(8) Impulsive sound, attributable to the source, measured at a level of 15 dB(A) or more above the ambient sound level, as measured at any point within a receiving property or as measured at a distance of 15 feet or more from the source of a public right-of-way. Impulsive sound levels shall be measured in the A-weighting network with the sound level meter set to fast response. The ambient sound level shall be taken in the A-weighting network with the sound level meter set to slow response (see Administrative Code of the City of New York§24-218(b)(3)).

(9) To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendant's conduct (*see, Schulz v. Dattero*, 104 AD3d 831, 832 [2nd Dept. 2013]).

(10) To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success in the merits; (2) irreparable harm in the absence of the injunction; and (3) a balance of the equities in favor of granting the injunction (see, CPLR 6301; *Norton v. Dubrey,* 116 AD3d 1215 [3rd Dept. 2014]).

Analysis

(1) I have considered all of the relevant evidence, and I find that plaintiffs have established, by a preponderance of the evidence, that there is a likelihood or probability of success on the merits in this case with respect to the nuisance claim asserted against the Blujeen defendants; that they will suffer irreparable harm in the absence of the injunction; and that a balance of the equities in favor of granting the injunction tips toward them (*see, Spangenberg v. Chaloupka*, supra; CPLR 6301; *Norton v. Dubrey, supra; Schulz v. Dattero, supra).*

(2) Specifically, I find that the plaintiffs testified credibly as to the loud noises they heard

emanating from Blujeen being on January 11, 2015, between the hours of 2 p.m. and 7 p.m. and thereafter for months at various hours (*see, Lauria v. Lauria, supra*). I also find that the plaintiffs testified credibly with respect to the disruptive effect theses loud noises have had on their family life, including disrupting the sleeping patterns of each member of the family (*id*).

(3) I find that the findings and conclusions reached by Fierstein in his expert report dated April 27, 2015 to be persuasive. I find that the report contains data that scientifically demonstrates that the loud "voices and music" that emanated from Blujeen into the subject apartment during testing were "excessive" due to the fact that Blujeen was not "sufficiently soundproofed."

(4) I further find that the scientific data derived from Fierstein's testing supports his conclusion that such noises were in violation of the Noise Code. I further find that the Blujeen defendants accepted the suggestions made by Fierstein in his report and undertook significant corrective measures in an effort to solve the problem. I find that the expert report dated July 15, 2015, which was issued by Dr. Schnitta to the Blujeen defendants, acknowledges these efforts, but also points out existing violations of the "Noise Code" and "Building Code" with respect to her testing on June 25, 2015.

(5) I find it significant that Dr. Schnitta admitted on cross-examination that the report dated July 15, 2015 does not include any graphs, sound measurements or readings to support her findings from her visit to Blujeen and the subject apartment on June 27, 2015. I also find it significant that Dr. Schnitta admitted on cross-examination that she did not test for music in Blujeen on June 27, 2015 in order to determine whether there were any violations of the Noise Code.

(6) In addition, I find it significant that Dr. Schnitta admitted on cross-examination that when measuring for reverberation of the speakers in Blujeen she utilized the "balloon-popping"

method rather than the "speaker release" method, a method which has not been specifically identified in "ASTM" standards. As such, I find that findings and conclusions reached by Dr. Schnitta in the report dated July 15, 2015 with respect to her testing on June 27, 2015, including her speculation that certain noises audible in the subject apartment could "possibly come from a lounge adjacent to Blujeen or other source," to be unpersuasive.

(7) I find it significant that Dr. Schnitta admitted on cross-examination that in mid-March 2016, she sent engineers to conduct tests in Blujeen to determine whether certain Building Code standards had been met, but that no report was ever issued regarding her findings. I also find it significant that Dr. Schnitta admitted that the noise levels in the subject apartment in March of 2016 were in fact "worse" than it had been in June of 2015. Additionally, I find it significant that Dr. Schnitta admitted on cross examination that she has never been present in Blujeen to conduct tests while large numbers of people were in the restaurant.

(8) I find that the findings made by Fierstein in his expert report dated May 6, 2016 to be supported by his scientific data and analysis, as well as his conclusion that the soundproofing work performed in Blujeen was "ineffective" and that there has been "virtually" no change in the "excessive noise" levels transmitted to the subject apartment since April 24, 2015, in violation of the applicable provisions of the Noise Code.

(9) As such, I find that the totality of the evidence submitted by the plaintiffs sufficiently demonstrates that the periodic noises emanating from Blujeen into the subject apartment since January 11, 2015 were excessive and in violation of the applicable provisions of the Noise Code; that plaintiffs therefore have demonstrated a likelihood or probability of success on the merits of their claim against the Blujeen defendants alleging nuisance; that they will suffer irreparable

harm in the absence of the injunction; and that a balance of the equities in favor of granting the injunction tips towards them (see, CPLR 6301; *Norton v. Dubrey, supra; Schulz v. Dattero, supra).*

(10) Consequently, I find that plaintiffs are entitled to the issuance of the preliminary injunction requested in the Order to Show Cause dated May 21, 2015, to the extent that the Blujeen defendants be directed to "erect, install and /or apply a drop ceiling or other soundproofing material to the ceiling and walls within Blujeen sufficient to prevent any sounds or other noise emanating from Blujeen to enter" the subject apartment.

Conclusion

Upon consideration of all the testimony presented; the considered credibility to be afforded the witnesses, and review of exhibits admitted into evidence, I find that plaintiffs are entitled to the issuance of the preliminary injunction requested in the Order to Show Cause dated May 21, 2015, to the extent that the Blujeen defendants be directed to "erect, install and /or apply a drop ceiling or other soundproofing material to the ceiling and walls within Blujeen sufficient to prevent any sounds or other noise emanating from Blujeen to enter" the subject apartment.

Accordingly, upon presentment of the referenced issue, on a motion made pursuant to CPLR§4403, I report and recommend that the court confirm this report.

Date: November 16, 2016.

Respectfully submitted,

Lancelot B. Hewitt

Lancelot B. Hewitt,
Special Referee