

### **QUESTION 3**

Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue. On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene. When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater.

Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family.

As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise. Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end.

Pedro approached Diana. She explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything.

Pedro intends to sue Diana.

1. What claims may Pedro reasonably assert against Diana? Discuss.
2. What remedies may Pedro reasonably seek? Discuss.

## **QUESTION 3: SELECTED ANSWER A**

### **Pedro v. Diana**

#### **1. Pedro's Claims Against Diana**

The issue is which claims that Pedro may assert against Diana.

#### **Private Nuisance**

The issue is whether Pedro may assert a claim for private nuisance against Diana due to the excessive noise and vibration from the open-air theater. A claim for private nuisance can be established by demonstrating that the defendant is causing a substantial and unreasonable interference with the plaintiff's use and enjoyment of the property. Interference is considered substantial when a reasonable person would find that there has been a significant deprivation of his or her ability to enjoy the property. A plaintiff's hyper-sensitivities are ignored when a court is adjudicating whether a nuisance exists.

Here, the facts describe the noise level coming from the rock concerts as "horrific." The floor shakes and Pedro is precluded from having even a normal conversation in his own home. Pedro purchased the home because he thought it was going to be a perfect place to raise a family. Much to his horror, the loud noise from the rock concerts coming from the open-air theater constitute a substantial and unreasonable interference with his use and enjoyment of his residence. Pedro does not appear to be hypersensitive to the noise, given that his neighbors have also complained to Diana about the noise level on the property. Further, a reasonable person would find a substantial and unreasonable interference with the enjoyment of his or her own home if the floor was shaking every weekend and conversations could not be had. Diana may argue that no reasonable

person would see this as a substantial interference because she has taken steps to mitigate the noise and resulting inconvenience as a result of the rock concerts (e.g., she only hosts rock concerts on weekends, the concerts must be done by 11:00 p.m., and she has set a maximum noise level). Diana also appears to be considering installing sound-deadening equipment as evidenced by her taking measurements in Pedro's backyard. But Diana's arguments are not likely to be availing given the significance of the disruption that Pedro is suffering.

Thus, Pedro can assert a viable claim for private nuisance against Diana.

### Public Nuisance

The issue is whether Pedro may assert a claim for public nuisance against Diana. A claim for public nuisance can be established by an unreasonable interference with the health, safety, and morals of the community at large. To recover under a theory of public nuisance, the plaintiff must suffer unique damages.

Here, Pedro will argue that the public health and safety is being threatened by horrific loud noise coming from the rock concerts at the theater every weekend. However, Pedro's claim for a public nuisance suffers because he cannot identify that he has suffered unique damages. In particular, Pedro's neighbors have already complained about the noise. Pedro also lives in a subdivision located adjacent to the theater.

Pedro's interest as a homeowner of one home in this subdivision that is experiencing noise is not unique as compared against to any other member of the residential community. Further, Diana will likely entirely contest that the theater is a public nuisance at all because the community thrives upon the inclusion of the theater; it is a cornerstone of the community and a focus of the cultural scene.

Thus, Pedro is not likely to assert a viable claim against Diana for public nuisance.

### Trespass to Land

The issue is whether Pedro may assert a claim for trespass to land against Diana. A trespass to land is an intentional tort. Trespass to land requires the showing of: (i) an intentional act on the part of the defendant, (ii) a physical invasion of real property, and (iii) causation, meaning that the defendant's conduct was a substantial factor in causing the injury.

Here, Diana went to Pedro's house without his permission. She intended to come onto Pedro's property to determine whether sound-deadening materials might be added. She then voluntarily let herself into Pedro's backyard, which constituted a physical invasion of Pedro's real property. Moreover, Diana caused the action to occur because her letting herself into the backyard was the substantial factor in causing the trespass.

Thus, Pedro can reasonably assert a claim against Diana for trespass to land.

### Conclusion

Therefore, Pedro can assert claims for private nuisance, public nuisance, and trespass to land against Diana.

## **2. Remedies that Pedro May Seek**

The issue is which remedies Pedro may seek against Diana.

### Compensatory Damages

The issue is whether Pedro may obtain compensatory damages from Diana for the nuisance claims. Compensatory damages are meant to compensate the plaintiff for foreseeable losses and may be pecuniary or non-pecuniary (such as pain and suffering). Compensatory damages must also be certain and unavoidable. Traditionally,

the method of damages calculation for a nuisance claim is the loss of use and enjoyment of the property plus any costs incurred while attempting to abate the nuisance. Courts will also offer an additional award to the plaintiff for the discomfort incurred as a result of the nuisance. Modernly, some courts are applying the doctrine of "permanent nuisance" when calculating a damages award in order to reduce the multiplicity of lawsuits that are being filed. Under this damages model, the plaintiff is entitled to recover as damages the diminution in value of his or her land.

Here, if the court applies a traditional damages calculation, Pedro will be entitled to his loss of use and enjoyment in his residence. The facts do not indicate that Pedro incurred any costs in an attempt to abate the nuisance. In fact, the only action that he took to abate the nuisance was when he approached Diana and explained to her the complaints about the nuisance. Pedro did not incur any costs as a result of having this conversation. The court will make a reasonable award of damages to compensate Pedro for the discomfort caused. Diana may argue that Pedro's damages award should be reduced by his knowing purchase of a residence in close proximity to a theater that is known to host rock concerts.

If the court applies the "permanent nuisance" doctrine, then Pedro will be entitled to recover the value of the diminution in his land as a result of the rock concerts. Diana will similarly argue that Pedro's recovery will need to be reduced by virtue of his assumption of the risk of coming to the nuisance.

Thus, Pedro can recover compensatory damages under either of the models above.

### Nominal Damages

The issue is whether Pedro may obtain nominal damages from Diana for the trespass to

land. Nominal damages are those that are obtainable by a plaintiff when no harm was actually suffered (as in a simple trespass to land case).

Here, Pedro did not suffer any damages as a result of Diana entering his property without his permission. The facts indicate that Diana left without disturbing anything in the backyard; thus nothing was damages as a result of Diana's conduct. Pedro can only be entitled to nominal damages from Diana for the trespass to land.

Thus, Pedro can recover nominal damages from Diana for her trespass to land.

### Punitive Damages

The issue is whether Pedro may seek punitive damages against Diana. Punitive damages are designed to punish a defendant for intentional conduct arising out of an intentional tort. Here, Pedro will not likely be able to recover punitive damages from Diana because she has acted in good faith by establishing reasonable parameters to confine the impact of the noise from the rock concerts. Thus, Pedro will not be able to seek punitive damages from Diana.

### Permanent Injunction

The issue is whether Pedro may obtain a permanent injunction against Diana enjoining rock concerts at the open-air theater. An injunction is an equitable remedy. A permanent injunction will last for the amount of time imposed by the court. A negative injunction enjoins the defendant from engaging in a specified activity. A mandatory injunction orders the defendant to perform an affirmative act. The elements of a permanent injunction are (1) inadequate remedy at law, (2) the injunction is feasible, (3) the balancing of hardships weighs in favor of granting the injunction, and (4) no defenses apply. Each element will be discussed in turn below.

### *Inadequate Remedy at Law*

The issue is whether there is an adequate remedy at law. If a violation is continuing, a court will deem that there is no adequate remedy at law.

Here, the nuisance is continuing. In fact, on weekend evenings, Diana hosts rock concerts at the theater. The theater is a large open-air theater and Diana explained that the loud rock concerts will need to continue.

Thus, there is no adequate remedy at law.

### *Feasibility of Enforcement*

The issue is whether an injunction is feasible. The feasibility of enforcement turns on whether the injunction will be mandatory or negative. See above for the definitions of mandatory and negative injunctions. There are no feasibility issues with negative injunctions because the court can merely exercise its contempt power and hold the defendant in contempt of court if the defendant commits an act that it is enjoined from engaging. There are feasibility issues with a mandatory injunction, however, because it requires the court to supervise the defendant in ensuring that the defendant is complying with the injunction. Generally, the scarcity of judicial resources precludes courts from acting as supervisors to enforce mandatory injunctions.

Here, Pedro will request a negative injunction in that the theater be enjoined from hosting further rock concerts. This will be feasible to enforce because the court can simply hold Diana in contempt of court if it learns that she sponsors a rock concert in violation of the injunction order.

Thus, enforcement of the injunction is feasible because it will be a negative injunction.

### *Balance of Hardships*

The issue is whether the balance of hardships will favor the granting of injunctive relief. In effectuating the balancing test, the court will balance the interests of the plaintiff in obtaining the injunction against the interests of the defendant and the public. If the burden to the defendant and the public outweighs the benefit to the plaintiff, then damages will be deemed an adequate remedy and an injunction will not be proper. Here, Pedro will argue that the balance of hardships tip in his favor because the noise from the rock concert is horrific and causing the floor to shake. Pedro cannot even maintain a conversation in his home due to the severe noise. Moreover, Pedro will argue that the public interest weighs in his favor because Pedro's neighbors have complained to Diana about the noise and vibration, and they received no meaningful response from Diana. Further, the theater is also rented to local dance companies during the week and generates revenue that way; it cannot be said that the theater is wholly dependent upon rock concerts for revenue generation.

On the contrary, Diana will argue that her interests and the public interests will be significantly burdened if an injunction is issued against her. With respect to Diana, she has owned the facility for 30 years; in fact, she built it. At the time that she built the facility, it was near the edge of the city, and it was only as time went by that the city development expanded to include housing in the vicinity of the theater. The theater cannot survive economically without rock concerts and thus Diana's financial interests could be wholly, negatively impacted. Moreover, Diana will argue that the public interest will lie against granting injunctive relief because the theater employs 200 people and has been a focus of the city's cultural scene for many years. Without the rock concerts, the theater will become bankrupt, and 200 citizens will be out of work.



Moreover, Diana has already taken steps that will work to mitigate the amount of the nuisance. Not only are rock concerts only on the weekend, but she requires that all concerts end by 11:00 p.m.; Diana also set a maximum noise level. Pedro's neighbors further dropped their complaints about the noise and Diana is taking reasonable measures to ensure that the nearby housing is only minimally impacted by the nuisance.

In consideration of all of this evidence, a court will likely side with Diana in concluding that the public interest and her interests outweigh the burden on Pedro. An injunction would have an overall negative impact of the economy and the culture of the community, force numerous people out of jobs, forfeit revenue brought in by the rock concerts, and cause the theater to close its doors.

Thus, on balance, the balance of hardships weighs against granting a permanent injunction.

#### *Defense - "Coming to the Nuisance"*

The issue is whether Diana can raise the defense of "coming to the nuisance" in precluding Pedro from obtaining injunctive relief. "Coming to the nuisance" means that the plaintiff voluntarily encountered the nuisance and decided to live near the nuisance anyway. "Coming to the nuisance" is generally not a defense to equitable relief.

Here, Diana may argue that Pedro came to the nuisance and thus assumed the risk because he knew about the theater when he purchased the house. But that will not be a successful defense in the injunction action. (Diana could assert this in response to the damages award so that Pedro's damages can be mitigated by those that would have been avoidable.)

Thus, "coming to the nuisance" is not a defense to the injunction.

### *Conclusion*

Thus, it is likely that Pedro may reasonably seek a permanent injunction from Diana, but it will likely be denied on the basis of hardship.

### Overall Conclusion

Therefore, Pedro may reasonably seek injunctive relief and damages remedies against Diana.

## **QUESTION 3: SELECTED ANSWER B**

### **I. PEDRO'S CLAIMS AGAINST DIANA**

#### **Trespass to land**

Trespass to land is intentional physical invasion of the land of another. Knowledge of legal title or intent to legally invade is not necessary; only the intent to physically invade suffices.

Here, "A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything." As such, D physically entered P's backyard, which is P's land, without consent. Although D did not intend to interfere with P's rights, D intended in fact to enter P's backyard physically. This satisfies the intent requirement.

In conclusion, D committed trespass to land and is liable

#### ***Defense of consent or private necessity fails***

Consent is a defense to trespass to land. Consent may be express or implied. Necessity is also a defense that exists when the action was justified because the trespass was done to prevent an imminent harm. Private necessity is when trespass was necessary to prevent harm to a private interest. Public necessity applies when the imminent or threatened harm was to the public. Public necessity is immune to damages caused by trespass. Private necessity claimant is still responsible for damages caused by trespass.

Here, D may raise the defense of consent or private necessity. Consent defense fails

because D did not seek P's consent expressly. Further, the mere owning of land does not imply consent to let others enter the backyard, even if they seek to enter to help the landowner. Further, any private necessity argument is weak. D could argue that it was necessary for D to measure P's land to help P. However, D could simply have asked P before entering. Since D forgot, D could have called P or returned at some other time. Since D simply entered P's backyard without seeking any form of consent, and since D had alternatives available and no imminent threat existed to make D's immediate entrance necessary, D will not establish these defenses.

#### Only nominal damages available

A physical trespass presumes that harm existed, and as such P does not have to prove that P suffered a specific pecuniary harm. However, based on the facts, D did not disturb anything and so it is unlikely P suffered any significant pecuniary damages. P will likely recover nominal damages, which are little amounts of damages that are awarded to vindicate the plaintiff's rights when not much harm was incurred in fact.

#### Conclusion

In conclusion, D committed trespass to land against P, and is liable. However, P can recover nominal damages, but will likely *only* recover nominal damages unless P can prove that P suffered some facts that indicated in the facts.

Pedro approached Diana. she explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

Pedro intends to sue Diana

## **Private nuisance**

Private nuisance occurs when the defendant substantially and unreasonably interfered with another private person's possession or use of private property. An interference is substantial when it would be offensive to a reasonable person. A hardened plaintiff who is subjectively not bothered by the interference can still recover if that interference is "substantial." An interference is unreasonable when the harm it causes is outweighed by the value it provides.

### *Whether interference is substantial*

Here, "As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise." It appears that the shaking is physical as P can feel the vibrations of the sound. This likely offends reasonable persons because although whether loud noise by itself offends a reasonable person is arguable, when the sound physically vibrates and causes movement the reasonable person is likely to be offended by it and be annoyed by it, and the reasonable person's life will be interfered by it and their enjoyment of their home is likely reduced, possibly significantly. Further, "Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end." As such, it appears that people other than Pedro were in fact offended by the noises and vibrations to the point that they instituted a good faith lawsuit. D will highlight that they decided to live with it, and this shows that the interference is not substantial. Had it been substantial, D will argue, then the neighbors could objectively not decide to live with it. Although whether

interference is substantial is a fact intensive inquiry, given the fact that the venue is surrounded by residences and the noise physically vibrates and quakes the neighbors, the court will likely deem the noise and vibrations substantial and offensive to a reasonable person.

### *Whether interference is unreasonable*

Here, "D operates a large open-air theater. "On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene." As such, it appears that D produces a lot of value to the community. Local dance companies likely need D's venue to do their performances and make their living. Further, rock and culture are important benefits to the community. It appears that culture is a major economic driver for the city. Further, the theater employs 200 people, which is a great benefit and contribution to the community. D will highlight that D's venue allows 200 people to make a livelihood while promoting the city's culture and fostering social ties and community bonds through art. Although P will counter that the harm is significant because it makes the lives of people around the venue difficult to live, to sleep, etc., D will counter that the very fact that the neighbors can decide to live with the noises attest to the fact that the harm is not significant, especially considering the great magnitude of value to the community - 200 jobs, cultural focus, tourism, economy, dancers, and musicians, etc.

### *Conclusion*

In conclusion, the court can rule either way, if this were a case of first impression and

preclusion was not a consideration. Although it appears that the interference is substantial, it also appears that an organized group of people can decide to live with it. Also, it appears that the venue provides a great amount of value to the public that cannot be denied. As such, the court may legitimately determine that the interference is not unreasonable and thus there is no private nuisance here.

*Coming to the nuisance is not a defense*

Coming to the nuisance is typically not a defense. Such consideration only is a defense when a party intentionally comes to the nuisance for the sole purpose of harassing or instituting a lawsuit. In general, coming to the nuisance is one of many factors considered in the overall analysis.

Here, "Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue." Then, "Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family." As such, it appears that P not only came to it, P knew of the theater and its potential consequences and P did not investigate at all. Since the neighbors had already brought a lawsuit before, a simple asking of questions around would likely give P notice of the theater's activities. As such, it appears that P was on inquiry notice to inquire into the theater's activities but failed to do so. However, coming to the nuisance is not dispositive in any way because P did not come to the nuisance solely to harass with a lawsuit; P genuinely came in good faith because P believed that it was a perfect place to raise a family. As such, the court will not outright dismiss P's private nuisance. However, the court may use the fact that P came to the nuisance and the fact that P

failed to inquire at all into the theater's activities to conclude on the substantial/unreasonableness analysis in favor of D.

### Neighborhood creeping into D's venue

Another factor is the neighborhood's creeping into D's venue. As mentioned above with P's coming to nuisance, the "neighborhood" coming to the nuisance will not be a dispositive factor and may merely be one of many other factors. However, it appears that the court should at least give some weight to the fact that "When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater." As such, D was operating D's venue in good faith.

### Conclusion

In conclusion, the court will likely side with D based on the totality of circumstances and find that the value of D's operation outweighs harms that apparently were accepted to by the neighbors. Further preclusion may or may not be a consideration as discussed below.

### **Public nuisance**

Public nuisance is substantial and unreasonable interference with health, safety, morals, or other rights of the community. When a private party seeks to bring a lawsuit for public nuisance, that party must have suffered a harm distinct from the harm suffered by the community.

Here, the harm as mentioned above might be ruled not unreasonable. Further, P has not suffered any harm from the noise or vibration that is unique from the harm suffered by other neighbors. P suffered the same exact harm that everyone around P suffers. As such, P cannot bring a public nuisance claim.



## **Preclusion**

Preclusion bars the re-litigation of issues already litigated. Claim preclusion and issue preclusion exist.

### **Claim preclusion**

Claim preclusion bars re litigation of same claims when there is a final valid judgment on the merits, asserted by same parties in same configuration, and the claims are the same.

Here, the parties are different because P was not part of the earlier lawsuit for relief. As such, claim preclusion does not apply.

### **Issue preclusion**

Issue preclusion bars re-litigation of same issues when 1) in a final valid judgment on the merits exist; 2) the issues was necessarily determined; 3) the issue was essential to the judgment; and 4) no mutuality problems exist.

Here, the prior parties were unsuccessful in obtaining relief, and they decided to live with it. As such, the prior lawsuit likely ended, and the plaintiffs decided against appealing. As such, the decision is final. It appears that the claim was not unsuccessful because of personal jurisdiction or other issues, and so it appears that the prior lawsuit went into the merits. The vibrations and noise are the whole point of the prior lawsuit and of this lawsuit as well. As such, the issue was both necessarily determined and essential to prior judgment. Finally, mutuality problems must not exist. First, D was party to the prior action and had a chance to defend D's self. Further, P was not party to the prior action. However, in this case since D was successful in the prior action, D will seek to assert issue preclusion against P. Since P was not party to the prior action, P had no

chance to be heard. As such, D cannot assert issue preclusion against P.

### Conclusion

In conclusion, D will not be able to assert issue preclusion against P. P will not want to assert preclusion because D prevailed (it appears) in the former action.

### **Negligent infliction of emotional distress**

### **Defenses: defense (self, property, others); consent; arrest; necessity**

### **Other torts (negligence, strict liability)**

## **II. REMEDIES PEDRO CAN SEEK**

Remedies for trespass to land was discussed earlier and is likely to be limited to nominal damages, especially since D will probably not come against and against and cause a multiplicity of suits problem. The remedies here will concern the case that P wins on the nuisance claim.

### **Money damages**

Tort money damages are primarily "compensatory damages" which seeks to compensate the plaintiff put make the plaintiff whole. Sometimes there are "nominal" damages that seek to vindicate a plaintiff who basically has not been harmed, as discussed above. There are also "punitive" damages which will punish the defendant for willful and wanton conduct.

Here, punitive damages should not be available because D is not engaged in willful and wanton conduct to harm P or others. Rather, D is engaged in a legitimate business that benefits the entire community which happens to also harm nearby neighbors, who came to the nuisance because both the neighborhood crept towards D's venue and the neighbors decided to purchase the homes or rent the homes (in which case it would not

be that costly for them to relocate or move away).

Further, P was seeking to raise a family here and live a quiet life here with P's family.

However, the value of what P is unable to do this because of the noise and vibrations.

First, it is not certain that P will win damages because of reasons discussed above - no nuisance might exist. Second, even if P wins on the private nuisance claim, it is possible

that P did not suffer much pecuniary harm. Perhaps P actually got the land for a cheaper price because the seller reduced the price because of the noise and vibrations.

As such, P might not have suffered harm in decrease of land value (P might have *gotten*

the land cheaply to begin with). Third, it is possible that P will be culpable as well

because P failed to inquire at all, as described above, when a simple few questions would have revealed the problem, or even a visit on a weekend.

If P's land value did go down because of the noise and vibrations, then P may be entitled to the difference between the value of the land as P purchased it without the noise and vibration issues.

### **Temporary restraining order, preliminary injunction, permanent injunction**

P may also seek equitable relief. Although P might go through temporary restraining orders and preliminary injunction, ultimately it is a permanent injunction that P would seek to try to enjoin D from having such loud noises.

Permanent injunction is appropriate when 1) legal damage is inadequate; 2) enforcement is feasible; 3) property right exists; 4) balance of harms and equities; 5) no defenses.

#### **1) legal damage is inadequate**

Legal damages might be inadequate when the conduct at issue might be repeated or

occur in the future; or when damages would be speculative or uncertain; or when the defendant is insolvent so a judgment would be meaningless.

Here, damages would be speculative because it would be difficult not only to measure the harm of constant noises and vibrations. Further, D seeks to play noises every weekend into possibly likely decades into the future. But D might stop the operation next year. As such, damages are speculative and uncertain. It can be argued that the decrease in value of land with the noises is a sufficiently certain measure of damages, however.

### 2) enforcement is feasible

A negative injunction prohibiting an action is easier to enforce than affirmative injunctions. One single act is easier to enforce than series of acts. An act requiring skills or personal taste is harder to enforce than objective acts. Involuntary servitudes are disfavored if not unconstitutional.

Here, the injunction sought is negative, which is not hard to enforce. Every time D engages in the making of noise, every neighbor would hear. As such, it would be noticed, and someone can make a complaint to the court and the court can issue contempt order. Further, since the land is in the state and city of the court, there are no jurisdictional issues and the injunction, and its enforcement is feasible.

### 3) property right exists

Traditionally, a protectible property right was needed. Modernly and in CA, property right is not necessary. Here, however, there is right in use and enjoyment of land property, quiet enjoyment, without the noise and vibrations. As such, this element would be satisfied.

#### 4) balance of harms and equities

The harms and equities must be balanced, including benefit to the public. Here, the harm to public would be high because 200 people would lose their jobs. The harm to P would be high as well because on every weekend P would suffer loud noises and vibrations until 11pm, which is arguably very late and offensive to reasonable ordinary persons. The harm to D would be significant, although perhaps D can still operate during weekdays because dance performances seem not to be the issue, only rock concerts.

#### 5) no defenses

It appears that P did not unduly delay and cause D prejudice (no laches). It also appears that P did not act in a culpable manner even if failure to inquire was a little neglectful (no unclean hands)

#### Conclusion

In conclusion, the analysis for permanent injunction does not appear to be one sided. As such, the court may likely refuse to grant it, as it did in the prior action by neighbors against the same D.

#### TROs and preliminary injunctions

The analysis for TROs and preliminary injunctions is similar to that for permanent injunctions. The major difference is that they require the necessity of maintaining status quo until a preliminary hearing can be held because of imminent harm (TRO) and until a full trial (preliminary injunction).

Here, it appears that neighbors can decide to live with the noise and vibrations. The neighbors had organized to file a lawsuit. As such, they would not merely decide to "live

with it" out of shyness, since they could commiserate with each other and feel free to complain and such feelings would avalanche and not be reduced. As such, it appears that there is no imminent irreparable harm that would justify TROs and preliminary injunctions.

Further based on the analysis above on private nuisance especially, likelihood of success does not appear to be great; It might be 60% at most.

*other remedies*

Other remedies such as constructive trust and equitable lien do not apply and are not relevant. Permanent injunction is the only relevant one and even that is unlikely.