (Complaint, ¶ 6.) As a result, the existing mechanical units were to be replaced with two new units that did not generate noise in excess of the City's noise ordinances and one of the units was to be moved away from Plaintiffs' bedroom. (*Ibid*.) The units were replaced but both of them were placed in the same location. (*Ibid*.) When the

[1] As the parties share surnames, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

units switched to heating in the winter of 2020, they again produced noise exceeding the City's limits. (*Ibid*.) Plaintiffs informed Defendants, however, the noise continues. (*Ibid*.)

Plaintiffs filed their Complaint on April 22, 2022, asserting, (1) nuisance, (2) negligence, (3) intentional infliction of emotional distress, and (4) permanent injunction. On March 5, 2024, Defendants filed the instant motion, which Plaintiffs oppose.

II. Evidentiary Objections

A. Plaintiffs' Objections

Plaintiffs' objections to the declarations of Harry Price and Ramesh do not comply with Rule of Court 3.1354 ("Rule 3.1354"). Rule 3.1354 requires two documents to be submitted when evidentiary objections are made: the objections and a separate proposed order on the objections, both of which must be in one of the two approved formats set forth in the rule. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in the proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 (*Hodjat*) [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

Plaintiffs' objections do not comply with Rule 3.1354. Consequently, the Court declines to rule on the evidentiary objections. Objections that are not ruled on are preserved for appellate review. (See Code of Civ. Proc., § 437c, subd. (q).)

B. Defendants' Objections

Defendants submit objections to Plaintiffs' respective declarations, the declarations of counsel Justin Roño ("Roño"), Ryan Schofield ("Schofield"), and Bruce Allen ("Allen").

Objections 5-6, 8-11, and 17-19 to Roño's declaration are SUSTAINED and objections 1-4, 7, 12-16, and 20-22 are OVERRULED.

Objections 2, 4, 10, and 14 to Tien's declaration are SUSTAINED and objections 1, 3, 5-9, 11-13, and 15-16 are OVERRULED.

Objection 2 to Hai's declaration is SUSTAINED and objections 1 and 3 are OVERRULED.

Objections 1-6 to Schofield's declaration are OVERRULED.

Objections 1-4 to Allen's declaration are OVERRULED.

III. Legal Standard for Motion for Summary Judgment

Any party may move for summary judgment. (Code of Civ. Proc., §437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 ("*Aguilar*").) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra*, 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in questions. (*Aguilar, supra*, at p. 851.) Summary adjudication of general "issues" or of facts is not permitted. (See *Raghavan v. The Boeing Company* (2005) 133 Cal.App.4th 1120, 1136.) The only "claim for damages" that can be independently summarily adjudicated under section 437c(f)(1) is a claim for punitive damages.

Where a plaintiff (or cross-complainant) seeks summary judgment, the burden is to produce admissible evidence on each element of a "cause of action" entitling him or her to judgment. (Code Civ. Proc. § 437c, subd. (p)(1); See *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287, disapproved on other ground in *Aguilar*; *S.B.C.C., Inc. v. St. Paul Fire & Marine, Ins. Co.* (2010) 186 Cal.App.4th 383, 388.) This means that plaintiffs, who bear the burden of proof at trial by a preponderance of evidence, therefore "must provide evidence that would require a reasonable finder of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law but would have to present his evidence to a trier of fact." (*Aguilar, supra*, at 851; See also *LLP Mortgage v. Bizar* (2005) 126 Cal.App.4th 773, 776 [burden is on plaintiff to persuade court there is no triable issue of material fact].)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 850.) A triable issue of material fact exists "if, and

only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.) Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

Defendants move for summary judgment on the ground they have established a complete defendant to all claims and Plaintiffs can't prove one or more necessary elements of their claims. (Notice of Summary judgment, p. 2:1-3.)

IV. Analysis

A. Parties' Undisputed Material Facts

Defendants undisputed material facts are as follows: On March 13, 2019, Defendants acquired title to their home. (Defendants' Separate Statement of Undisputed Material Facts ("UMF"), No. 1.) Plaintiffs own the neighboring home. (Defendants' UMF, No. 2.) Defendants' property was newly constructed at the time of purchase, and they received the original plans and specifications from the City, which were stamped as "approved." (Defendants' UMF, No. 3.) Their property was constructed with a new heat pump system ("HVAC System") that heats and cools the house via a heat exchange mechanism that circulates refrigerant from exterior units to interior blower units. (Defendants' UMF, No. 4.) The HVAC System has four exterior units, two on each side of Defendants' property, that are separately tied to four different interior units serving four different parts of the house. (Defendants' UMF, No. 5.) The HVAC System produces less carbon pollution than natural gas-powered furnaces. (Defendants' UMF, No. 6.)

When they moved in, Defendants had no actual or constructive knowledge that sound generated by the HVAC System equipment exceeded the City's applicable noise ordinance. (Defendants' UMF, No. 7.) On September 5, 2019, Los Altos issued a Notice of Violation prohibiting Defendants from using the two exterior units bordering Plaintiffs' property until they were permitted by the City, and they complied with the City's noise ordinance. (Defendants' UMF, No. 8.)

Defendants ceased regular operation of the two exterior units of the HVAC System while the Notice of Violation was in effect. (Defendants' UMF, No. 9.)

Plaintiffs acknowledged that Defendants were not at fault when they first began using the equipment. (Defendants' UMF, No. 10.) The City never cited Defendants for any breaches of the Notice of Violation. (Defendants' UMF, No. 11.) In June 2020, Defendants replaced the two HVAC units nearest Plaintiffs' property with the quietest models they could find, which were approved by the City. (Defendants' UMF, No. 12.) On October 13, 2020, the City took measurements and "determined the HVAC units located on Defendants' property are compliance with the Los Altos Municipal Code noise limits," and it confirmed the HVAC system was permitted and released its restriction on the use of the recently replaced HVAC System. (Defendants' UMF, No. 13.) Plaintiffs confirmed that after the new HVAC units were installed, the noise issue improved "dramatically." (Defendants' UMF, No. 14.) The new units do not generate irregular sounds such as humming, squealing, whining, or beating. (Defendants' UMF, No. 15.) None of Defendants' other neighbors have complained about the HVAC System. (Defendants' UMF, No. 16.) Plaintiffs' adult son who resides with them has not asserted any claims in this lawsuit. (Defendants' UMF, No. 17.) Hai hears the HVAC System "from time to time." (Defendants' UMF, No. 18.) Tien is more sensitive to the sounds than Hai. (Defendants' UMF, No. 19.) Although, she is not disturbed by the HVAC System in the "summer months." (Defendants' UMF, No. 20.)

Measurements taken in April 2023 and February 2024 confirm that the HVAC System complies with the applicable City noise ordinance. (Defendants' UMF, No. 21.) In April 2023, Plaintiffs' expert confirmed that sound from the HVAC System was "not audible" inside the bedroom closest to the HVAC System. (Defendants' UMF, No. 22.) The sound generated by the operation of the HVAC System is normal for mechanical equipment in a residential environment. (Defendants' UMF, No. 23.) Depriving Defendants of the use of the two exterior units of the HVAC System means that half of their house would not be heated or cooled by the HVAC System. (Defendants' UMF, No. 24.) The loss of the two exterior units imposed a hardship on Defendants and their children. (Defendants' UMF, No. 25.) Relocating the units is not feasible because it would still need to tie into the existing paired interior unit via already plumbed HVAC lines. (Defendants' UMF, No. 26.) As of

January 1, 2023, the City expressly authorized the use of external heat exchange pumps such as Defendants' HVAC System as part of its "Green Building" regulations. (Defendants' UMF, No. 27.)

According to Plaintiffs, they moved into their home in 2006. (Plaintiffs' Additional Material Facts ("AMF"), No. 36.)[2] Plaintiffs chose their neighborhood in part because it is a peaceful and quiet location. (Plaintiffs' AMF, No. 37.) When Plaintiffs remodeled their home, they chose triple-pane windows and extra wall insulation, because quiet enjoyment was so important to them. (Plaintiffs' AMF, No. 38.) In March 2019, Defendants moved into a newly built residence next door, which included two heat pumps located approximately 17 feet from the wall of Plaintiffs' home, one of which is located directly across from the primary bedroom window. (Plaintiffs' AMF, Nos. 39-40.) Almost immediately, noise from the HVAC heat pump began to wake Tien every morning at approximately 6:00 a.m. (Plaintiffs' AMF, No. 41.) Tien is not an early riser as she works late, and she is very disturbed by the noise in the early morning hours. (Plaintiffs' AMF, Nos. 42-43.) After she was disturbed one morning, she went to Defendants' door and informed Ramesh that the machinery was waking her up. (Plaintiffs' AMF, No. 44.) Ramesh exhibited no interest in or concern for Tien. (*Ibid*.)

Hai also visited Ramesh in 2019 to tell him that too much noise was emanating from the machines and the noise violated the City's noise limits. (Plaintiffs' AMF, No. 45.) The noise continued at the same annoying level for a week until Tien got the City involved. (Plaintiffs' AMF, No. 46.) On April 8, 2019, the City Code Enforcement Office informed Defendants that the noise was bothering their neighbors. (Plaintiffs' AMF, No. 47.) The City's acoustical consultant conducted an inspection and determined that the two HVAC units on the side nearest to Plaintiffs exceeded permissible noise limits found in the City's noise ordinance. (Plaintiffs' AMF, No. 48.)

On May 1, 2019, the City informed Ramesh the heat pump equipment was not permitted. (Plaintiffs' AMF, No. 49.) On May 2, 2019, the City issued a Notice of Violation regarding the HVAC equipment. (Plaintiffs' AMF, No. 50.) In September 2019, the City performed acoustical testing and issued another Notice of Violation, this time it ordered the complete cessation of the two

[2] The numbering for Plaintiffs' AMFs continues from Defendants UMFs, thus, the Court's numbering reflects Plaintiffs' separate statement.

HVAC units until they were permitted and complied with the sound ordinance. (Plaintiffs' AMF, No. 51.) On September 5, 2019, Los Altos Police Department issued a Notice of Violation, however the same day, Defendants ran the HVAC units for over 30 minutes, despite the City's order. (Plaintiffs' AMF, Nos. 52-53.) To date, the heat pumps remain unpermitted. (Plaintiffs' AMF, No. 54.) In March 2019, the City tested the units mid-day and found only one of them in compliance with the noise ordinance. (Plaintiffs' AMF, No. 55.) On October 8, 2020, the City tested the equipment again, at 9:00 a.m. and issued a code compliance letter. (*Ibid*.) The noise continued to disturb Plaintiffs. (Plaintiffs' AMF, No. 56.)

In December 2020, Tien took her own sound measurements showing high levels of sound and texted those measurements to Ramesh. (Plaintiffs' AMF, No. 57.) Plaintiffs were subjected to loud morning noise for 15 months before Defendants' builder replaced the pumps and they continued to be subjected to loud noises after the replacement. (Plaintiffs' AMF, No. 58.) In June 2020, Defendants' builder changed the HVAC units with units that were supposedly quieter. (Plaintiffs' AMF, No. 59.) Defendants have not produced evidence that they paid for new heat pumps. (Plaintiffs' AMF, No. 60.) Plaintiffs acoustical consultant, Schofield performed testing at Plaintiffs' residence from December 21, 2021, through January 3, 2022. (Plaintiffs' AMF, No. 61.) He found that every morning the HVAC System clearly powered on at 6:00 a.m. and his testing showed it produced noise levels in violation of Municipal Ordinance section 6.16. (*Ibid*.) The ambient noise level is low at this location before 7:00 a.m. (Plaintiffs' AMF, No. 62.)

The City ordinance requires that residential noise levels do not exceed 45 decibels from 10:00 p.m. to 7:00 a.m. (Plaintiffs' AMF, No. 64.) During those hours, ambient noises from traffic, planes, yard blowers, etc. is at a minimum and it is during these hours that Plaintiffs are most often disturbed. (Plaintiffs' AMF, No. 65.) Schofield's findings of violations occurred well after the units had been replaced. (Plaintiffs' AMF, No. 66.) Living with the unwelcome noise became so unbearable to Tien that she stopped sleeping with her husband in their primary bedroom. (Plaintiffs' AMF, No. 67.) When Defendants' HVAC noise powers on at 6:00 a.m., at 59 decibels, it reaches 51 to 54 decibels and violates the City's noise ordinance. (Plaintiffs' AMF, No. 68.) One of Defendants' units on

Plaintiffs' side of their house is not balanced as it is not installed level as instructed by the manufacturer, which increases the sound and vibration output. (Plaintiffs' AMF, Nos. 69-70.)

During cold weather, the heat pumps shift to defrost mode and the valve reverses making a whooshing sound for several seconds then a louder sound emits from the compressor. (Plaintiffs' AMF, No. 71.) The sounds appear louder in the winter. (*Ibid*.) The HVAC pump can easily be relocated to the other side of Defendants' house and installed level so that they are not located next to a neighbor's bedroom window. (Plaintiffs' AMF, No. 72.) The electrical connections for the condensing could be re-routed and reinstalled at the other side of the house. (Plaintiffs' AMF, No. 73.) The wiring could be run up inside the existing pipe chase up to the roof across the flat roof, and down to the new location. (*Ibid*.) It would be an easy job for two technicians to relocate the condensers. (Plaintiffs' AMF, No. 74.)

1. Statute of Limitations

Defendants argue Plaintiffs claims cannot be based on the original nuisance because it was abated when they ceased operation of the HVAC System in response to the City's Notice of Violation. (MPA, p. 15:18-20.) Code of Civil Procedure section 335.1 provides a two year statute of limitations for actions for injury to "an individual caused by the wrongful act or neglect of another." Plaintiffs filed their Complaint on April 22, 2022. However, the units were still noncompliant with the noise limits through November 2019 and they were not replaced until June 2020. (Ramesh Decl., ¶ 26; Exh. 3.) Therefore, the statute of limitations did not start running on September 5, 2019. Moreover, Plaintiffs allege the disturbances continued the entire time. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 937 ["if appellants demonstrate that whatever nuisance caused by defendant is continuing in nature, every repetition of the wrong may create further liability. Hence the statute of limitations would not run merely from the original intrusion"].) Therefore, summary adjudication cannot be granted on this basis.

2. First Cause of Action: Nuisance

Nuisance is broadly defined by Civil Code section 3479 to mean, in relevant part, "Anything which is injurious to health,… or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." (Civ. Code, §

3479.) "[I]n order for a defendant's conduct to constitute a nuisance, the interference with use and enjoyment of land must be both substantial and unreasonable." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178.) To prevail on a claim for private nuisance, a plaintiff must prove (1) an interference with his use and enjoyment of his property; (2) "that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage'"; and (3) that the interference was unreasonable, "i.e., it must be 'of such nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938-939 (*San Diego Gas & Electric Co*).)

Defendants contend they are immune from liability under Civil Code section 3482, which provides, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." (Civ. Code, § 3482.) "Although Civil Code section 3482 speaks in terms of 'a statute,' that term has been broadly interpreted to include regulations and other express government approvals." (*Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1206 (*Williams*).) "Although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance." (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 100.)

Defendants argue the City building department explicitly permitted the installation of the HVAC System with knowledge of Plaintiffs' complaints. (Defendants' UMF, No. 13.) Defendants further argue the use of the HVAC System is consistent with the City's "green" building policies ("Cal Green Code"). However, the policy was implemented effective January 1, 2023, and it "applies to all newly constructed hotels… dwellings… Existing sites and landscaping improvements that are not otherwise disturbed are not subject to the requirements of Cal Green." (Price Decl., Exh. 20.) Defendants' reliance on the Cal Green Code is unavailing because their home was built in 2019 and the units were replaced in 2020, prior to the implementation of the policy.

Defendants rely on *Katcher v. Home Savings & Loan Assn* (1966) 245 Cal.App.2d 425 (*Katcher*) in arguing that issuing a permit for the HVAC System is the same as issuing a permit for construction of homes.

In *Katcher,* the plaintiffs sued a builder for nuisance after their use and enjoyment of their homes were impaired by the builder's construction. (*Id*. at p. 427.) The trial court granted the builder's motion for summary judgment. (*Id*. at p. 426.) The plaintiffs argued a municipal code prohibited the construction of any "structure" in excess of 45 feet, the defendant's construction was a "structure" within the meaning of the code, and some of the constructions undisputedly exceeded 45 feet. (*Id*. at p. 428.) However, the court was persuaded by the defendant's interpretation of the code and found that the construction was not a "structure" within the meaning of the building code. (*Ibid*.) It further concluded that "defendant was not guilty of a nuisance since everything defendant did was expressly authorized by permits issued pursuant to validly enacted city ordinances and building codes." (*Ibid*.) The city filed an amicus curiae brief which supported the trial court's findings that the builder performed its grading as authorized under its permit from the city and that the permit was properly issued. (*Id*. at p. 429.) The appellate court affirmed the judgment. (*Id*. at p. 430.)

Here, Defendants' property was newly constructed at the time of purchase. (Defendants' UMF, No. 3.) They received original plans and specifications from the City that were stamped as "approved." (*Ibid*.) However, on May 1, 2019, the City informed Defendants that while the specifications for the equipment had been included in the project file, there was no approval stamp, suggesting that the specifications for the equipment may have been overlooked. (Ramesh Decl., ¶ 10.) Therefore, unlike in *Katcher*, the permits were not properly issued at the time of purchase.

In June 2020, Defendants replaced the units nearest Plaintiffs' property, which was approved by the City. (Defendants' UMF, No. 12.) In October 2020 and February 2021, the City took noise measurements and found the units were in compliance with the noise limits. (Defendants' UMF, No. 13.) On June 27, 2020, Jon Biggs, the Community Development Director, emailed Defendants, stating,

> I am sending this email to confirm the City's approval of the replacement of the units per the plans and specifications that were had stamped or signed approved and provided to you…To help facilitate this, we are ready to go to the site to inspect the work and test the noise levels with the test equipment maintained by our code compliance staff. If the inspection finds that all work has been done per approved plan and noise tests

> demonstrate compliance, we will sign off on the approved plans noting Cities approval of the work and the units.

(Ramesh Decl., Exh. 7.)

In October 2020, Biggs, emailed Defendants, stating,

> I have attached a copy of the plan with the Planning Stamp and my signature noting approval of the two replacement units in the location indicated. The only thing that may cause pause is the note that the permit number is pending—this is for a building permit number. However, in checking with the building official, a permit is not necessary as the work done was the replacement of the units—using the same wiring, conduits, ducts, etc., which does not trigger the need for a building permit.

(Ramesh Decl., Exh. 9.)

On February 5, 2021, Biggs emailed Defendants, reiterating the results of noise measurements of the equipment on July 13, 2020, and October 8, 2020. (Ramesh Decl., Exh. 8.) He further stated,

> The City's noise regulations provide the following limits for noise measurements maximums at a receiving property – from 7:00 a.m. to 10:00 p.m., the limit is 55 dBA and from 10:00 p.m. to 7:00 a.m., the limit is 45 dBA. As I have provided in the past, the readings we have taken demonstrate compliance with these limitations.

(*Ibid*.)

Although Defendants did not receive an actual permit, they were informed by the City that they did not need one for the equipment and that the use of their equipment was permitted. Moreover, the approval of the use of the replacement units was based on the equipment's compliance with Los Altos Municipal Code section 6.16.050. But, while Defendants had the City's permission to use their equipment, they did not have its permission to use it outside of the noise limits, which is the nuisance identified by Plaintiffs.

Defendants rely on *City of Norwalk v. City of Cerritos* (2024) 99 Cal.App.5th 977 (*City of Norwalk*), which involved a dispute between neighboring cities regarding the closure of certain routes as designated truck routes that caused heavier traffic through other routes. (*Id*. at p. 984.) Two Vehicle Code sections expressly authorized Cerritos to enact ordinances limiting through traffic by

commercial vehicles and vehicles exceeding a certain weight limit to designated arteries within the city. (*Id*. at p. 991.) The appellate court explained, "in our view, courts assessing whether an alleged nuisance is a 'necessary implication' of a statute's express authorization should ask the following question: is the alleged nuisance an inexorable and inescapable consequence that necessarily flows from that statutorily authorized act, such that the statutorily authorized act and the alleged nuisance are flip sides of the same coin." (*Id*. at p. 987.) Where an alleged nuisance does not inexorably and inescapably flow from the statutorily authorized act, Section 3482 immunity does not apply. (*Ibid*.) The court held that the immunity applied because the effects of the diversion of traffic inexorably and inescapably flowed from the enactment of the ordinance expressly authorized by the two Vehicle Code provisions. (*Id*. at p. 991.)

The Court is not persuaded by Defendants' reliance on *City of Norwalk* because Defendants do not rely on any statutory provisions, only the City's permission to use their equipment after the determination that it complied with noise limits. Moreover, Defendants argue the excess noise "inexorably and inescapably flows" from its authorized use. (MPA, p. 11:27-12:3.) However, as the Court stated above, Plaintiffs' claims are not based on the use of the equipment, but on the manner it is used, i.e., above the noise limits. Defendants' argument is also belied by the implementation of the Cal Green Code because there have been no changes to the Municipal Code regarding exterior noise, therefore, it does not follow that the City would implement such a requirement if violations of the noise limits would "inexorably and inescapably" flow from it. Based on the foregoing, Section 3482 does not confer complete immunity to Defendants.

Defendants further argue the HVAC System is not a nuisance because it does not "substantially impact" Plaintiffs' use of their property and is not unreasonable. (MPA, p. 12:8-12.)

The elements of substantial damage and unreasonableness are questions of fact to be determined by considering all circumstances of the case. (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 263-264 (*Mendez*).) "The degree of harm [with respect to damage] is to be judge by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community?" (*San Diego Gas & Electric Co, supra,* 13 Cal.4th at pp. 937-938.) "The primary test for determining whether the invasion is

unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again, the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but "whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in light of all the circumstances of that case." (*Id*. at pp. 938-939.)

Defendants contend the HVAC System is not a nuisance because it is undisputed that the impact of the noise did not "substantially impact" Plaintiffs' use of their property. (MPA, p. 12:6-8.) They argue the HVAC System performs with the parameters set by the noise ordinance and the units do not produce irregular sounds such as humming, squealing, whining, or beating. (Defendants' UMF, Nos. 13, 15, 21.) Defendants provide their acoustical consultant, Jeffrey Pack's ("Pack") declaration. Pack opines "the operations of the heat pumps conform to [the City's] noise ordinance and their function is normal, if not very quiet for mechanical equipment in a residential environment." (Pack Decl., ¶ 19.) Pack also noted that on April 19, 2023, he and Schofield took measurements in Plaintiffs' bedroom and Schofield noted the equipment was "not audible." (Pack Decl., ¶ 14.) Defendants further contend they cannot relocate the unit closest to Plaintiffs' property because it still needs to tie into the existing corresponding unit via already-plumbed HVAC lines and if Defendants were deprived of the two units bordering Plaintiffs' property then half of their home would not be heated or cooled by the HVAC System. (Defendants' UMF, Nos. 24, 26; Ramesh Decl., ¶¶ 20, 26.) Defendants provide Hai's testimony in which he testified that he only hears the HVAC System from "time to time", is not disturbed by it in the summer months, and the new units improved the noise issue "dramatically." (Defendants' UMF, Nos. 14, 18, 24.) Thus, Defendants meet their burden to show there is no triable issue of material fact and the burden shifts to Plaintiffs.

Plaintiffs provide their acoustical consultant Schofield's declaration, in which he states he took measurements every morning from December 31, 2021, to January 3, 2022, at 6:00 a.m. when the equipment powered on. (Schofield Decl., ¶ 5.) He states the equipment produced noise levels significantly louder than the permissible noise limit of 45 dBA.

The parties disagree over the applicable Municipal Code, Plaintiffs rely on Municipal Code section 6.16.050, while Defendants rely on Section 6.16.070.

Section 6.16.050 pertains to the City's exterior nose limits and it states the noise limit in residential areas from 10:00 p.m. to 7:00 a.m. is 45 dBA and from 7:00 a.m. to 10:00 p.m. is 55 dBA. (Los Altos Municipal Code, § 6.16.050, Table 1.) Section 6.16.090 identifies special exemptions to the noise limits and provides as relevant, "exemptions from exterior noise standards. The provisions of Section 6.16.050 of this chapter shall not apply to activities covered by the following provisions of this chapter…6. Subsection (12) of subsection (B) of Section 6.16.070 relating to air-conditioning or air-handling equipment…" (Los Altos Municipal Code, § 6.16.070, subd. (D)(6).) Section 6.16.070 pertains to prohibited acts and provides, as relevant, "Specific prohibitions: The following acts and the causing or permitting thereof, are declared to be in violation of this chapter…(1) Air conditioning or air-handling equipment. Operating or permitting the operating of any air-conditioning or air-handling equipment in such a manner as to exceed any of the following sound levels without variance." (Los Altos Municipal Code, § 6.16.070, subd. (B)(12).) When measured at "any point on a neighboring property line, five feet above grade level, no closer than three feet from any wall," the limit is 50 dBA. (Los Altos Municipal Code, § 6.16.070, Table 6.) However, when measured "outside the neighboring living area neared the equipment location, not more than three feet from the window opening, but at least three feet from any other surface," the limit is 45 dBA. (*Ibid.*)

When he took the sound measurements from December 31, 2021, to January 3, 2022, Schofield's sound level meter was placed two feet from the fence below the top elevation of the fence. (Schofield Decl., ¶ 3; Exh. B, p. 1.) Thus, the limit was 45 dBA for his measurements. Schofield's testing showed that at *6:00 a.m. each day*, the sound levels were at 49 dBA, and they remained above 45 dBA from 6:00 a.m. to 6:55 a.m., with measurements taken every 5 minutes. (Schofield Decl., Exh. B, Table 2.) Defendants' expert, Pack, took measurements on February 7 which were retaken on February 9, 2024, *at 9:00 a.m.* He took measurements at one foot beyond the property line, thus, he applied the 50 dBA limit. His results showed that aside from one measurement, the noise levels were below 45 dBA, when adjusted for ambient noise. (Pack Decl., Exh. 14.) Thus, by either standard, Pack's measurements concluded that the equipment was within the noise limits. (Pack Decl., Exh. 14,

p. 19.) However, it is clear the timing of the measurements is critical to Plaintiffs' claims as they contend disturbance occurs when the equipment starts at 6:00 a.m. Tien states she was "startled out of sleep every morning at approximately 6:00 a.m.," which was frustrating to her because she works late hours. (Tien Decl., ¶¶ 11-12.) Even after the Defendants' equipment was deemed compliant with the noise ordinance, she was still woken up during the night and early in the morning. (Tien Decl., ¶ 29.)_ As a result of the disturbance, she stopped sleeping in her primary bedroom and instead sleeps in the basement on the other side of the house. (Tien Decl., ¶ 32.) She states "the whole experience is so emotionally upsetting to me since I need good sleep for my job as an engineer, and I can't ever trust that I won't be woken up by a big noise starting early in the morning. I have given up sleeping with my husband in my own bedroom to try and get some peace." (Tien Decl., ¶ 33.) Therefore, there is a triable issue of material fact as to whether the noise levels at 6:00 a.m. are objectively a substantial and unreasonable interference of Plaintiffs' use and enjoyment of their property. Thus, and summary adjudication of the first cause of action is DENIED.[3]

B. Second Cause of Action: Negligence

"An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach of a proximate or legal cause of injuries suffered by the plaintiff." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) "Recovery for negligence depends as a threshold matter on the existence of a legal duty of care." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213.) "[T]he existence of a duty is a question of law for the court." (*Kentucky Fried Chicken of California, Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819.) "The question of whether a duty exists is a question of law and must be decided by the court on a case-by-case basis." (*Dutton v. City of Pacifica* (1995) 35 Cal.App.4th 1171, 1175.) "Whether a legal duty of care exists in a given factual situation is a question of law to be determined by the court, not the jury." (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754.) "The existence and scope of duty are legal questions for the court." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 163.)

[3] Defendants state the fourth cause of action is "ancillary" to the first cause of action. (MPA, p. 7:21-22.) They fail to offer any arguments as to the fourth cause of action. Thus, to the extent Defendants seek to adjudicate it, summary adjudication as to the fourth cause of action is DENIED.

Defendants argue Plaintiffs do not allege nor can they show that Defendants owed them a duty or breached said duty. (MPA, p. 16:10-12.)[4] Defendants further argue Plaintiffs cannot state a claim for negligence *per se* because the nuisance was abated in 2019. (MPA, p. 16:24-26.)

"[Evidence Code section 669] sets forth the doctrine commonly called negligence per se. It provides that negligence of a person is presumed if he violated a statute or regulation of a public entity, if the injury resulted from an occurrence that the regulation was designed to prevent, and if the person injured was within the class for whose protection the regulation was adopted. This presumption may be rebutted by proof that the violator did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." (*Klein v. BIA Hotel Corp.* (1996) 41 Cal.App.4th 1133, 1140.) Negligence per se is not a cause of action. "The negligence per se doctrine actually relates to the burden of proof." (*Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 596.) If the elements are met, the doctrine merely creates an evidentiary presumption in support of a claim for negligence.

Defendants violated the City's noise ordinance, Plaintiffs were injured by the violation due to the excess noise which the ordinance was designed to prevent and Plaintiffs are within the class of people for whose protection the ordinance was adopted. Therefore, there is a presumption of negligence.

Defendants state from the day Tien first complained about the equipment, they worked with the project manager for the developer/seller of their property, their realtor, the City, and acoustic experts to try to address the issue. (Defendants UMF, No. 29; Ramesh Decl., ¶¶ 6, 8-10, 13-15, 17-20, 22-24, 26.) Defendants' evidence is sufficient to rebut the presumption established by Section 669. Thus, the burden shifts to Plaintiffs to demonstrate a triable issue of material fact as to their negligence claim.

Plaintiffs fail to address the negligence claim in their opposition. As a result, they fail to meet their burden. Thus, summary adjudication as to the second cause of action is GRANTED.

C. Third Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the

[4] The Complaint is devoid of allegations regarding the existence of a duty or breach.

probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) "[E]xtreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 (*Hughes*).) It must also appear that the defendant's conduct was unprivileged. (*Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 394.) The assertion of an economic interest in good faith is privileged. (*Id*. at p. 395.) However, "it is well established that one who, in exercising the privilege of asserting his own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress." (*Ibid*.) The defendant's conduct must be directed to the plaintiff, but malicious or evil purposes are not essential to liability. (*Ragland v. US National Bank Assn.* (2012) 209 Cal.App.4th 182, 203 (*Ragland*).) Whether conduct is "outrageous" is usually a question of fact. (*Id*. at p. 204.)

Defendants rely on *Girard v. Ball* (1981) 125 Cal.App.3d 772 (*Girard*) in arguing their conduct was privileged and that Plaintiffs cannot show they suffered "severe or extreme emotional distress." In *Girard*, the plaintiff was an attorney and real estate developer. (*Id*. at p. 777.) His agent entered into an agreement with the defendant for services on a construction project. (*Ibid.*) The parties agreed that use of the materials and equipment supplied and installed by the defendant after an initial 90-day period covered by their written agreement would result in a rental fee. (*Ibid*.) The plaintiff used the materials beyond the initial period and failed to pay for the use after an initial payment. (*Id*. at pp. 777-778.) The defendant and/or his agents reached out to the plaintiff via written communication and phone calls. (*Id.* at p. 778.) The plaintiff sued for fraud, intentional infliction of emotional distress, and trespass. (*Ibid*.) The court found that the mailing of two written communications previously referred to and the making of phone calls for payment was insufficient to constitute outrageous conduct. (*Id*. at p. 787.) It concluded the defendant's conduct in his economic interest was privileged because there was a written agreement between the parties and he demonstrated good faith. (*Ibid*.) It further found there was no evidence that the defendant intended to inflict emotional distress or any evidence from with such an intent could be inferred. (*Ibid*.) The court noted

that while the plaintiff stated in his answers to interrogatories that he couldn't sleep and experienced anxiety symptoms, he did not seek medical treatment. (*Id*. at p. 788.) Moreover, he did not identify any other symptoms until months after the motion for summary judgment was filed. (*Ibid.*)

Defendants fail to provide any evidence that their conduct was in assertion of their economic interest, thus, the Court is not persuaded that Defendants' conduct was privileged. Moreover, the facts in *Girard* are much more limited in time and actions, whereas here, the dispute has spanned years and the conduct has been more constant. Furthermore, Tien has alleged more detailed symptoms.

Defendants contend their sole intent was to heat and cool their home and in October 2020, the City concluded their HVAC System complied with the noise limits. (Defendants UMF, No. 32.)

Defendants also rely on Hai's testimony, which is as follows:

> Q. Okay. I asked your wife a number of questions about emotional distress because I jumped to a conclusion between the two of you, maybe it's mainly your wife, if anyone whose suffered from emotional distress. Have you suffered from emotional distress as a result of this?
>
> A. No. I – it's more like annoying. From time to time, I wake up early because of the noise. But I don't think it's emotional stress for me.

(Defendants UMF, No. 33; Price Decl., Exh. 17, p. 30:12-20.)

Defendants sufficiently demonstrate their conduct was not directed at Plaintiffs, thus, they establish there is no triable issue of material fact regarding their intent to cause emotional distress. The burden shifts to Plaintiffs to demonstrate a triable issue of material fact.

Plaintiffs provide Tien's testimony, in which she states,

> Q. You knew they bought a brand new house that, according to them, had been fully permitted and had an occupancy permit. That's why they were able to buy and move in, right?
>
> A. The way I look at it, this was three years ago. It wasn't his fault at the beginning. But when he continued to do that, it [became] his fault.

(Roño Decl., Exh. K, p. 92:25-93:6.)

Tien expressed dissatisfaction with Defendants' failure to address the issue once and for all. (See Tien Decl., ¶ 29 ["Nothing changed when I would complaint to [Ramesh]. I was upset that the Balakrishnans didn't seem to care about being good neighbors"].) Plaintiffs also contend that Defendants could have moved the units to the other side of their home, so they are not located next to a neighbor's bedroom window. (Plaintiffs' AMF, No. 72.)

Defendants use of their HVAC System with the knowledge of Plaintiffs' complaints is not the same as Defendants' using it to cause Plaintiffs emotional distress. Plaintiffs fail to provide any evidence that Defendants' use of their HVAC System was directed at them. (See *Ragland, supra,* 209 Cal.App.4th at p. 203.) Thus, Plaintiffs fail to meet their burden here and summary adjudication as to the third cause of action is GRANTED.

D. Punitive Damages

A claim for punitive damages requires "clear and convincing" evidence that the defendant has been guilty of "oppression, fraud, or malice" in the commission of a tort. (Civil Code § 3294(a).) "Malice is defined as either 'conduct which is intended by the defendant to cause injury to the plaintiff,' or 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' Oppression is 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.'" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1048-1049 (*American Airlines*).)

"The standard for a motion for summary adjudication on a claim for punitive damages is whether clear and convincing evidence exists to support that claim." (*Szarowicz v. Birenbaum* (2020) 58 Cal.App.5th 146, 171.) "The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence." (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 113.)

"In ruling on a summary judgment or summary adjudication motion, 'the judge must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden…[This] holding that the clear-and-convincing standard of proof should be taken into account

in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.'" (*American Airlines, supra,* 96 Cal.App.4th at p. 1049.)

"Accordingly, although the 'clear and convincing' evidentiary standard is a stringent one, it does not impose on a plaintiff the obligation to 'prove' a case for punitive damages at summary judgment. However, where the plaintiff's ultimate burden of proof will be by clear and convincing evidence, the higher standard of proof must be taken into account in ruling on a motion for summary judgment or summary adjudication, since if a plaintiff is to prevail on a claim for punitive damages, it will be necessary that the evidence presented meet the higher evidentiary standard." (*American Airlines, supra,* 96 Cal.App.4th at p. 1049.)

Defendants argue Plaintiffs cannot show they acted in a despicable manner because they acted diligently and in good faith to remediate a problem they did not cause. (MPA, p. 19: 15-16.)

Defendants rely on *Farmy v. College Housing, Inc.* (1975) 48 Cal.App.3d 166, 173 (*Farmy*), which involved a nuisance action against a student housing complex which alleged excess noise, students throwing items, and other issues. (*Id*. at pp. 169-170.) The appellate court reversed an award for punitive damages because the owners took measures to mitigate the alleged nuisances. (*Id*. at pp. 180-181, 183.) Similarly, Ramesh reached out to the project manager for the seller/builder of their home the day he received the complaint from Tien. (Ramesh Decl., ¶ 6.) While the Notice of Violation was in effect, Defendants ceased regular operation of the two exterior units. (Defendants' UMF, No. 9.) Defendants were never cited for any breaches of the Notice of Violation. (Defendants' UMF, No. 11.) Defendants implemented the recommendations of the project manager for the seller/builder of their property, the City's experts, and their own acoustical expert from April 2019 to June 2020 in order to bring the equipment into compliance with the noise ordinance. (Defendants' UMF, No. 30; Ramesh Decl., ¶¶ 6, 9, 17-19, 26.) In June 2020, Defendants replaced the noncompliant units and in October 2020, the City concluded the units were compliant with noise limits and it released restrictions on the use. (Defendants' UMF, No. 12-13.)

In opposition, Plaintiffs contend Defendants only made efforts to remediate the noise when the City "red-tagged" their equipment. (Opp., p. 15:26-28.) On April 8, 2019, the City Code Enforcement office informed Defendants that the noise was bothering their neighbors. (Plaintiffs AMF, No. 47.) While the parties dispute exactly when Ramesh reached out to the property manager, Ramesh forward the communication with Officer Miguel Wong to the property manager on April 9, 2019, at the latest. (See Roño Decl., ¶ 8; Exh. C.) The first Notice of Violation was issued on May 2, 2019. (Ramesh Decl., Exh. 1.) Plaintiffs had to wait 15 months for Defendants' builder to replace the equipment. (Plaintiffs' AMF, No. 58.) Plaintiffs contend Defendants ignored Schofield's report that the equipment was still exceeding the noise limits and that it stated in the early morning and again in the evening. (Opp., p. 16:16-18.) Moreover, it appears Plaintiffs contend that Defendants did not make good faith efforts to mitigate the noise because they failed to move the equipment to another location on their property. (Opp., p. 16:19-22.) However, Plaintiffs fail to provide any authority that Defendants have to take Plaintiffs' preferred remediation action in order to demonstrate good faith. Moreover, Plaintiffs do not argue or provide evidence that Defendants' conduct rose to the level of malice or oppression. Therefore, Plaintiffs fail to meet their burden to show a triable issue of material fact. Thus, the motion for summary adjudication of Plaintiffs' request for punitive damages is GRANTED.