TWELFTH JUDICIAL DISTRICT COURT
COUNTY OF LINCOLN
STATE OF NEW MEXICO

DALE A. ANTILLA, et al
Plaintiffs,

vs. **No. D-1226-CV-2021-00241**

ROPER CONSTRUCTION, INC.,
and RYAN ROPER, individually,
Defendants,

And

JAMES A. MILLER and
SARAH L. and JOSHUA C. BOTKIN,
Plaintiffs/Counter-Defendants

v. **No. D-1226-CV-2021-00261**
(Consolidated into above case)

ROPER INVESTMENTS, LLC and
ROPER CONSTRUCTION, INC.,
Defendants/Counter-Plaintiffs

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on the motion for preliminary injunction under Rule 1-066 NMRA filed by Plaintiffs James A. Miller, Sarah L. Botkin, and Joshua Botkin (collectively "Plaintiffs"). The motion sought a preliminary injunction to enjoin Defendants Roper Investments, LLC and Roper Construction, Inc. (collectively "Roper") from constructing and operating a concrete batch plant in violation of deed restrictions burdening Roper's use of his property and benefitting Plaintiffs. In accordance with the Court's order at the close of the hearing on the motion for preliminary injunction, Plaintiffs submit the following Proposed Findings of Fact and Conclusions of Law.

Jurisdiction and Procedural Background

1. This Court has jurisdiction over this preliminary injunction proceeding pursuant to N.M. Const. art. VI, § 13 and Rule 1-066(A) NMRA.

2. On December 16, 2021, Plaintiffs filed their Motion for Preliminary Injunction and Memorandum in Support.

3. On March 9, 2022, Plaintiffs submitted their Consolidated Reply in Support of Motion for Preliminary Injunction and Memorandum in Support and Response to Defendants' Counter-Motion for Trial on the Merits Plaintiffs' Motion for Preliminary Injunction.

4. On March 10, 2022, Plaintiffs filed their Notice of Completion of Briefing.

5. The Court held a hearing on Plaintiffs' request for preliminary injunctive relief commencing on May 10, 2022, and continuing on May 17, 2022, June 3, 2022, and June 8, 2022.

FACTUAL BACKGROUND

The Deed Restrictions and Ownership History of Tracts 1, 2, 3A, 4A-1 and 4B

6. In 2011, Frank Reed and his wife, Ellen Bramblett, purchased 13.7 acres of land located in Alto, New Mexico. *See* Plaintiffs' Ex. 1, p. 2; Plaintiffs' Ex. 2-A. At the time Mr. Reed and his wife purchased the 13.7 acres, there were no deed restrictions of record burdening the purchased land. *Id.*; [5-10-22 AF 0843 1:35:50-1:37:00].

7. Mr. Reed and Ms. Bramblett subdivided the 13.7 acres into four (4) separate, adjoining tracts in 2012 under a Family Claim of Exemption. *See* Plaintiffs' Ex. 2-B. The four (4) separate, adjoining tracts were identified on the Boundary Survey Replat as Tract 1, Tract 2, Tract 3, and Tract 4. *Id.* The County of Lincoln approved the subdivision of the original 13.7 acres into four (4) separate tracts under the Family Claim of Exemption on May 22, 2012. *Id.*; [5-10-22 AF 0843 1:37:20-1:38:10].

8. Pursuant to the Family Claim of Exemption Boundary Replat, Mr. Reed and Ms. Bramblett executed the following deeds on August 30, 2013: (1) Quitclaim Deed conveying Tract 1 Mr. Reed's daughter, Amanda Marie Reed; (2) Quitclaim Deed conveying Tract 2 to Mr. Reed's daughter, Sadie Reed Cartwright; and (3) Quitclaim Deed conveying Tract 3 to Ms. Bramblett's son, Lance Kuykendall. *See* Plaintiffs' Ex. 2-C. These three (3) Quitclaim Deeds were duly recorded with the Lincoln County Clerk. *Id.*; [5-10-22 AF 0843 1:38:10-1:39:40].

9. In May of 2014, Mr. Reed and his family were preparing to sell Tract 3 to Plaintiff Josh Botkin. To clarify what types of activities would be allowed and what types of activities would be prohibited on the four (4) tracts of land, and to provide a continuity of usage of the tracts for residential and light commercial purposes only, Mr. Reed and his family placed deed restrictions on Tracts 1 through 4. *See* Plaintiffs' Ex. 2-D. Specifically, Quitclaim Deeds for each of the four (4) tracts were recorded contemporaneously with the Lincoln County Clerk on May 27, 2014, with identical Deed Restrictions burdening each tract. *Id.* The Deed Restrictions were part of a common scheme of development and placed on all four tracts to ensure that all subsequent owners of the four tracts would be bound by the Deed Restrictions and, accordingly, also receive the benefit of the usage restrictions set forth in the May 2014 Quitclaim Deeds. [5-10-22 AF 0843 1:39:40-1:43:30; 2:29:00-2:29:50; and 2:31:20-2:31:50].

10. Relevant to Plaintiffs' Motion for Preliminary Injunction, the Deed Restrictions burdening all four (4) tracts prohibited the following: "Any other use which, by it's [sic] nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners." *See* Plaintiffs' Ex. 2-D, paragraph 2.d ("Deed Restriction 2.d"). Deed Restriction 2.d was intended to accomplish the common plan by prohibiting manufacturing and industrial operations to protect the owners of the

tracts from nuisances created by noise, hours of operation and odors. [5-10-22 AF 0843 1:44:20-1:45:00 and 2:09:40-2:11:00].

11. After the Quitclaim Deeds burdening all four (4) lots were recorded with the Lincoln County Clerk, a Warranty Deed was recorded conveying Tract 3 to Josh Botkin. *Compare* Plaintiffs' Ex. 2-D time stamps with Plaintiffs' Ex. 2-E time stamp. Mr. Botkin was aware of the Deed Restrictions prior to closing and agreed to restrictions. Mr. Botkin's Warranty Deed specifically noted that Tract 3 was burdened by all restrictions of record, including the prohibition of any use which would be a nuisance to adjoining owners. *See* Plaintiffs' Ex. 2-E; [5-10-22 AF 0843 1:45:10–1:46:20].

12. Mr. Botkin's realtor informed him about the Deed Restrictions and Mr. Reed's efforts to burden all four (4) tracts to ensure consistent use of the land for the benefit of all subsequent adjoining owners of the four (4) tracts. After learning about the Deed Restrictions, Mr. Botkin communicated to Mr. Reed the uses Mr. Botkin intended for Tract 3 – landscape company offices and eventual plant nursery – to confirm that those uses would not violate the Deed Restrictions. Mr. Reed provided Mr. Botkin assurances that those uses did not violate the Deed Restrictions. [5-10-22 AF 0843 2:36:50-2:38:30].

13. Shortly after Tract 3 was conveyed to Josh Botkin, Mr. Reed and Ms. Bramblett conveyed Tract 2 to Salvador and Leonor Martinez. *See* Plaintiffs' Ex. 2-F; [5-10-22 AF 0843 1:46:20-1:47:00].

14. In late 2014, Mr. Reed and Ms. Bramblett recorded a Boundary Survey Replat with the Lincoln County Clerk. *See* Plaintiffs' Ex. 2-G. The Boundary Survey Replat divided Tract 4 into two smaller tracts identified as Tract 4A and Tract 4B, with Mr. Reed and Ms. Bramblett retaining

ownership of both tracts. *Id.* At the time, Mr. Reed believed that the division of Tract 4 into two smaller tracts would facilitate the sale of those properties. [5-10-22 AF 0843 1:47:00-1:48:40].

15. In June 2018, Mr. Reed agreed to sell one (1) acre of Tract 4A to Josh Botkin. A Boundary Survey Replat was file with the Lincoln County Clerk identifying Josh Botkin's enlarged property as Tract 3A and Mr. Reed's smaller property as Tract 4A-1. *See* Plaintiff's Ex. 2-H. The Warranty Deed filed with the Lincoln County Clerk reflecting Mr. Botkin's ownership of the extra acreage from Tract 4A specifically noted that the Warranty Deed was subject to all restrictions of record, which included the Deed Restriction 2.d. *Id.*; [5-10-22 AF 0843 1:48:40-1:49:40].

16. Mr. Reed and Ms. Bramblett conveyed Tracts 1, 4A-1 and 4B to the Frank Reed and Ellen Bramblett Trust on August 30, 2019. *See* Plaintiffs' Ex. 2-I. In accordance with the common plan prohibiting uses that would be a nuisance to owners of the adjoining tracts, the Correction Special Warranty Deed conveying Tracts 1, 4A-1 and 4B to the trust referenced the Deed Restrictions burdening the original four tracts. *Id.*; [5-10-22 AF 0843 1:50:00-1:51:10].

17. Subsequent to the recording the conveyance of Tracts 1, 4A-1 and 4B to the Reed/Bramblett Trust, Tract 4A-1 was conveyed to Glen and Nikki Tomlinson. The Warranty Deed conveying Tract 4A-1 to the Tomlinsons was filed on February 28, 2020, and reflected that Tract 4A-1 was subject to all restrictions of record, including Deed Restriction 2.d prohibiting manufacturing and industrial use of Tract 4A-1. *See* Plaintiffs' Ex. 2-J. The Tomlinsons conveyed Tract 4A-1 to Tomel Holdings by Warranty Deed that similarly reflected that Tract 4A-1 was subject to the Deed Restrictions. *See* Plaintiffs' Ex. 2-L; [5-10-22 AF 0843 1:51:10-1:51-50; 1:52:40-1:53:20; and 1:52:50-1:53:40].

18. Subsequent to the recording the conveyance of Tracts 1, 4A-1 and 4B to the Reed/Bramblett Trust, Tract 4B was conveyed to Tomel Holdings LLC. *See* Plaintiffs' Ex. 2-K.

The Warranty Deed conveying Tract 4B to Tomel Holdings was filed on February 21, 2020 and reflected that Tract 4B was subject to all restrictions of record, including Deed Restriction 2.d prohibiting manufacturing and industrial use of Tract 4B. *Id.*; [5-10-22 AF 0843 1:51:50-1:52:40].

19. In January 2021, Mr. Reed and Ms. Bramblett conveyed Tract 1 to Plaintiff Austin Miller. *See* Plaintiffs' Ex. 2-M. The Warranty Deed conveying Tract 1 to Mr. Miller, recorded with the Lincoln County Clerk on January 20, 2021, reflected that Tract 1 was subject to all restrictions of record, including Deed Restriction 2.d prohibiting manufacturing and industrial use of Tract 1. *Id.* [5-10-22 AF 0843 1:53:40-1:54:10]. Mr. Miller was made aware of the Deed Restrictions through his father, who acted as his real estate agent, and through conversations with Mr. Reed. [5-10-22 AF 0843 00:04:00]. Mr. Miller understood that the Deed Restrictions prohibited manufacturing activities. *Id.*

20. Tracts 1, 2, 3A, 4A-1 and 4B were all burdened with the Deed Restrictions, including Deed Restriction 2.d prohibiting manufacturing and industrial use on the tracts, in May 2014, prior to all subsequent conveyances of these tracts. The Deed Restrictions were intended to benefit all subsequent owners of the tracts by prohibiting uses which would be a nuisance to adjoining owners of these tracts and providing continuity of development of the tracks. According to Mr. Reed, who created the Deed Restrictions, a business that created excessive noise would violate the Deed Restrictions placed on all these lots. [5-10-22 AF 0843 1:41:40-1:43:30; 1:54:50-1:55:40; and 2:31:50-2:32:10].

Roper's Acquisition of Tracts 4A-1 and 4B

21. In early 2021, Roper began negotiations with Tommy Wilson, the Managing Member of Tomel Holdings, and his wife, Melanie Wilson, for the purchase Tracts 4A-1 and 4B. *See* Respondent Ex. ZZ, ROPER 00599.

22. On January 22, 2021, Mr. Roper e-mailed Lincoln County employee Glenda Allen and requested a letter from the county indicating that Tracts 4A-1 and 4B were not subject zoning restrictions or to the Deed Restrictions. *See* Respondent Ex. YY, ROPER 00572. Mr. Roper incorrectly claimed: "I know it's [sic] unrestricted I just need it in writing." *Id.*

23. Ms. Allen provided Mr. Roper with a letter that same day, January 22, 2021. *See* Respondent Ex. YY, ROPER 00570. Ms. Allen confirmed that there were no zoning restrictions affecting Tracts 4A-1 and 4B, but cautioned Mr. Roper about the Deed Restrictions burdening those lots. *Id.* Ms. Allen even provided Mr. Roper with a copy of the Correction Special Warranty Deed conveying these tracts to the Reed/Bramblett Trust which contained the Deed Restrictions. *Id.*; ROPER 00577.

24. After receiving Ms. Allen's letter informing him of the Deed Restrictions burdening Tract 4A-1 and Tract 4B, Mr. Roper attempted to obtain approval from a different Lincoln County employee, Whitney Whittaker, to record the deed conveying Tracts 4A-1 and 4B to Roper Construction without Deed Restriction 2.d. *See* Respondent Ex. YY, ROPER 00571. Ms. Whittaker responded to Mr. Roper and said she would get back to him about recording without Deed Restriction 2.d after she had done some research. *Id.* Importantly, Roper provided no documentary evidence that Ms. Whittaker ever condoned Mr. Roper's ill-conceived plan to record his deed without Deed Restriction 2.d.

25. After Mr. Roper's attempts to omit the Deed Restrictions generally, and Deed Restriction 2.d in particular, Mr. Roper then attempted to remove Deed Restriction 2.d by including a removal provision in the Real Estate Contract with the Wilsons. On February 9, 2021, Ms. Wilson e-mailed Mr. Roper a form Real Estate Contract for Mr. Roper's review. *See* Respondent Ex. ZZ, ROPER 00599-00606.

26. That same day, February 9, 2021, Mr. Roper sent Ms. Wilson the Real Estate Contract with some additional changes. *See* Respondent Ex. ZZ, ROPER 00617-00618, 00645-00647, 00609-00615. Specifically, Mr. Roper engaged in a scheme to improperly remove Deed Restriction 2.d by adding the following provision to the Real Estate Contract: "SELLER HEREBY AGREES TO ALLOW THE BUYER TO DELETE SECTION 2(d) ON PAGE 2 ON EXHIBIT "B", LIMITATIONS & RESTRICTIONS, WHEN THE NEW WARRANTY DEED IS RECORDED." *Id.*, ROPER 00613 (capitalization in original). Mr. Roper also attached Exhibit "B" to the e-mail to Ms. Wilson, which was a copy of the Correction Special Warranty Deed conveying Tracts 1, 4A-1 and 4B to the Reed/Bramblett Trust. *Id.*, ROPER 00645-00647. Mr. Roper had crossed out Deed Restriction 2.d on the Correction Special Warranty Deed. *Id.*

27. Mr. Roper was further made aware of the Deed Restrictions prior to purchasing Tracts 4A-1 and 4B during a discussion with Josh Botkin. Josh Botkin called Mr. Roper after learning from Tommy Wilson that Roper was interested in purchasing the tracts. Mr. Botkin informed Mr. Roper about the Deed Restrictions and asked about Mr. Roper's intended use for the property. Mr. Roper inaccurately described his intended use of Tracts 4A-1 and 4B as storage only for decorative rock and aggregate. At no time during this conversation, or at any time, thereafter, did Mr. Roper acknowledge to Josh Botkin that he intended to construct and operate a concrete batch plant. Mr. Botkin became aware of Mr. Roper's plans only after Mr. Roper had submitted his application for an air quality construction permit to the New Mexico Environment Department ("NMED"). [5-10-22 AF 0843 2:44:50 – 2:47:40].

28. Mr. Roper's claim that Mr. Botkin's only concern was whether Mr. Roper would conduct rock crushing operations is not credible given the text message sent from Mr. Roper to Mr. Botkin in which Mr. Roper admitted that Mr. Botkin specifically asked whether Mr. Roper intended to

operate a concrete batch plant: "You asked about a crusher which I denied and *you even mentioned a concrete plant* which I didn't comment on one way or the other." *See* Respondent Ex. CCC (emphasis added).

29. Not only was Mr. Roper aware of Deed Restriction 2.d, he was also aware that he and the Wilsons could not unilaterally remove Deed Restriction 2.d from burdening Tracts 4A-1 and 4B. When he first contacted the title company acting as escrow agent for the closing, Mr. Roper informed Vickie Caudill, the closing officer at Alliance Abstract Title LLC in charge of preparing the closing documents for Roper's purchase of Tracts 4A-1 and 4B, that he wanted to change the Deed Restrictions burdening the tracts he was purchasing. [5-17-22 AF 1519 0:10:10-0:14:30].

30. On March 4, 2021, Ms. Caudill wrote to Mr. Roper, informing Mr. Roper that she needed to talk with him about what he "said about 'changing some of the restrictions.'" *See* Respondent Ex. AAA, ROPER 00687. The next day, March 5, 2021, Ms. Caudill informed Mr. Roper of the following:

> The restrictions affect the 2 lots you are buying and 3 more to the left. I am sending you a copy of the county map that shows the owners names on each lot. *So a document would have to be drawn up stating that you or the seller, if you do not want to close because of this, will have to sign along with the other 3 lot owners. So let me know if you want to close without removing the restriction*, or if you do not want to close and have the seller work on this?

See id., Roper 00686 (emphasis added); [05-17-22 AF 1519 0:15:40-0:18:20].

31. Instead of attempting to properly remove Deed Restriction 2.d by obtaining the consent of the adjoining lot owners subject to the restriction, Mr. Roper advised Ms. Caudill that he would just move forward with the closing without removing Deed Restriction 2.d. *See* Respondent's Ex. AAA, ROPER 00685; [05-17-22 AF 1519 0:18:20-0:18:50].

32. On March 10, 2021, a Warranty Deed conveying Tracts 4A-1 and 4B to Roper Investments was recorded with the Lincoln County Clerk. *See* Plaintiffs' Ex. 2-N. The Warranty Deed

reflected that Tracts 4A-1 and 4B were subject to all restrictive covenants, which still included Deed Restriction 2.d.

INJUNCTIVE RELIEF

33. To obtain a preliminary injunction to preserve the status quo, a plaintiff need not prove his or her case or resolve all factual questions, but instead only show that: (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; and (3) issuance of the injunction is not adverse to the public's interest; and (4) there is a substantial likelihood the plaintiff will prevail on the merits.

Irreparable Harm – Noise Assessment

34. SWCA is an environmental consulting firm specializing in noise impact analysis, air quality permitting and compliance, and various environmental site investigations. Plaintiffs retained SWCA to prepare a noise assessment of the concrete batch plant proposed by Defendant Roper. Plaintiffs' Ex. 21 ¶ 4.

35. Brad Sohm, P.E. is a Senior Noise Specialist with SWCA who had primary responsibility for the implementation of the assessment to determine likely noise levels from the proposed concrete batch plant. Mr. Sohm has performed numerous noise impact studies under the California Environmental Quality Act, for the Federal Energy Regulatory Commission, under the National Environmental Policy Act ("NEPA"), and other numerous state and local noise regulations. Plaintiffs' Ex.10, C.V. of Brad Sohm. Carlos Ituarte-Villarreal, Ph.D., is an Air Quality Modeling Specialist/Engineer with SWCA and has performed approximately 25 noise assessments of industrial facilities. [5-10-22 AF1344 2:13:40-2:14:40]. Dr. Ituarte-Villarreal was responsible for the implementation of the noise assessment and assuring quality control and compliance with all applicable industry standards. Plaintiffs' Ex. 21.

36. The purpose of a noise assessment is to determine levels of noise "interference" with human activities from a proposed or existing industrial or commercial operation and to protect public health and welfare with an adequate margin of safety. Protection of public health and welfare includes protection against speech interference, or interference with sleep or other activities which would be impaired as a result of excessive noise. [5-10-22 AF1344 1:49:50-1:51:20 and 2:15:00-2:16:00].

37. In situations where an industrial facility has been proposed, but not yet built, the facility is considered a "greenfield" site. In that circumstance, it is common and accepted practice in the noise assessment profession to utilize published data that identifies and quantifies noise impacts from specific equipment and industrial activities. [5-10-22 AF1344 1:42:00-1:43:00].

38. In 1974, the United States Environmental Protection Agency ("U.S. EPA") developed and published criteria to identify the effects on public health and welfare which may be expected from different quantities and qualities of noise. The U.S. EPA document, entitled "Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety," dated March 1974, was prepared by the U.S. EPA Office of Noise Abatement and Control ("the U.S. EPA Study"). Plaintiffs' Ex. 11.

39. The U.S. EPA Study provides accepted standards and guidance in the noise assessment profession to assess whether a particular activity will create excessive or permissible levels of noise. According to the U.S. EPA Study, interference with activities will not occur if outdoor noise levels are maintained at an energy equivalent of 55 decibels ("dB"). [5-10-22 AF1344 0:38:30-0:40:50]. According to the U.S. EPA Study, interference with activities will not occur if outdoor levels are maintained at an energy equivalent of 55 dBs, the acceptable noise level to protect the vast majority of the population against annoyance or interference with every-day

activities and to protect public health and welfare with an adequate margin of safety. *Id.* Plaintiffs' Ex. 11.

40. The 55 dB maximum, as set forth the U.S. EPA Study, is based on a weighting of daytime and nighttime noise, which is expressed as 55 Ldn. The weighting results in an average dB level for both daytime and nighttime, which might be greater or less than the noise generated solely during daytime or nighttime hours. For instance, if the average hourly daytime noise level is at a level above 55 dB, but there are no proposed nighttime hours of industrial operation for the facility, then the dB expressed as an average daytime/nighttime, or Ldn, would be expected to be less than the average hourly decibels perceived in the daytime. The 55 dB maximum, as set forth in the U.S. EPA Study, is expressed Ldn, which requires a conversion of daytime hourly decibels to an average of daytime/nighttime noise levels, expressed as Ldn. That resulting average, according to the U.S. EPA Study, should not exceed 55 dB/Ldn, or in outdoor areas where people spend a limited amount of time, the threshold is 55dB on an Leq basis, which is a continuous sound level measured over a particular time. Plaintiffs' Ex. 11; [5-10-22 AF1344 0:41:50-0:44:30].

41. According to accepted industry standards, an increase in 10 dB results in a doubling of the sound perceived by humans, while a decrease of 10 dB similarly results in a perception of sound levels less than half. [5-10-22 AF1344 0:42:30-0:43:10]. A study prepared by Bolt, Baranek, and Newman, Inc. in 1973, entitled, "Fundamentals in Abatement of Highway Traffic Noise," provides the basis for the accepted conclusion that humans perceive a doubling of sound for each 10 dB increase in noise. Accordingly, although the maximum U.S. EPA recommended sound levels for outdoor residential areas is 55 dB, increasing the decibels by 10 to 65 dB is a perceived as a doubling of that sound. Plaintiffs' Ex. 13; [5-10-22 AF1344 0:42:30-0:43:10 and 0:46:40-0:47:50].

42. The U.S. EPA standard of 55 dB as a maximum sound level for the protection of public health and the environment has been adopted by other regulatory agencies, including the Federal Energy Regulatory Commission ("FERC"). Plaintiffs' Ex. 12. In 2017, the FERC adopted the U.S. EPA Study's standard of 55 dB as a limitation for noise for the proposed construction or operation of pipelines. [5-10-22 AF1344 0:43:10-0:46:40].

43. In the current circumstances, because the proposed concrete batch plant has not yet been constructed and is therefore a greenfield project, SWCA utilized a noise model known as the FHWA Roadway Construction Noise Model (the "RCNM"). The RCNM model is widely accepted in the noise assessment industry as the proper model to assess likely or probable noise impacts from proposed industrial facilities that have not yet been constructed. [5-10-22 AF1344 0:04:00-0:06:30 and 0:48:40-0:50:10].

44. The U.S. Department of Transportation Federal Highway Administration has developed the FHWA Roadway Construction Noise Model User's Guide for use in the RCNM (the "RCNM User's Guide"). Plaintiffs' Ex. 14. The RCNM User's Guide includes specific noise values for equipment used at a concrete batch plant, including concrete mixing trucks, front-end loaders, and the concrete batch plant itself. *Id*. According to the RCNM User's Guide, the noise levels for a front-end loader are 79 dBA (at a reference distance of 50 feet), which are A-weighted decibels, or an expression of the loudness of sound as perceived by the human ear, a concrete mixing truck produces noise levels of 79 dBA, and a concrete batch plant produces 83 dBA. *Id.* [5-10-22 AF1344 0:50:10-0:52:10] and [6:10-22 AF1330 0:37:30-0:38:40].

45. Under the New Mexico Air Quality Control regulations, Roper was required to submit an application for an Air Quality Construction Permit specifying the physical attributes of the plant, the proposed layout of the facility, and all equipment to be used or anticipated to be used for

concrete batch plant operations, including the hours of operation, the number of concrete mixing trucks, the number of front-end loaders, and other equipment commonly associated with concrete batch plant operations.

46. In preparing the noise assessment, SWCA relied on Roper's application and representations that the facility would use ten (10) concrete mixing trucks and one (1) front-end loader. [5-10-22 AF1344 0:53:50-0:54:20]. With this information, SWCA incorporated into the noise assessment model the specific published noise data for each piece of equipment, as specified by the RCNM User's Guide. Plaintiffs' Ex. 21 ¶ 9; [5-10-22 AF1344 0:53:50-0:54:20].

47. Although Roper's application for an Air Quality Construction Permit sought approval for the use of 20.3 trucks per hour, SWCA reduced that number, for purpose of the noise assessment, to two trucks per hour. [5-10-22 AF1344 0:53:50-0:54:20]. According to the testimony of the SWCA witnesses, Mr. Sohm and Dr. Ituarte-Villarreal, the reduction was employed in order to generate a conservative result of likely noise generated from the proposed facility. Plaintiffs' Ex. 21 ¶ 9; [5-10-22 AF1344 0:53:50-0:54:20 and 2:24:40-2:26:00].

48. In accordance with the RCNM User's Guide, SWCA employed a usage factor of 40%, for each of the two trucks and front-end loader, thereby reducing the noise levels expected from operations. [6-8-22 AF1455 1:15:20-1:16:40]. Although Roper's expert, Mike Dickerson of MD Acoustics, sought to reduce anticipated noise levels by limiting the usage factor to 0.16 hours (10 minutes per hour) for each piece of equipment, such a reduction is contrary to the accepted protocol set forth in the RCNM User's Guide. Moreover, the evidence demonstrated that Mr. Dickerson has followed the FHWA Users Guide in previous noise assessments, even those where he knew, or could have easily obtained, the actual usage factor because the plant was operational. [6-8-22 AF1455 1:15:20-1:16:40]. For instance, in a noise impact study prepared by Mr. Dickerson for a

car wash in the city of Oakley, California, dated December 8, 2021, Mr. Dickerson "assum[ed] a usage factor of 40% for each piece of equipment," consistent with the U.S. EPA protocol and the FHWA's User Guide. [6-8-22 AF1455 1:15:20-1:16:40]. In that same study, Mr. Dickerson used a noise level at 50 feet of 85 dBA for the concrete mixer and 88 dBA for a truck. Plaintiffs' Ex. 50; Quick Quack Car Wash-Noise Impact Study.

49. Notably, the conservative methodology employed by SWCA is underscored by the significant reduction in the number of concrete mixing trucks from 20 trucks per hour, as requested in the air quality permit application, to two trucks per hour. Plaintiffs' Ex. 21 ¶ 9; [5-10-22 AF1344 0:53:50-0:54:20]. According to Mr. Roper's own testimony, his Carrizozo plant recently experienced a level of business requiring the use of 20 concrete mixing trucks from 7:30 a.m. to 11:00 a.m., which is an average of 4.5 trucks per hour, or 250% greater than the number used by SWCA in the RCNM. [06-08-22 AF1330 0:22:30-0:23:10]. This conservative approach more than accounts for any usage of the equipment that Roper asserts could be less than the RCNM User's Guide determination of 40% based on similarly situated industrial applications.

50. As a pre-requisite to determining noise impacts from a proposed industrial facility using the RCNM, a noise assessment must first determine the background, or ambient, noise levels at certain properties which may suffer adverse noise consequences from the proposed industrial facility. [5:10-22 AF1344 2:15:00-2:17:00]. These areas or properties are called "noise sensitive areas," or NSAs. Plaintiffs' Ex. 21 ¶ 7 and [5:10-22 AF1344 2:15:10-2:15:50].

51. In the current circumstances, SWCA located NSA-1 on Tract 3-A, owned by Plaintiffs Sarah L. and Joshua C. Botkin. [5:10-22 AF1344 2:23:40-2:24:00]. The Botkin property is immediately west of and adjacent to the westerly boundary of the proposed concrete batch plant. Notably, NSA-1 is located in the middle of the Botkin property, a significant distance from the

boundary of the Botkin property and the proposed concrete batch plant. SWCA also located NSA-2 approximately 3,271 feet to the north-northeast of the proposed batch plant location. Additionally, SWCA located NSA-3 approximately 3,623 feet to the east-northeast of the proposed concrete batch plant. Finally, NSA-4 is located approximately 829 feet south of the proposed batch plant, almost twice the distance from Tract 1, which is west of the proposed concrete batch plant and owned by Plaintiff James A. Miller. Plaintiffs' Ex. 21 ¶ 8.

52. In order to determine the ambient or background noise levels at each NSA, SWCA placed noise receptors at each location to determine existing sound levels. [5:10-22 AF1344 2:17:00-2:23:40]. The ambient sound level is defined as the composite of all noise from sources from near or far, or alternatively, the normal or existing level of environmental noise at a given location. Plaintiffs' Ex. 21 ¶ 8.

53. The results of the SWCA assessment demonstrated that the current A-weighted equivalent ambient or background noise levels were 46.0 dBA at NSA-1, which is located in the middle of the property owned by Sarah and Josh Botkin, and directly east of the property owned by James A. Miller. The ambient noise levels recorded at NSA-2 were 29.8 dBA; 33.4 dBA at NSA-3; and 45.5 dBA at NSA-4. These background levels are consistent with levels based on existing land uses and are characterized as Normal Suburban Residential areas with sound levels ranging from 39 dB to 50 dB. *See* Plaintiffs' Ex. 15, Table C.1; Plaintiffs' Ex. 21 ¶ 8; [5:10-22 AF1344 2:23:40-2:24:40].

54. After making conservative adjustments and inputting the ambient noise levels into the model, SWCA then inputted the noise levels expected from operations at the concrete batch plant, consistent with the values for each piece of equipment as set forth in the RCNM User's Guide. SWCA selected the center of the proposed batch plant as the baseline, or the noise source from

which the impact on the NSAs would be measured. [5:10-22 AF1344 2:26:00-2:27:00]. This placement of the noise source at the middle of his property again represented a conservative approach that would underestimate noise levels. *Id*. Much of the noise would occur close to the boundaries of the proposed batch plant, where mixing trucks and other equipment would be operated. Accordingly, the noise impacts assessed by SWCA would likely underestimate the actual noise impacts that would be expected from the batch plant. Plaintiffs' Ex. 21 ¶ 9; [5:10-22 AF1344 2:26:00-2:27:00].

55. After making conservative adjustments and inputting the data from each noise source identified by Roper in the Air Quality Construction Permit Application, the RCNM performed a linear regression analysis to determine the noise impact at each NSA. Those impacts were then superimposed by SWCA on the background or ambient noise levels.

56. Although backup-alarms on trucks and other heavy equipment will be utilized at the proposed batch plant, which result in levels between 90 and 100 dB for each back-up alarm, SWCA did not include any transient noise sources as inputs to RCNM, and opted instead to use only those sources that would be relatively constant based on common operation of batch plant equipment. [5:10-22 AF1344 2:24:40-2:26:00]. Again, this represented a conservative approach to the noise model, which likely contributes to the underestimation of noise levels produced by the RCNM. Plaintiffs' Ex. 21 ¶ 9; [5:10-22 AF1344 2:24:40-2:26:00].

57. SWCA ran the RCNM assuming that Roper would operate the concrete batch plant consistent with his application for an Air Quality Construction Permit, which would have allowed operations during certain months beginning at 3:00 a.m. In that instance, the RCNM model determined that the sound levels at the middle of the Botkin property, or at NSA-1, would be approximately 65.4 dBA, which is an increase over existing ambient levels of almost 15 dBA.

This resulting noise level would result in a perception by human beings somewhere in between more than a doubling, but less than 400%, of the noise level currently experienced at the Botkin property. [5:10-22 AF1344 2:29:50-2:30:10].

58. Subsequently, SWCA changed the inputs to the RCNM under the assumption that Roper, based on his testimony, would never operate the batch plant during nighttime hours. SWCA reran the model, limiting the hours of operation to daytime, which necessarily resulted in a reduction of the Ldn value, because there would be no nighttime operations. However, even with the new input to the RCNM limiting operations to daytime hours, the results demonstrated that the proposed concrete batch plant would result in noise levels of 58.3 dBA at middle of the Botkin property, an increase of approximately 8 dBA. Limiting operations to daytime hours (7:00 a.m. to 4:00 p.m.) also resulted in an exceedance of the U.S. EPA recommended level of 55 Ldn and an approximate 200% increase in the perceived noise levels at the Botkin property. Plaintiffs' Ex. 53 ¶ 4; [5:10-22 AF1344 1:15:00-1:15:40].

59. After the receipt of the results of the RCNM results using only daytime hours for operation, Roper and his consultant attempted to reduce likely noise impacts from the proposed plant by changing the configuration of the batch plant to include a 10-foot barrier between the Botkin property to the west of the proposed aggregate bins at the batch plant. Plaintiffs' Ex. 53 ¶ 4. Roper and his consultant also asserted that the majority of noise sources could be lowered to one meter above ground surface, which would also reduce noise impacts from the equipment.

60. The changes proposed by Roper are not permissible under the construction permit regulations or the New Mexico Environment Department ("NMED"). Each time Roper changes the physical configuration of the batch plant, a new Air Quality Construction Permit Application must be submitted, with new air dispersion modeling demonstrating that the project would not

cause or contribute to an exceedance of an applicable New Mexico Ambient Air Quality Standard (NMAAQS), or National Ambient Air Quality Standards (NAAQS). Under the applicable regulations (20.2.72.203.A.7 NMAC), Roper must provide an accurate diagram of "all components and locations" of emission sources of the proposed facility. Plaintiffs' Ex. 53 ¶ 6. The application submitted by Roper also required a plat plan drawn to scale, including the "emission points, roads, buildings/structures, tanks and fences on the property." The requirement to identify the exact location of structures, fences and other components is so precise that the applicant must use the Universal Transverse Mercator coordinate system, which assigns coordinates at each particular location of the components on the surface of the earth. Plaintiffs' Ex. 53 ¶ 6.

61. There are important reasons why the applicant cannot change the layout as submitted in the Air Quality Construction Permit Application and required by NMED application specifications. Anytime the location or characteristics of buildings or other structures are changed, or additional structures are added, the results of the air quality dispersion modeling will also change. There are many factors which account for the differing results. For instance, if any part of the batch plant is proposed to be below grade (and was not in the original application), the release height for the emission sources will change and likely increase model concentrations. Plaintiffs' Ex. 53 ¶ 7.

62. Additionally, changing locations or height of structures, or adding additional structures results in a consequence called "downwash," which must be accounted for in the air quality dispersion modeling. "Downwash" is a turbulent wake of airflow created on the downward side of a building. This effects air dispersion modeling because a plume caught in this pathway may be drawn into the wake and temporarily trapped in a recirculating cavity. This "downwash" effect leads to higher ground-level pollutant concentrations near the building than if the building were

not present. According to SWCA, the NMED – similar to all other regulatory agencies – does not allow unilateral changes to the physical layout of the plant because those changes render the previous air modeling unreliable for a failure to take into account downwash consequences. Plaintiffs' Ex. 53 ¶ 7.

63. Roper has not testified that he would implement a 10-foot barrier or other measures, even if those changes could be submitted in a new air quality construction permit application. Nevertheless, SWCA sought confirmation the results of its initial RCNM model by running a verification model using the SoundPLAN Essential (version 5.1) software with the exact inputs that represent the physical attributes of the proposed plant as reported and subsequently changed by Roper. SWCA inputted the exact terrain conditions at the site, the 10-foot barrier proposed by Roper's consultant (but not allowed under the air quality permit regulations), the exact height and specifications for the plant, the local meteorological data, and related geographical information. Plaintiffs' Ex. 54 ¶ 4.

64. The SoundPLAN model estimates noise contours of the overall project in accordance with a variety of standards, primarily using the International Standards Organizations ("ISO") 9613-2:1996, Acoustics, for Noise Propagation Calculations. All sound propagation losses, such as geometric spreading, ground absorption, and barrier shielding are calculated in accordance with these recognized standards. Plaintiffs' Ex. 54 ¶ 6. The SoundPLAN model considers a number of influences, including sound power levels, locations of noise sources, distance between noise sources and receivers, topography of the area, the influence of absorption provided by the ground, shielding from structures or vegetation, and air absorption. Notably, the SoundPLAN model assumes "sound propagation occurs over porous ground or mixed ground, most of which is porous," typically which results in a sound attenuation factor between 0.6 and 1. Plaintiffs' Ex. 54

¶ 7. The sound attenuation factor is based on the type of ground surface at the source and between the source and the receptor. The more the ground surface resembles "soft ground," the attenuation factor increases to close to 1, and it is assumed that the sound is reduced through absorption before reaching the receptor. Hard surfaces, on the other hand, have a ground factor of 0, which results in no attenuation of the sound before it is perceived at the receiving location.

65. In the current circumstances, the new configuration provided by Roper, which includes the 10-foot barrier immediately west of the aggregate bins, also shows that the entire batch plant area is paved. This pavement consumes approximately half the distance between the eastern edge of the batch plant and the border of Botkin property on the west. According to accepted noise propagation values published by the ISO, the pavement at the proposed batch plant would be considered a hard surface, entitled to an attenuation factor of 0 and would not cause any reduction in sound. The SoundPLAN model, however, assumes a "porous" or soft ground with an attenuation factor between 0.6 and 1, which again will cause an underestimation of the actual noise impacts of the proposed concrete batch plant. Plaintiffs' Ex. 54 ¶ 7.

66. Using the exact terrain of the site, the 10-foot barrier proposed by Roper, the 7-meter height specifications for the plant as reflected in the schematic drawings prepared by Roper and submitted to the NMED, a receiver height of 1.7 meters above ground, the local meteorological data and related geographical information, the SoundPLAN model still reported an hourly A-weighted equivalent noise level (leq) of 59.5 dBA at NSA-1 on the Botkin property, a greater than 200% increase in perceived loudness and an exceedance of the U.S. EPA guidance. Plaintiffs' Ex. 54 ¶¶ 9-10.

67. Subsequent to the verification run of the SoundPLAN model performed by SWCA, Roper again attempted to minimize noise levels by suggesting that the noise sources could be reduced

from seven meters above ground surface to one meter above ground surface. This purported reduction is contradicted by Roper's schematic drawings submitted in his Air Quality Construction Permit Application, which demonstrated that the noise sources associated with the concrete batch plant, including the aggregate bins, transfer conveyor, cement batcher, air actuated valves, air actuated cylinders, air pulses for baghouse cleaning and truck loading range from approximately 20 feet above ground surface to 50 feet above ground surface. Plaintiffs' Ex. 54 ¶ 11.

68. Notwithstanding these discrepancies, SWCA again reran the SoundPLAN model using the reduction of the noise sources from seven meters above ground surface to one meter above ground surface. The SoundPLAN model reported only a slight decrease – 0.5 dBA – of the noise level at NSA-1. Accordingly, even with the additional change proposed by Roper – which is contrary to the NMED Air Quality Construction Permit Application – the SoundPLAN model reported only a slight reduction of the noise impact at NSA-1 from 59.5 dBA to 59.0 dBA, which still represents a greater than 200% increase in perceived loudness and an exceedance of the U.S. EPA guidance. Plaintiffs' Ex. 54 ¶ 10 and [6-8-22 AF1455 1:01:50-1:02:20].

69. The Affidavit of Roper's sound consultant, Mike Dickerson, Jr., dated June 16, 2022, asserts that Mr. Dickerson reran the SoundPLAN model with the same inputs used by SWCA, but applied a different acoustical factor and a ground attenuation factor of 0.75. [Defs' Ex. ZZZZ ¶10]. According to Mr. Dickerson's run of the SoundPLAN model, the noise impacts at NSA-1 "dropped from 59 dBA to 54.5 dBA," slightly below the U.S. EPA guidance level of 55 dBAs, but still representing an approximate of 200% increase over ambient noises at the NSA-1 location. Defs' Ex. ZZZZ pg. 6; [6-8-22 AF1455 1:01:50-1:02:20].

70. Although SWCA provided Mr. Dickerson with all of the inputs used for the SoundPLAN model, the Dickerson Affidavit substantially deviated from those inputs. There are no isopleths,

modeling files, or any documents demonstrating the inputs used by Mr. Dickerson, but the Affidavit itself reveals that Mr. Dickerson did not follow the design layout submitted by Roper and used by SWCA as a model input. As Dr. Ituarte-Villarreal testified, SWCA relied exclusively on Respondent's Exhibit FFF, which showed the precise layout of the plant and the distances from receptors. Plaintiffs' Ex. 21 ¶ 4. The input of Respondent's Exhibit FFF into Google Earth showed that NSA-1 was located 138 feet from the property line separating the Botkin tract from the proposed batch plant property, that the aggregate bins were only 105 feet from that property line, and that 215 feet of paved surface existed between the proposed batch plant and the front of the aggregate bins. Plaintiffs' Ex. 21 ¶ 4.

71. In contrast, paragraph 10 of Mr. Dickerson's Affidavit presents a markedly different input for the plant layout. While there is no indication that Mr. Dickerson actually measured any distances, it is apparent that he did not use the information submitted by Mr. Roper in Exhibit FFF and inputted by SWCA into the SoundPLAN model. Instead, Mr. Dickerson's Affidavit concludes that there is a 238-foot distance between NSA-1 and the Botkin/Roper property line, and that the paved surface extends for only 115 feet, instead of the 215 feet set forth in Exhibit FFF. The use of these divergent distances, which contradict the project layout set forth in Defendants' Exhibit FFF and inputted by SWCA into the SoundPLAN model, was likely done to create less "hard surface" and additional "soft or porous" surface in order to show an increase of the sound attenuation from the proposed batch plant to NSA-1. Respondent Ex. ZZZZ ¶ 8(a).

72. There is an additional consequence resulting from Mr. Dickerson's use of a distance of 238 feet from the Botkin eastern property line to the location of NSA-1, instead of 130 feet as set forth in Defendants' Exhibit FFF and used by SWCA to run the SoundPLAN model. Although the various models run by SWCA, including the SoundPLAN model, calculated the resulting decibels

at the exact location of NSA-1, the U.S. EPA standard of 55 dBA must be met at the property line itself. Consequently, Mr. Dickerson's manipulation of the site data to obtain a sound level at NSA-1 of 54.5 dB fails to recognize that the noise from the proposed concrete batch plant must be assessed, by Mr. Dickerson's own calculations, 238 feet closer to the batch plant, at the Botkin's property line. Due to the fact that sound attenuation increases over distance (particularly over "soft or porous" ground), it is probable that Mr. Dickerson's own calculations would reveal sound significantly in excess of 55 dB at the Botkin property line.

73. The RCNM model assessment, the verification SoundPLAN model run, and the subsequent SoundPLAN model runs incorporating a 10-foot barrier and a reduction sound sources from seven meters above ground surface to one meter above ground surface all result in the same conclusion: The sound impacts from the proposed concrete batch plant exceed U.S. EPA guidance of 55 dBA and would be perceived by a human as greater than a 200% increase in existing noise levels.

Irreparable Harm – Property Values

74. Marc Beatty is a real estate appraiser who owns NM Appraisal Company. [5-17-22 AF 1314 0:02:00-0:07:00]. Mr. Beatty is a licensed appraiser who has been conducting appraisals in the Ruidoso area for 16 years. *Id.* Mr. Beatty has experience determining diminution of value of property resulting from certain uses on adjoining property. *Id.* Mr. Beatty is not familiar with any studies regarding the diminution of property values caused by a concrete batch plant. [5-17-22 AF 1314 0:07:00-0:11:24]. In Mr. Beatty's opinion, there are no such studies because concrete batch plants are generally constructed and operated in industrial neighborhoods, and not in residential neighborhoods. *Id.*

75. Due to the lack of studies regarding concrete batch plants in residential areas, Mr. Beatty examined two comparable appraisals with which he was involved – the Greentree Solid Waste

facility and the Grindstone Canyon Resort development. *Id.* Based on the relocation of the Greentree waste facility to a residential area, the price per square foot of residences was 35 to 45 cents versus $1.90 per square foot for residences just one-half mile away. *Id.* For the Grindstone Canyon development, residential lots located around the disamenity of a large water tank sold for far less than the lots located elsewhere in the development. *Id.*

76. Mr. Beatty also considered information received from a broker regarding the proposed concrete batch plant and the resulting adverse effects on the marketing of property located north of Roper's property. [5-17-22 AF 1314 0:13:29-0:14:40].

77. Based on his experience and the initial investigation he performed, Mr. Beatty opined that the proposed concrete batch plant would cause diminution in value to adjoining and nearby properties if it were allowed to be constructed. [5-17-22 AF 1314 00:14:42-00:15:48]. Although Mr. Beatty would have to complete a full appraisal to determine the exact diminution in value, he opined that, based on his professional experience, the diminution in value of the adjoining and nearby properties would certainly occur. *Id*.

78. Print Mundy is a licensed real estate broker with 38 years of experience buying and selling real estate in the Lincoln County area. [5-17-22 AF 1314 01:09:20-01:13:00]. Mr. Mundy represents a seller who owns land directly adjacent to Tracts 4A-1 and 4B. Prior to the public notice regarding Roper's proposed concrete batch plant, there were numerous offers to buy the listed parcels. *Id.* Subsequent to the public notice of Roper's intent to construct and operate a concrete batch plant on Tracts 4A-1 and 4B, there have been no offers to purchase the listed parcels of land located adjacent to these tracts. [5-17-22 AF 1314 01:16:07-01:20:00].

79. The proposed concrete batch plant has had a negative effect on all real estate transactions in the area surrounding Tracts 4A-1 and 4B. [5-17-22 AF 1314 01:16:07-01:20:00]. According

to Mr. Mundy, real estate buyers are unwilling to buy very attractive parcels of land once they learn they have to drive past a concrete batch plant to access the property, and sellers like Mr. Mundy's client are awaiting the outcome of Mr. Roper's efforts to build the proposed concrete batch plant. *Id.*

Irreparable Harm – Nuisance

80. Mr. Botkin operates a nursery on his tract where he sells plants and landscaping supplies. [5-10-22 AF 0843 2:33:30-2:24:00]. Mr. Botkin's property is directly adjacent to Tracts 5A-1 and 4B. There is a greenhouse and an office located on the property. Before constructing the office, Mr. Botkin consulted with Mr. Reed about whether the construction of the office would violate the Deed Restrictions, and Mr. Reed assured him the office would not violate the Deed Restrictions. [5-10-22 AF 0843 2:38:30-2:40:00]. Mr. Botkin stores landscaping materials that are sold to the public. Mr. Botkin's nursery is a light commercial business that blends with the rural character of the four (4) tracts of land. *See* Plaintiffs' Exs. 4-6.

81. Mr. Botkin is aware of Mr. Roper's Carrizozo plant operations and believes that the proposed Alto plant would adversely affect his business operations. Specifically, dust and other fugitive emissions from the plant would contaminate the water from his rainwater collection system. Because he relies on this collected water to water his plants, the contaminated water would further contaminate the plants from which he makes his livelihood. The dust and other fugitive emissions from the proposed plant will also adversely affect the trees that Mr. Botkin sells by interfering with the trees' ability to photosynthesize, essentially suffocating them. The dust and other fugitive emissions for the proposed plant will also adversely affect the trees' ability draw nutrients and water from the soils, thereby adversely affecting the health and growth of the trees. [5-10-22 AF 0843 2:47:40-2:50:30.].

82. Mr. Miller owns Tract 1 where he lives and where his office for his septic tank installation business is located. [5-10-22 AF 1344 0:02:00-0:04:00]. Mr. Miller does not construct septic tanks on his property, and only repairs equipment and vehicles from time to time. *Id.* His shop and tanks represent light commercial activity, and the Mr. Miller's uses of Tract 1 for his residence and the office for his installation business blend well with the rural character of the four (4) tracts. *See* [5-10-22 AF 1344 0:02:00-0:04:00]. Fugitive dust and other emissions from the proposed Alto plant will constitute a nuisance on his property, where he both lives and works. [5-10-22 AF 1344 0:8:30-0:10:00].

83. According to Dave Edler, who has 20 years of experience working in the concrete industry and at concrete batch plants, there are multiple sources of noise at concrete batch plants. *See* Plaintiffs' Ex. 29 at 1:50-2:42. Mr. Edler reviewed the air quality construction permit application filed by Roper and is familiar with the types of equipment described in the application. *Id.* at 5:00-5:33. The noise sources at the proposed concrete batch plant include multiple back-up alarms throughout the duration of plant operations, the noise made when the aggregate is dumped into the aggregate bins from the metal trucks, the front-end loaders when they scoop up the aggregate into the metal bucket of the loader and then back up to the feed hopper, motor and rollers connected to the feed hopper conveyor, the rock falling into the metal aggregate bins, the maximum operation of the mixer trucks during loading, and the loading of the cement and fly ash which causes a weed-blower like noise for up to 45 minutes. *Id.* at 6:54-15:04. The operation of a concrete batch is such a noisy process that the employees who worked at the concrete batch plant with Mr. Edler wore ear protection. *Id.* at 15:04-15:33.

84. The video depicting the considerable dust and other fugitive emissions from Roper's Carrizozo plant are representative of what happens at a concrete batch plant on a windy day and

constitute a nuisance to neighboring properties. *See* Plaintiffs' Ex. 30 (Carrizozo Plant Video); Plaintiffs' Ex. 29 at 18:00-18:15.

85. The NMED has denied Roper's application for an air quality construction permit because Roper failed to meet its burden that construction and operation of the proposed plant would meet state and federal air quality standards.

Preliminary Injunctive Relief – Irreparable Injury

86. Based on the evidence amplified above, Plaintiffs will be irreparably harmed by Roper's construction and operation of the concrete batch plant as a result of dust, noise, loss of quiet enjoyment of their properties, loss of business assets, and diminution of the value of their properties caused by the plant.

Preliminary Injunctive Relief – Balancing the Equities

87. The equities favor Plaintiffs because: (1) The Reed Deed Restrictions are enforceable; (2) Roper knew about the Deed Restrictions and voluntarily consented to them; and (3) Roper concealed his true purpose in buying the property.

88. Roper has not established that preliminarily enjoining the construction and operation of the concrete batch plant will result in any actual harm to Roper. The only purported injuries that Roper alleges may result from preliminarily enjoining its construction and operation of the proposed concrete batch plant are speculative and pertain exclusively to potential threats to an *additional* source of income.

89. Roper's purported harm is mitigated as a result of the NMED's denial of the air quality construction permit application, which prevents Roper from constructing and operating the plant, while the harm to Plaintiffs remains as a result of Roper's further attempts to appeal the NMED's

decision and obtain approval of the application from the New Mexico Environmental Improvement Board.

90. Plaintiffs' interest in obtaining a preliminary injunction outweighs the speculative harm to Roper.

Preliminary Injunctive Relief – The Public Interest

91. Roper has no protectible interest in seeking to abrogate a restrictive covenant which runs with the land, while the Plaintiffs' interest in enforcing property rights far outweighs Roper's illegitimate interest in seeking to abrogate those rights.

92. The inequity of Roper's attempt to abrogate the deed restriction is underscored by his actual knowledge of Deed Restriction 2.d and his attempts to unilaterally remove those restrictions.

93. Plaintiffs have met their burden of proving that issuance of a preliminary injunction weighs heavily in favor of the public's interests to: (1) vindicate property rights in accordance with well-established public policy; (2) protect the public from nuisance due to noise and dust; and (3) protect property values.

Preliminary Injunctive Relief – Substantial Likelihood of Success on the Merits

94. Plaintiffs have met their burden of proving that there is a substantial likelihood that they will prevail on the merits because: the Deed Restrictions are unambiguous and prohibit manufacturing and industrial uses, such as the construction and operation of a concrete batch plant; the noise emitted from the concrete batch plant exceeds the limits established by the U.S. EPA to protect the public's health and welfare; the concrete batch plant will decrease the value of the Plaintiffs' properties; and construction and operation of a concrete batch plant constitutes a nuisance to adjoining owners.

Preliminary Injunction – *Status Quo*

95. The status quo, the last peaceable uncontested status between the Plaintiffs and Roper, was prior to Roper announcing his intent to construct and operate a concrete batch plant on the land burdened by the restrictive covenant.

Preliminary Injunction – Rule 1-066 NMRA Security

96. For good cause shown, this Court has the discretion to waive the furnishing of security under Rule 1-066.

97. For purposes of a bond issuance, Roper failed to demonstrate that it will be injured in the presence of a preliminary injunction enjoining their construction and operation of the proposed concrete batch plant. The NMED's denial of Roper's permit application for an air quality construction permit prevents Roper from constructing and operating the concrete batch plant unless and until the New Mexico Environmental Improvement Board reverses the NMED's denial of Roper's permit application. Waiver of the security requirement under Rule 1-066 is appropriate.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Proposed Findings of Fact, Plaintiffs submit the following Proposed Conclusions of Law:

Anticipatory Nuisance

1. Plaintiff's motion for a preliminary injunction based on the existence of an anticipatory nuisance is proper and not premature. *See Gonzales v. Whitaker*, 1982-NMCA-050, ¶ 22, 97 N.M. 710 (discussing "the proprietary of requesting an anticipatory injunction become a nuisance is created and the correctness of its issuance if the necessary proofs are made").

2. Plaintiffs have proven that Roper's proposed construction and operation of the concrete batch plant will necessarily result in a nuisance. *See Koeber v. Apex-Albuq Phoenix Exp.*, 1963-NMSC-051, ¶¶ 5-6, 72 N.M. 4 (stating that "[i]t is well settled that a court of equity may enjoin a

threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result from the contemplated act or thing it is sought to enjoin") (emphasis added) (quoted authority omitted).

3. Plaintiffs have demonstrated that Roper's proposed construction and operation of the concrete batch plant in violation of Provision 2.d is intentional, given that Roper had actual knowledge that a covenant against nuisances burdened the property on which he intended to operate a concrete batch plant. *See Padilla v. Lawrence*, 1984-NMCA-064, ¶ 10, 101 N.M. 556 (finding that "the [nuisance] was intentional because defendants knew or should have known that their conduct in operating the [bark, manure, and soil processing] plant interfered with plaintiffs' use and enjoyment of their land").

4. Plaintiffs' motion for preliminary injunction is granted because Plaintiffs met their burden of establishing that Roper's intentional construction and operation of the concrete batch plant will impair Plaintiffs' use and enjoyment of their respective properties in violation of the covenant against nuisances to which Roper is bound. *See Gonzalez v. Whitaker*, 1982-NMCA-050, ¶ 20, 97 N.M. 710 (stating that "ordinarily an injunction will be granted where the act or thing threatened is nuisance per se, or necessarily will become a nuisance").

Preliminary Injunctive Relief

5. The granting of an injunction is an equitable remedy, and whether to grant equitable relief lies within the sound discretion of the trial court. *Moody v. Stribling*, 1999-NMCA-094, ¶ 30, 127 N.M. 611.

6. Plaintiffs have established that absent a preliminary injunction, they will suffer irreparable injury in the form of adverse health effects, irreversible loss of enjoyment of their properties, and diminished property values. *See LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314

(requiring the existence of irreparable injury to the plaintiff for preliminary injunctive relief to be granted).

7. The deed restriction is enforceable and Roper knowingly consented to it. *Aragon v. Brown*, 2003-NMCA-126, ⁋ 25, 134 N.M. 459 (acknowledging prior holdings stating that "when one takes land with notice of restrictions, equity and good conscience will not permit that person to act in violation of the restrictions").

8. Interests in real property are unique in character and militate strongly in favor of injunctive relief, a common and appropriate remedy for enforcing a deed restriction. *See Wilcox v. Timberon Protective Ass'n*, 1990-NMCA-137, ⁋ 34, 111 N.M. 478 ("However, where the character of the property is intact, legal remedies are inadequate, since damages due to loss of quiet enjoyment are incalculable."); *see also Cafeteria Operators, LP v. Coronado-Santa Fe Associates, LP, et al.,* 1998-NMCA-005, ¶ 19, 124 N.M. 440 (particularities related to real property are relevant when considering the character of interests to be protected by injunctive relief); *see also Appel v. Presley Companies*, 1991-NMSC-026, ⁋ 4, 111 N.M. 464 ("This court has recognized the importance of enforcing protective covenants where the clear language of the covenants, as well as the surrounding circumstances, indicates an intent to restrict use of the land."); *see also Montoya v. Barreras*, 1970-NMSC-111, ⁋ 12, 81 N.M. 749 (stating that restrictive "covenants constitute valuable property rights of the owners of all lots in the tract").

9. Preliminary Injunctive relief is proper because Roper has not established that an order granting preliminary injunctive relief will cause harm that outweighs the harm that plaintiffs will suffer. *See LaBalbo v. Hymes*, 1993-NMCA-010, ⁋ 11, 115 N.M. 314 (stating that to obtain a preliminary injunction, the threatened injury to plaintiffs must outweigh any damage the injunction might cause the defendant).

10. Preliminary injunctive relief is proper because Roper's construction and operation of the concrete batch plant will substantially interfere with Plaintiffs' use and enjoyment of their properties, will diminish their property values, and will create an unjustifiable nuisance, issuance of a preliminary injunction weighs heavily in favor of the public's interest. *See LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314 (stating that to obtain a preliminary injunction, the issuance of the preliminary injunction must not be adverse to the public's interest).

11. Through their presentation of a reliable noise assessment and introduction of multiple lay and expert witnesses, Plaintiffs have established that there is a substantial likelihood that they will prevail on the merits. *See LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314 (requiring a substantial likelihood that plaintiff will prevail on the merits to issue a preliminary injunction).

12. Because Roper's construction and operation of the concrete batch plant will create an unjustifiable nuisance to adjoining property owners, the balance of equities weighs heavily in favor of the issuance of a preliminary injunction enjoining Roper from continuing their construction and operation of the proposed concrete batch plant. *See Aragon v. Brown*, 2003-NMCA-126, ¶ 12, 134 N.M. 459 ("The public policy in New Mexico is to uphold the valuable property right of all the lot owners to establish standards they deem appropriate, the concomitant right of all of the lot owners . . . to rely on those standards, and the reciprocal obligation to comply with those standards when one acquires a lot with notice, actual or constructive, of the standards.").

Enforcement of Deed Restriction 2.d

13. The terms of Deed Restriction 2.d are clear, unambiguous, and enforceable, and Roper is legally bound by the restrictive covenant. *See Nuisance*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/nuisance#learn-more (last visited Apr. 29, 2022) (defining nuisance as harm, injury, annoying, unpleasant or obnoxious); *see Noise*, Merriam-

Webster.com, https://www.merriam-webster.com/thesaurus/noise#:~:text=1%20loud%2C%20confused%2C%20and%20usually%20inharmonious%20sound%20the,Avenue%20made%20normal%20conversation%20impossible%20Synonyms%20for%20noise (defining noise as "sound, especially one that is loud or unpleasant or that causes disturbance); *see also Wilcox v. Timberon Protective Ass'n*, 1990-NMCA-137, ¶ 20, 111 N.M. 478 (stating that the standard for determining whether a deed restriction is ambiguous "is whether the instrument is reasonably and fairly susceptible of different constructions") (abrogated on other grounds by *Agua Fria Save the Open Space Ass'n v. Rowe*, 2011-NMCA-054, ¶ 22, 149 N.M. 812); *see, e.g.*, *Wilson v. Maynard*, 961 N.W.2d 596, 602 (S.D. 2021) (holding that because the word "residential" aligns with the common understanding of the word, the covenant restricting all new construction on the property to "residential purposes" is not ambiguous).

14. Deed Restriction 2.d prohibits the construction and operation of the proposed concrete batch plant when the Court gives effect to the circumstances surrounding the creation of the Deed Restrictions, and the object of Mr. Reed and his family in creating the Deed Restrictions, taken together with the language of the Deed Restrictions.

15. Plaintiffs have standing to enforce the restrictive covenant against nuisances because, as owners of neighboring properties, Plaintiffs were intended to benefit from the restrictive covenant. *See Waterview Towers Condo. Ass'n, Inc. v. City of West Palm Beach*, 232 So.3d 401, 410 (Fla. Dist. Ct. App. 2017) (explaining that the right to enforce a restrictive covenant rests on whether the covenant was made for the benefit of the party seeking to enforce it).

16. Plaintiffs have standing to enforce the restrictive covenant against nuisances because the circumstances surrounding the creation of Deed Restriction 2.d evidence a common scheme of development where the deeds containing the Deed Restrictions were recorded at the same time,

contain identical covenantal language, were intended to protect the tracts by mandating residential and light commercial uses only, and the tracts have never been used for manufacturing or industrial purposes. *See Dunning v. Buending,* 2011-NMCA-010, ¶ 13, 149 N.M. 260 (a "general plan of development can be relevant to the determination of whether an enforceable covenant running with the land" exists.).

17. Plaintiffs' motion for preliminary injunction is granted because Plaintiffs were entitled to rely on Deed Restriction 2.d to prevent manufacturing and industrial uses on the burdened tracts. *Appel v. Presley Companies*, 1991-NMSC-026, ¶ 4, 111 N.M. 464 (emphasizing that the New Mexico Supreme Court has clearly and repeatedly "recognized the importance of enforcing protective covenants where the clear language of the covenants, as well as the surrounding circumstances, indicates [sic] an intent to restrict the use of the land").

18. Plaintiffs have not waived their right to enforce the restrictive covenant based on conducting light commercial activities. *See Meyers v. Armstrong*, 2014-NMCA-051, ¶ 18 (rejecting "the notion that individual owners in a subdivision must move to enforce the covenants against relatively minor violations that have little impact on them in order to maintain the right to enforce against minor violations that significantly impact their rights"); *see also Neff v. Hendricks*, 1953-NMSC-060, ¶ 7-11, 57 N.M. 440 (finding that "minor and trivial [covenant violations] do not suggest an intent by the common owner or its assigns to waive the restrictions," and that the grantor's rights are not waived "absent an intention to waive" them).

Status Quo

19. Plaintiffs have established that a preliminary injunction is necessary to maintain the *status quo*. *See Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001) (stating that the status quo is "the last uncontested status between the parties which

preceded the controversy until the outcome of the final hearing" (internal quotation marks omitted) (quoted authority omitted)).

Rule 1-066 Security

20. Roper failed to establish that a preliminary injunction in favor of Plaintiffs will directly or materially affect it and, accordingly, this Court exercises its discretion to deny the issuance of a Rule 1-066 bond. *See* Rule 1-066(C) NMRA; *Madden v. Ortiz*, 2020 WL 955857, at *5 n.3 (D.N.M. Feb. 27, 2020) (holding that federal courts in New Mexico should look to Fed. R. Civ. P. 65 when determining issues based on Rule 1-066 NMRA; *Legacy Church v. Kunkel*, 455 F.Supp.3d 1100, 1133 (D. N.M 2020) (stating that "Courts in the Tenth Circuit have wide discretion under Rule 65(c) in determining whether to require security, and may, therefore, impose no bond requirement" (internal quotation marks omitted); *Cont'l Oil Co. v. Frontier Refining Co*., 338 F.2d 780, 782 (10th Cir. 1964) (holding that a trial judge is not required to issue a bond where enjoined party fails to demonstrate damages by reason of the injunction).

Respectfully submitted,

HINKLE SHANOR LLP

By: */s/ Thomas M. Hnasko*

Thomas M. Hnasko
Julie A. Sakura
Jeremy I. Martin
Post Office Box 2068
Santa Fe, NM 87504
(505) 982-4554
thnasko@hinklelawfirm.com
jsakura@hinklelawfirm.com
jmartin@hinklelawfirm.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, I caused a copy of the foregoing *Plaintiffs' Proposed Findings of Fact and Conclusions of Law* to be electronically filed and served via the Court's Odyssey File & Service System to all counsel of record as follows:

Shelly L. Dalrymple
Jocelyn Barrett-Kapin
Troy S. Lawton
Post Office Box 2307
Santa Fe, NM 87504-2307
505-982-3873
sdalrymple@montand.com
jbarrettkapin@montand.com
tlawton@montand.com
Attorneys for Roper Construction, Inc. and Roper Investments, LLC

By: */s/ Thomas M. Hnasko*
Thomas M. Hnasko