TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

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JEANETTE A. IRBY, JUDGE
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DOUGLAS L. FLEMING, JR., JUDGE
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Loudoun, Fauquier and
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JAMES PAUL FISHER, JUDGE
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W. SHORE ROBERTSON, JUDGE RETIRED
JAMES H. CHAMBLIN, JUDGE RETIRED
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In re: Rockland Farm, LLC, *et al.* v. White's Ferry, Inc., CL00056672-01

Dear Counsel:

This case comes before the Court upon the Complaint filed by Rockland Farm, LLC and Betsey J.S. Brown, Trustee of Rockland Farm Land Trust (hereinafter collectively "Plaintiffs") against White's Ferry, Inc. (hereinafter "White's Ferry" or "Defendant"). The Complaint seeks redress for trespass, damage to property, unjust enrichment, and breach of contract.

The Defendant operates a commercial ferry across the Potomac River between Virginia and Maryland. The allegations forming the basis of this action stem from the Defendant's presence on a Virginia parcel called "Rockland." For decades and presently, the Defendant has used the real property at issue as the Virginia landing for its ferry operation and for access thereto and therefrom. The Plaintiffs and the Defendant do not agree what areas of this parcel the Defendant may lawfully occupy. The Defendant takes the position that, notwithstanding the Plaintiffs' ownership of Rockland, the presence of the business and its customers on the property and use thereof is lawful.

The instant complaint was filed on July 2, 2009 in CL56672-00 against White's Ferry and two individual defendants. Responsive pleadings were filed on July 6, 2010 but no other substantive action was recorded in the case until October 11, 2012, when CL56672-00 was discontinued pursuant to Code § 8.01-335(A) by Order entered October 11, 2012.

On August 30, 2013, the case was reinstated as CL56672-01. On September 14, 2016, by consent, the Court ordered the Defendants' responsive pleadings withdrawn, and leave was given for the Defendants to file an answer. The Defendants filed their Answer on October 5, 2016. By Order of May 26, 2017, the matter was set for trial on January 30 and 31, 2018. On January 30, 2018, the individual Defendants were dismissed from the case by entry of a consent Order.

The Court received evidence on these claims on January 30 and 31, 2018, however the time estimated and allotted for trial was insufficient and the trial was adjourned and scheduled to resume on October 10 and 11, 2018. Due to an overbooked docket, the case was continued and rescheduled by the Court for November 28, 29, and 30, 2018. On November 27, the Court granted a motion to continue filed by the Defendant due to multiple illnesses. The case was then scheduled for February 19, 20, and 21, 2019. The case resumed and evidence was taken on February 19, 2019, but inclement weather caused cancellation on February 20, 2019 and the remainder of the case was heard on February 21 and 22, 2019. At the conclusion of the trial, the Court directed counsel to file written closing arguments, which counsel submitted. The matter was taken under advisement.

The Court is appreciative of counsel's efforts in providing transcripts of the proceedings, framing the issues, and in summarizing the evidence pertinent to issues as applicable in their papers. The Court is also appreciative of the patience of counsel and the parties while the Court

worked to devote due time and attention to this matter. In reaching its decisions herein, the Court has reviewed and weighed the exhibits and the testimony of the witnesses admitted to evidence along with the written arguments of counsel.

I. Overview

The Defendant operates a ferry service between the Maryland bank of the Potomac River at the White's Ferry Property and the Virginia landing at Rockland Farm. The Defendant's property consists of two parcels of land in Montgomery County, Maryland, covering approximately 2.305 acres acquired by deed recorded on April 20, 1948.

Plaintiff Rockland Farm LLC owns all of the real property known as "Rockland," which is identified as Loudoun County Parcel #143365724 (hereinafter "the Property"), subject to whatever interest in the Property was taken by Loudoun County in Road Case #RR-1871-003 (hereinafter the "1871 Road Case"). See Court Exhibit 1.

The Defendant entered into a License Agreement (hereinafter "License Agreement") with Plaintiffs' predecessor in title in 1952. Exhibit A to Court Exhibit 1. The preamble clauses to that License Agreement establish that White's Ferry, Inc. had been operating White's Ferry "for a period in excess of 100 years" and that "some question ha[d] arisen as to the right of [White's Ferry, Inc.] to use the facilities in connection with said ferry as they now exist" on the property of Elizabeth F.R. Brown and Stanley N. Brown. The License Agreement recited that it was "agreed between the parties hereto that any such questions should be properly resolved by the terms of this agreement." Exhibit A to Court Exhibit 1. A key term in the License Agreement specified that the Defendant be provided a license to "use so much of that portion of [the Property] as [was then] used in connection with the operation of the said ferry." Id.

In other relevant part, the License Agreement provided that the Defendant "covenants and agrees not to erect any additional poles or wires, not [to] make any changes to the existing poles or wires other than normal replacement or repair, and not to do any additional excavating nor make any changes in the existing approaches, roadways, structures or facilities on the lands of [Plaintiffs], without the written consent of [Plaintiffs]." Id.

The License Agreement remained in place without controversy past the turn of the century. Plaintiffs allege that in 2004, the Defendant violated the terms of the License Agreement when it removed an existing retaining wall from the Property and replaced it with a wall farther from the river (hereinafter "the Construction"). The Plaintiffs allege that they did not consent to the Construction and demanded that the Defendant remove the new wall and restore the Property to its prior condition.

The Defendant refused to restore the Property, prompting Plaintiffs to terminate the License Agreement. Despite the termination, the Defendant has continued to operate its ferry on the Property. Several years passed, but the parties were not able to resolve the dispute and suit was filed on July 2, 2009.

In Count One of the Complaint, alleging trespass, the Plaintiffs seek monetary damages and injunctive relief. In Counts Two, Three, and Four, alleging damage to property, unjust enrichment, and breach of contract, respectively, the Plaintiffs seek monetary damages.

I. Count One: Trespass[1]

The Plaintiffs claim generally that the Defendant's use of the portion of the Property currently used as the Virginia landing (hereinafter the "Current Virginia Landing") interferes with the Plaintiffs' possessory interest therein. The same claim is made regarding the Defendant's use of those portions of the Property to support the operation of the business and to facilitate the access to and from the Current Virginia Landing (hereinafter the "Approach to the Current Virginia Landing" or "Approach").

The Approach includes a paved and concrete roadway, which motor vehicles and people traverse in accessing and departing the ferry. The parties dispute how much of said roadway is a public road because the parties disagree how much of this roadway has been established as Virginia Route 655, which runs generally east and west between U.S. Route 15 and the Potomac

[1] In its closing argument, the Plaintiffs request the Court to strike White's Ferry's evidence presented at trial as being legally insufficient to show with reasonable certainty that the Current Virginia Landing within the Property is subject to a public easement and encompasses the Property trespassed upon. Plaintiffs' First Closing Argument at 47, 49. A motion to strike is, in effect, a motion for summary judgment and is measured by the same standards. Owens v. DRS Auto. Fantomworks, Inc., 288 Va. 489, 496 (2014). As there remain questions of fact subject to consideration and weighing of the evidence, the Court denies Plaintiffs' motion.

River. The Defendant's position is that Route 655 ends where a public landing begins. The Plaintiffs' position is that Route 655, as it heads toward the Potomac River, ends at a sign displaying the words "End of State Maintenance." This sign is located at the end of the last hairpin turn of the roadway before the asphalt surface gives way to a concrete surface. The Plaintiffs do not claim any trespass on the roadway between Route 15 and the sign, but allege that the Defendant's presence on the roadway between that sign and the Potomac River is unauthorized and unlawful.

The Defendant claims that its presence on and use of the Current Virginia Landing and the Approach are lawful because those areas have been established as public rights of way, either by condemnation proceeding or as a prescriptive easement.

"[A] trespass is an unauthorized entry onto property which results in interference with the property owner's possessory interest therein." Cooper v. Horn, 248 Va. 417, 423 (1994) (quotation and citation omitted) (edit in original). To establish such a cause of action, the plaintiff must prove that he has an actual or constructive possessory interest in the land that was invaded by some act committed by the defendant. Id. An action for common law trespass to land "derives from the 'general principle of law, [that] every person is entitled to the exclusive and peaceful enjoyment of his own land, and to redress if such enjoyment shall be wrongfully interrupted by another." Id. at 422 (quoting Tate v. Ogg, 170 Va. 95, 99 (1938)) (edit in original). Therefore, any physical entry upon the surface of the land constitutes such an invasion, whether the entry is "a walking upon it, flooding it with water, casting objects upon it, or otherwise." W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 13, at 70 (5th ed. 1984).

A threshold question is whether the Plaintiffs own and have a possessory interest in the Property. This is not controversial and, in fact, is stipulated. The Court finds that the Plaintiffs have a possessory interest in the Property because they own Loudoun County Parcel #143365724.

Similarly, it is not controverted that the Current Virginia Landing and the Approach are located within the bounds of the Property. The elements of trespass are therefore established if the Plaintiffs prove by a preponderance of the evidence that the Defendant has made an unauthorized entry onto the Property, which results in interference with the Plaintiffs' possessory interest therein.

The Defendant concedes in the stipulations that the operation of the Virginia landing takes place on the Property. See Court Exhibit 1 ¶6. The Court finds that this constitutes entry onto the Property and that this entry results in interference with the Plaintiffs' possessory interest in the Property.

The Court also finds the entry is unauthorized because the Defendant has continued its presence by operating the ferry on the Property after the Plaintiffs' 2004 notice of termination of the License Agreement. The Court finds that the Plaintiffs have not again authorized the Defendant's continued presence on the Property after the License Agreement was terminated. The Court further finds that the Defendant's use of the Property has exceeded the bounds of the License Agreement in two ways: a) the Defendant caused the Construction to the Property in contravention of the License Agreement; and b) the Defendant has continued to use the Property after Plaintiffs terminated the License Agreement in 2004.

Hence, the elements of trespass have been proven by a preponderance of the evidence. A finding of liability for trespass, however, is defeated if the Defendant sufficiently establishes any of the defenses it claims. The leading controversy on the trespass claim, as the parties have framed the litigation, is whether the Defendant has proven any defense.

The defenses offered suggest that the Plaintiffs' interest in the Property is subject to a right of public access on portions thereof. To the extent that the Defendant proves that any area of the Current Virginia Landing or the Approach is subject to a right of public access, liability for trespass over that area would not be realized, though the elements of trespass are proven. The Defendant has advanced two main theories in support of its defense:

a) The subject area of the Property is accessible to the public because it was so established, via condemnation, in the 1871 Road Case; and

b) The Commonwealth, via the 1932 Byrd Act, took "the landing and the road that serves it into the State secondary highway system." See Defendant's Closing Argument at 5. Therefore, the Defendant claims, the public, including the Defendant, has the right to use the landing and the road "free from the control or interference of the Plaintiffs." Id. at 6.

Before considering the substance of the defenses, the Court will address the Plaintiffs' challenge against the propriety of interposing a defense in this litigation. The Plaintiffs assert that the Defendant should be estopped from attempting to challenge Plaintiffs' title. The Plaintiffs argue that the License Agreement was "essentially a settlement agreement that ... was expressly intended to 'properly resolve' any 'questions'," including the instant one, about the Defendant's right to use the Property. See Plaintiffs' First Closing Argument at 45.

The Court assumes *arguendo*, for purposes of the ensuing analysis, that the License Agreement does not serve to estop the Defendant from asserting its defenses and attempting to prove that their presence on and use of the Current Virginia Landing and the Approach is authorized under the law.

Turning now to the substance of the arguments, a common thread in the Defendant's defenses is the claim that its presence on and use of the Property is not unlawful because the Current Virginia Landing and the Approach are public areas. A party, such as the Defendant, that seeks to establish that property is publicly held, as opposed to being privately owned, must establish not only the existence of the public right, but also the location of the public property with reasonable certainty. White v. Reed, 146 Va. 246, 251 (1926); Bare v. Williams, 101 Va. 800, 803 (1903).[2] This is because Virginia law requires that public property be so identifiable that the public may know where it may travel without becoming trespassers and to apprise individuals of how much and what portions of their land has been appropriated. Id.

Reasonable certainty as a burden of proof is commonly considered in the context of establishing damages, and "does not require proof with mathematical precision; at a minimum, however, the claimant must present sufficient evidence to permit an intelligent and probable estimate ..." Martin v. Moore, 263 Va. 640, 651 (2002) (citing Dillingham v. Hall, 235 Va. 1, 3-4 (1988)). In such considerations, speculation and conjecture do not amount to reasonable certainty. Banks v. Mario Indus. of Virginia, 274 Va. 438, 455 (2007) (quoting Saks Fifth Ave., Inc. v. James, Ltd., 272 Va. 177, 188 (2006)). When the standard is applied to statutory

[2] A party claiming an easement bears the same burden. Mulford v. Walnut Hill Farm Group, 282 Va. 98, 112 (2011). "Both declaration and enforcement of an easement are equitable remedies, and he who seeks such equitable relief must prove 'the facts that give rise to the easement, whether by express grant or reservation, by implication, or by other means.'" Id. (quoting Brown v. Haley, 233 Va. 210, 216-17 (1987)). This includes easement by prescription. Id. (citing Nelson v. Davis, 262 Va. 230, 235 (2001)).

construction, the law "must afford a reasonable degree of certainty so that a person is not left to guess at what conduct is prohibited." Turner v. Jackson, 14 Va. App. 423, 433 (1992) (citing Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973)).

Given these interpretations of the standard, it is apparent that, to meet its burden on its defenses, the Defendant must adduce evidence that a) surpasses speculation and conjecture that the Current Virginia Landing and Approach have been designated for public use; and b) does not leave the Court guessing as to material aspects of that determination.

The Court will first address the theory of defense based on the 1871 Road Case. This theory is that an 1871 Road Case established a public landing on the Property by exercise of eminent domain. This theory spawns two distinct inquiries material to the resolution of this litigation: a) the broad question as to whether the location of White's Ferry in 1871 was hundreds of feet north of the current location, thus making the defense based on the 1871 Road Case inapplicable to the case at bar; and b) the more specific question as to whether the Defendant can prove with reasonable certainty what real property at issue today was condemned in the 1871 Road Case, and therefore is open to public access.

The parties' presentations at trial concentrated heavily on the broader question. The Defendant contends that the 1871 Road Case condemned real property located at the site of the Current Virginia Landing and Approach. The Plaintiffs' contention is that the 1871 Road Case established public access substantially north of the Current Virginia Landing and that none of the Current Virginia Landing area or Approach intersects with the property condemned in the 1871 Road Case. Alternatively, the Plaintiffs argue that, even if the Court accepts that the landing established in the 1871 Road Case did not occur substantially north of the current landing area, the Defendant fails to show how its use of Rockland complies with the undefined easement allegedly created by the 1871 Road Case. In summary, the Plaintiffs posit that the takings ordered in the 1871 Road Case have not been sufficiently proven to apply to the Current Virginia Landing and Approach. Consequently, the Plaintiffs argue that any public access created by the 1871 Road Case does not provide a defense to the claim of trespass on the Current Virginia Landing and Approach.

The Court's analysis begins with an assumption *arguendo*, that, per Defendant's position, the condemnation from the 1871 Road Case did not implicate a landing hundreds of feet north of the Current Virginia Landing. Even with that assumption, the burden remains with the Defendant

to establish with reasonable certainty the location of the taking in the 1871 Road Case, so the Court can then evaluate how, if at all, any public right of way corresponds with the real property at issue.

The first step in evaluating this theory of defense is to determine what real property has been shown with reasonable certainty to have been condemned in the 1871 Road Case, resulting in an easement for public access. The importance of the location of the condemned real property in the context of the instant case cannot be overstated. Proof with reasonable certainty of the existence of any public road, landing, or any form of public access to real property does not alone absolve the Defendant of a proven trespass. It is only when the public access is proven to have been established over the allegedly trespassed-upon real property that the defense is effective.

For example, if a plaintiff owns a parcel consisting of areas A, B, and C, and alleges that a defendant has trespassed upon each area, and the defendant proves that all three areas are fully accessible to the public, then the defendant has a complete defense to the claim of trespass. If, however, the defendant proves only that area A is accessible to the public, but fails to prove that areas B and C are as well, the defendant may still be liable for trespass upon areas B and C. Similarly, proof that public access has been established in a separate area D is not a defense against trespass on areas A, B, or C. Proof that a fraction of any area is accessible to the public does not serve as a defense against trespass for the entire area.

In examining that issue, the Court appropriately begins with the official Court record of the 1871 Road Case, which constitutes direct evidence of the ruling in that case. The ruling of the Circuit Court of Loudoun County in the 1871 Road Case was articulated and memorialized in a written Order entered on April 10, 1871 (hereinafter the "1871 Order").

The provisions of the 1871 Order are central to this litigation because the 1871 Order dictates what areas were condemned and made open to public use. A defense against trespass would be established for those areas that have been proven with reasonable certainty to have been established as public rights of way.

The significance of the words used in the 1871 Order is magnified in this case because it is not accompanied by a map or diagram providing a physical representation or illustration of its words. The Court finds that the absence of a map or diagram does not negate the fact of a

condemnation having been adjudicated in the 1871 Order. See Jeter v. Board, 68 Va. 910, 916-17 (1876). The lack of a map or diagram, however, obviously hinders the Defendant's ability to make its defense, but does not exclude that the defense can be proven by other evidence, including the words in the 1871 Order.

The 1871 Order, in pertinent part, recites summarily that the "said landing be established as reported by the Commissioners." See Exhibit C to Court Exhibit 1. That language does not, of itself, identify the condemned land with reasonable certainty. The inquiry does not end there, however. Consideration of the language incorporated in the report of the Commissioners is necessary to understand with completeness the directives in the 1871 Order. This Court interprets the 1871 Order to have condemned the land which the Commissioners "reported" for condemnation.

In the report, the Commissioners articulate that they "view[ed] and la[id] out a landing at Whites Ferry." Then they discussed "two roads" before reporting that they "also found it necessary to condemn and take off" a 1 perch by 27 perch strip of land.[3] It is certainly arguable and not an unreasonable conclusion that the "landing" and the "strip of land" are discrete areas of real property. The inclusion of the word "also," prefatory to the reference to the strip of land, contraindicates an interpretation of the report that the landing and the strip and the land are one and the same.

The Court will therefore first consider the two separately in ascertaining what real property was condemned in the 1871 Road Case.

Regarding the "landing at White's Ferry," the Court does not find that the 1871 Order establishes with reasonable certainty that the Current Virginia Landing area is a public right of way. Even though the 1871 Order obviously condemned the "landing at White's Ferry" in 1871, the Court does not agree with a circular logic that, because a landing was established "at White's Ferry," that such landing must have been established at the area that currently serves as the landing for the business known as White's Ferry. Without evidence to support that conclusion, it is speculative.

[3] With a perch measuring 16.5 feet, the dimension of the condemned area would be 16.5 feet by 445.5 feet.

Further, reasonable certainty would entail knowing, at a minimum, what the dimensions and shape of such landing are. Only then would the reasonable certainty of location be possible because general geographic location alone is insufficient to satisfy the burden of proof for the defense offered. Even assuming *arguendo* that there was no northern landing in 1871 and that the White's Ferry's landing area in Virginia in 1871 was generally located then where it is now, without knowing the shape or dimension of boundaries of the landing, it is speculation as to where a public right of way known as the "landing at White's Ferry" exists. Only through speculation can one fix where the public right of way might start and where it might end. In other words, without speculation or conjecture, the Court cannot find what real property is defined by the label "landing at White's Ferry." Even though the burden does not demand "mathematical precision," speculation, conjecture, or guessing contraindicate and exclude reasonable certainty.

This analysis considered that the "landing at White's Ferry" would be located on the eastern edge of the Property, bordering in some orientation on the Potomac River, as it is a reasonable inference that the landing would abut the river. Even assuming a location abutting the river (and even setting aside the dynamic nature of the shoreline as testified to by Plaintiffs' witness Elizabeth Comer), it is mere conjecture where on the river the abutment starts and ends. The Court, thus, cannot find with reasonable certainty what land was condemned when the description "landing at White's Ferry" is considered, let alone that it encompasses all of the Property upon which the Defendant entered without authority thereby interfering with Plaintiffs' property rights.

As for the "strip of land," there is reasonable certainty that the 1871 Order condemned for public use one long thin rectangular area of the Property. Again, though, speculation or conjecture is required to place this strip in any location or orientation even though the dimensions and shape are known. In the instant litigation, at least a modicum of precision is paramount to establishing the defense, but such is not provided in the 1871 Order. To define the location of the condemned strip of land would require conjecture or speculation. Therefore, the Court finds that the location of the "strip of land," considered separately, was not established with reasonable certainty in the 1871 Order.

In recognition of an alternative interpretation of the 1871 Order, the Court has also considered the scenario where the "landing at White's Ferry" and the "strip of land" are synonymous. The evidence of the compensation paid to A.T.M. Rust, owner of condemned land, supports this alternative. The parties stipulate that $17 was paid for land at a price of $100 per acre, which equates to 7,405 square feet of land. See Court Exhibit 1 ¶ 21. The strip of land that

was condemned by the 1871 Order covers an area of 7,350.75 square feet. Whether the small discrepancy is merely a product of rounding, or because an unspecified additional 54.25 square feet of land was also condemned, there exists a feasible argument that the real property identified as the "landing at White's Ferry" is identical to the "strip of land."

Ultimately, the same conclusion is reached when the two descriptions are considered as one concurrent area of real property. Although, in combination, the two descriptions provide a size and dimension of an area of land and a location abutting the river, one can only speculate as to its orientation or particular location on the river. The Court does not find, when considering the "landing at White's Ferry" and the "strip of land" considered as identical areas, that the 1871 Order defines the condemnation is with reasonable certainty.

In summary, the 1871 Order is of little value in establishing the location of the landing and the strip of land, whether considered as separate or concurrent pieces of real property, and does not do so with reasonable certainty.

The third aspect of the condemnation as reported in the records is about two roads. The Court has also examined the defense posed in consideration of these roads. The Commissioners' Report recited that "we were of the opinion that it was necessary that two roads should approach the landing, one coming from the direction of Leesburgh [sic], the other coming from the Direction of the lime stone mill, each road to be graded not less than twenty feet wide..." The Court is satisfied that the roads are separate and apart from the landing and the strip of land, whether considered together or separately.

As with the landing and the strip, proving the location of the roads condemned with reasonable certainty would be beneficial in proving a defense based on the 1871 Road Case. Doing so would allow the Court to determine whether the real property claimed to be trespassed upon is indeed legally accessible (in this instance as a road) to the public, including Defendant.

Just as with the "landing at White's Ferry" and the "strip of land," the 1871 Order is of little value in establishing the location of these roads with reasonable certainty. While the 1871 Order describes the general direction of the roads and a minimum width (20 feet), the information regarding location is less specific. The 1871 Order necessarily makes the locations of the roads dependent upon the location of the landing, which for reasons stated, is not able to be discerned with reasonable certainty based on the 1871 Order.

In addition to the analysis of the 1871 Order on a more technical level, as described in the preceding paragraphs, the Court has also taken a practical approach to the defense based on the 1871 Road Case. In this approach, the Court has taken the most discrete piece of information from the 1871 Road Case (i.e. the strip of land 1 perch by 27 perches) in an effort to visualize the area condemned in the 1871 Order as it relates to the areas of the Property for which the Plaintiffs have established the elements of trespass.

The width of the illustration in Plaintiffs' Exhibit 45A is approximately 35 inches. Per the scale on the document (1 inch = 20 feet), the width of the illustration represents approximately 700 feet. On Exhibit 45A, the condemned strip of land, if it were represented to scale, would measure 22.275 inches (about 2/3 the width of the illustration) by .825 inches. Roads, represented to scale, would be 1 inch wide.

In an exercise based on visualization of the Court's interpretation of the substance of the 1871 Order, the Court has examined to what extent a to-scale representation of the "strip of land" overlaps the areas shaded in teal and teal hatching (i.e. areas of the Property the Court finds that the Defendant entered onto resulting in interference with Plaintiffs' possessory interest therein).[4]

The point of the exercise is to determine whether any orientation of the strip with any orientation of two, to-scale (as to width) roads starting at the strip would "cover" the areas of the Property that the Defendant entered without authority interfering with the Plaintiffs' possessory interest. An affirmative result of such exercise would open the door to the possibility of a complete defense being proven.

Upon application of the exercise, the Court finds that there is no orientation of a strip of those dimensions, even with two roads running off of it, that would result in a complete overlay of the areas of the Property that the Defendant entered and used. Different orientations provide different degrees of intersection but, on the evidence presented, it is unlikely and perhaps not possible that the Defendant's business activities on the Property have been exclusively performed on land that was condemned in 1871 for public access. Plainly, the evidence does not establish such with reasonable certainty.

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[4] For purposes of the exercise, the Court must assume that the "strip of land" and the "landing at White's Ferry" are synonymous, because if they were to be considered separately, the Court would be at a loss as to how to represent "the landing at White's Ferry" graphically because the 1871 Order provides no description thereof.

The Court observes that even if, in this exercise, there emerged a potential orientation of the condemned real property that completely overlaid the area of Defendant's entry and interference, it would be speculation that such orientation is what was directed by the 1871 Order.

The Court cannot make a finding on the location of the condemned strip of land based on the 1871 Order without speculation. Therefore, the Court records of the 1871 Road Case do not establish with reasonable certainty as to the location of the landing or the roads established in that case.

The Defendant has also argued that circumstantial evidence establishes what was condemned in the 1871 Road Case.

The Defendant argues that the maps presented as evidence in the case constitute proof "beyond a reasonable certainty as to the locations of the White's Ferry landing in both Virginia and Maryland from 1860s to the present day." Implicit in this argument is that the maps sufficiently prove the location of the landing condemned in the 1871 Road Case.

The maps are presented as circumstantial evidence of the Defendant's claim of public access over the areas of the Property that are the subject of this litigation. The Defendant relies on maps created years after the 1871 Road Case to attempt to establish the location of the landing established therein. Again, it is worth noting that the question of location in this case was litigated on both a broad scale (was there a more northern landing?) and a narrower scale (where, with reasonable certainty, is the real property condemned as an easement for public use in 1871 located?). As such, considerable evidence, including the maps, is relevant to and has been the subject of counsels' arguments on both levels.

The Court may draw all reasonable and legitimate inferences from the circumstantial evidence submitted. Reasonable and legitimate inferences do not include speculation, however. Comparatively, the maps are more persuasive to support the Defendant's position regarding the broad issue of general location of the landing, as opposed to the narrower issue of a more specific location. Indeed, the evidence of the maps concentrated on dispelling the Plaintiffs' theory of a more northern location to the landing. Again, however, the Court has assumed *arguendo* that the broad issue is resolved in the Defendant's favor (i.e. White's Ferry was not at a more northern location in 1871), so it is the question of the more specific location that requires analysis.

The Court does not find the maps to be persuasive to establish with reasonable certainty the location of the real property condemned in 1871. Based on the totality of the evidence adduced in this case, it is unclear how any map could accurately lay out with reasonable certainty the location of the real property condemned in 1871. If any map was based on the records of the 1871 Road Case, which the Court has previously analyzed, the map necessarily speculates as to where the condemned property begins and ends, because the records of the Road Case fall well short of establishing the location of the condemnation with reasonable certainty.

For any map that was based on anything other than the records of the 1871 Road Case, the evidence is insufficient to determine that its pertinent depictions of the Virginia landing area and approach reliably reflect what the 1871 Road Case ordered. For reasons stated previously, it seems an impracticable task to map out what was condemned based on the language of the 1871 Order.

Evidence that the ferry landing has been in "the same place" for a long period of time, even back to 1871 may have persuasive value on the broader issue of location but does not provide reasonable certainty regarding the more specific issue of location. This is particularly true when, as in the instant case, measurements as small as yards or feet are potentially material in determining locations relevant to the issues before the Court.

The Court observes that among the maps that the defense relies upon are following Defendant's exhibits and their respective scales: Exhibit 6 – approximately 1 inch = 1 mile; Exhibit 46 – approximately 1 inch = 1 mile; Exhibit 47 - approximately 7/16 inch = 1 mile; Exhibit 49 – approximately 1 inch = 1 mile; Exhibit 63 - approximately ½ inch = 1 mile; Exhibit 64 - approximately ½ inch = 1 mile; Exhibit 65 - approximately 2 inches = 1 mile; Exhibit 66 - approximately 2 5/8 inches = 1 mile; and Exhibit 67 - approximately 2 5/8 inches = 1 mile. The Court has examined these maps thoroughly, and even if there was sufficient assurance regarding the foundation of the maps, the scales used for these maps are inconsistent with depicting the precision necessary to the instant analysis.

The Defendant's contention that the location of the real property condemned in the 1871 Road Case has been sufficiently established was weakened by portions of testimony given by its own witnesses. Despite the existence of multiple maps and surveys, several of which they

testified about, the Defendant's expert witnesses testified generally that they do not know the location of the areas of real property that were condemned by the 1871 Order.

One of the expert witnesses, Bruce Robertson, was presented with various maps and was asked to identify certain features thereon. His testimony was taken only as evidence of what is depicted on the maps and not that a map accurately depicts what it purports to depict. The direct examination of Robertson included testimony identifying the depicted location of White's Ferry in Virginia. It also identified the eastern terminus of Route 655 as being depicted on the shore of the Potomac River, offered as circumstantial evidence that the prescriptive easement does not terminate at the "End of State Maintenance" sign.

Even if Robinson's testimony about the depictions of White's Ferry and Route 655 on maps was also taken for the accuracy of the maps, answers on cross examination diminished whatever persuasive value it would have had. First, Robertson testified that "we don't know where the landing is," referring to the landing involved in the 1871 Road Case. Robertson further testified that "the suit did not show where that landing is except that it was established at White's Ferry." Also on cross examination, he testified, in contradiction to how he identified Route 655 on various maps, that in his expert designation, in reference to Route 655, he stated that "the right-of-way extends down the bank to a point near the ferry landing which is marked by an 'End of State Maintenance' sign."

The other defense expert witness, Philip Dake, testified at length on the broader issue of the potential of a more northern landing area for the ferry in 1871. His testimony that applied to the specific issue of location, most significantly about the 1871 Road Case, however, is the focus of this analysis. When asked if he was able to discern what interest or title was acquired in 1871 based on the Road Case, he testified that "it's not explicitly stated in the documents, but I think it was an easement." After exposition of the 1871 Order, he was asked if he could state "what the [strip of land] taken is." Dake replied that he did not know what that was and that the deed does not identify the location of the strip. When asked if he was "able to say, based on [his] review of the file, where [the strip of land] is," Dake said, "No, I cannot." He affirmed that, when he testified in a soil erosion case regarding the Property in 2004, he was not able to say where the strip of land was. On cross examination, Dake conceded that in the 2004 case, when asked at deposition to draw where the landing was, he had said that he would be guessing to try to do so.

Dake testified that, to his knowledge, there is no court case or record that has relocated White's Ferry since 1871. The fact that there is no court order or record changing the location serves to emphasize the impact of the lack of clarity regarding location in the records of the 1871 Road Case, as there is no superseding record to potentially rectify the lack of clarity.

The subsequent instruments of record for the Property likewise do not provide clarity or guidance to define what was taken in the 1871 Road Case. The parties stipulate that no instrument of record among the Loudoun County land records contains any "less and except" or abatement for a ferry landing on the Property. See Court Exhibit 1 ¶ 25.

The Court also finds that the controversy over the Stanton survey is, ultimately, of little consequence. In 1891 County Surveyor Alfred Stanton surveyed the Rockland farm property as part of a judicially supervised sale of a portion of the land. The survey does not depict a landing. The Plaintiffs argue that if a landing had existed at that time, it would have been depicted. The Defendant retorts that the purpose of the survey was limited to the instructions of the court order to identify and sell 235 acres of the property. As such, they argue, the purpose of the survey did not extend to identifying the ferry landing. The Court does not disagree with the Defendant's position and, accordingly, does not find the Stanton survey determinative that no condemnation occurred at the Current Virginia Landing area. Nevertheless, that explanation still does not further the Defendant's case in ascertaining the location of the White's Ferry's landing in 1871, as it goes more to the broad issue of location than it does to the instant inquiry regarding the more specific issue of location.

The Court, thus, is not persuaded that the circumstantial evidence proves with reasonable certainty what was condemned in the 1871 Road Case, either independently or in combination with the direct evidence of the 1871 Order. Therefore, the Court finds that the Defendant has not proven that the 1871 Road Case established a landing or other public access in Virginia that is locatable today. Accordingly, the defense that the outcome of the 1871 Road Case relieves the Defendant from liability for trespass has not been established.

The Court emphasizes that it is the failure to prove the location with reasonable certainty that is fatal to the Defendant's theory that the 1871 Road Case constitutes a defense to the trespass claim. The Court, by this ruling, does not reverse or vacate the 1871 Order, but simply

finds that facts necessary to the instant litigation regarding the location of the easement have not been proven.[5]

The Defendant's second line of defense is anchored to the Byrd Act of 1932. The Defendant contends that, in 1932, the Commonwealth of Virginia took the landing and the road that serves the landing (Route 655) into the State secondary highway system via the Byrd Act.[6] The Defendant contends further that, as a result of the purported taking, the public (including White's Ferry) has maintained the lawful right to use the Current Virginia Landing area and Approach without a requirement for authorization from Plaintiffs and free from Plaintiffs' control or interference.

Regarding this theory of defense specifically, the Plaintiffs raise a preliminary issue. They contend that the Defendant advanced this defense at trial without first identifying it in its Grounds of Defense. The Plaintiffs claim therefore, that this defense is not properly before the Court.

For purposes of the following analysis, the Court assumes *arguendo* that the Defendant's imposition of this defense is procedurally sound and will proceed to analyze the issue substantively. Because this defense also depends upon demonstrating the existence and location of a public right of way, the burden of proof on this theory of defense, consistent with White and Bare, is reasonable certainty.

The Defendant's invocation of the Byrd Act rests on a theory that the Byrd Act, upon its passage, transformed certain private roads, private landings, and privately-owned real property into areas of public access.

The Plaintiffs argue, in contradiction to the Defendant's position, that the Byrd Act did not "establish," "confirm," or "legally re-establish" the Current Virginia Landing area as being a public road or landing. Instead, the Plaintiffs suggest that the Byrd Act was merely adopted to

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[5] Considering this ruling, the Court need not consider the necessity of a ferry franchise and right to land in order to lawfully operate its ferry. This holding also renders moot White's Ferry's Motion to Strike.

[6] The parties stipulate that Route 655 was made part of the State secondary system under the Byrd Act as depicted on the 1932 Map of Secondary Systems. They disagree, however, about the extent of the prescriptive right of way for Route 655 relative to the Current Virginia Landing.

transfer the responsibility for maintaining certain public roads and landings from counties to the state. See Mulford v. Walnut Hill Farm Group, 282 Va. 98, 108 n.7 (2011) (citing Godwin v. Board of Supervisors, 161 Va. 494, 500 (1933)).

Part 1 of the Byrd Act provides as follows, in pertinent part:

> That there be, and is, hereby, created and established the secondary system of State highways, to consist of all of the public roads, causeways, bridges, landings and wharves in the several counties of the State as of March first, nineteen hundred and thirty-two, not included in the State highway system.

1932 Va. Acts Ch. 415, at 872.

Upon review of the entire Byrd Act, the Court agrees with the Plaintiffs' position. The main effect of the Byrd Act is to shift responsibility for maintenance of the existing public rights of way from the counties to the Commonwealth. No provision of the Byrd Act allows for a conversion of private property to public property or the creation of any new public roads, causeways, etc. In other words, the Byrd Act would only have applied to that which was already a public way. The Byrd Act does not create any rights to public access. Therefore, the Defendant cannot rely on the Byrd Act as being a vehicle for establishing, confirming, or legally re-establishing any right of public access on any area of the Property.

The Defendant's defense becomes effectual only when it proves with reasonable certainty the public status of any piece or pieces of the Property that have been used in the operation of the business. As discussed above, the 1871 Road Case has not established that the Current Virginia Landing and Approach were condemned for public use. Therefore, a defense based on the Byrd Act is not persuasive.

The Court finds that the two major theories of defense have not yielded proof with reasonable certainty that any portion of the Property at issue has been established as a public road or landing or other public right of way. The Court has also considered additional arguments the Defendant has put forth. They are addressed below. The Court, for reasons stated, finds that none persuade the Court that a defense to trespass has been proven.

First is the Defendant's argument regarding the "End of State Maintenance" sign, wherein it takes the position that the sign does not establish the end of a public right of way. In support of that position, the Defendant cites to Board of Supervisors v. Ripper. 790 F.Supp. 632, 636 (W.D. Va. 1992) ("mere non-maintenance or non-use is not sufficient to extinguish a road as a public road"). However, even if this legal proposition was authoritative on this Court, it is only helpful to the Defendant once the evidence establishes with reasonable certainty the existence and the location of a public right of way that is in controversy. The Court has found that no public right of way has been established with reasonable certainty. Therefore, no public right of way on the paved and concrete roadway on the approach between the sign and the Potomac River has been proven. There is no public right of way for which an end needs to be determined. This legal proposition does not, as the Defendant would suggest, serve by itself to establish the existence of a public road, public landing, or any public right of way.

The Defendant also notes that in 1954 the Loudoun County Board of Supervisors abandoned the portion of Route 655 "beginning at a point in State highway secondary road system Route 655 along the Potomac River, where is located White's Ferry and thence running northward along the Potomac River" thence west to State Route 15. See Defendant's Exhibit 42. In interpreting this abandonment, the Defendant argues that it did not include the landing between the "End of State Maintenance" sign to the Potomac River. Even if that is true, it is not persuasive that the described segment of Route 655 is a public way because the evidence does not prove with reasonable certainty that it had been so established prior to the abandonment.

The Defendant relies on letters from the Virginia Department of Transportation (hereinafter "VDOT") to support its contention that VDOT "continued to exercise control over" the landing between the "End of State Maintenance" sign and the Potomac River. The first VDOT letter includes suggestions for the Defendant's "use and consideration of the development of construction plans…" See Plaintiffs' Exhibit 8. The letter notes that "[t]his office will be available to work with you and the Leesburg Residency office of VDOT to properly establish the new limits of VDOT's maintenance obligations." Id. The letter, however, considers construction plans to the road and surrounding area of the Property exceeding the mere landing area. The use of the word "ramp" in the caption carries little, if any, weight toward a conclusion that property beyond the sign is public. Thus, VDOT's suggestions are not necessarily an exercise of control over the Current Virginia Landing.

The second letter offers comments on the Defendant's construction proposals. See Plaintiff's Exhibit 11. The letter "recommends" that Defendant erect four signs, but does not mandate their installation, and certainly does not rise to the level of VDOT taking the initiative of erecting them. Id. The letter also requires Defendant to "[p]rovide documentation that the Department will have an unrestricted ability to perform [its] maintenance within the limits of Route 655." Id. That acknowledgement of VDOT's maintenance responsibilities is limited to Route 655 and does not even imply that it extends to the Current Virginia Landing. Even the recommendation for a sign stating "Ferry Traffic Only" is not evidence of an established public landing, as it could be consistent with VDOT managing traffic flow and providing information to the public that the ferry is the only outlet to the road. As such, even if the letters regard input on construction to areas beyond the "End of State Maintenance" sign, they are not conclusive, in and of themselves, that the area beyond the sign is public. Thus, the letters do not compel the Court to accept the Defendant's argument.

Finally, the Defendant implores a logical consideration of the circumstantial facts. The Defendant argues that there is no rationale for Route 655 to be taken into the State secondary highway system other than to provide public access to the public ferry landing. While the argument is not irrational, the Court must base its decisions on facts and evidence, not mere speculation. It is not uncommon for public roads to lead to private property (i.e. neighborhoods, shopping centers, etc.). There is no legal or factual basis to support a contention that a public road provides access exclusively to public areas. A finding that the purpose of Route 655 did not include being a means of transport to private destinations would be speculation. Without evidence supporting that conclusion, this line of argument is unpersuasive.

In addition to the insufficiency of evidence to establish that the Current Virginia Landing and Approach are public, there was also adduced evidence that tended to prove that the Current Virginia Landing and Approach are private property. Such evidence obviously frustrates the establishment of the posited defenses.

The parties have stipulated that neither Loudoun County nor the Commonwealth currently maintain any part of the Approach or the Current Virginia Landing beyond the "End of State Maintenance" sign and have not done so since at least 1946. See Court Exhibit 1 ¶ 34. To the contrary, the Property beyond the sign has been privately maintained.

Private property and ferry traffic only signs were also erected by the parties at the recommendation of VDOT. Even setting aside the language of the signs, the fact that VDOT merely recommended the installation of the signs, rather than erecting them itself, tends to show an absence of public dominion (and therefore a prevalent private dominion over the Property). Moreover, there is no evidence that either the Commonwealth or Loudoun County has asserted or claimed any interest in the Property. That latter point is emphasized when it is considered that Plaintiffs have consistently been assessed property taxes for the Property (including the Current Virginia Landing area) as it has been for the remainder of its property, without abatement for an easement or other condemnation.

Based on the entirety of the evidence, the Court concludes that the Defendant has not established with reasonable certainty that the Byrd Act created a prescriptive right of way for the Current Virginia Landing, establishing it for public use. The Court also finds that the Defendant has not established what, if any of the area at issue beyond the End of State Maintenance sign was established as a public right of way prior to the Byrd Act. Therefore, the Court finds that the Defendant has not proven this second theory of defense and the Court finds that the Defendant is liable for trespass against the Plaintiffs.

Having found for the Plaintiffs on the claim of trespass, the Court next considers the issue of damages. It is well-settled that a plaintiff claiming damages must establish the amount due with reasonable certainty. Southern Ry. Co. v. Burton & Briel, 149 Va. 364, 370 (1928). The prior discussion of the burden of reasonable certainty applies to this issue as well.

Even when a plaintiff fails to meet the burden of reasonable certainty on damages, a plaintiff that has met its burden of proving a trespass on its land is, at a minimum, entitled to nominal damages. Raven Red Ash Coal Co. v. Ball, 185 Va. 534 (1946). "Nominal damages are 'appropriate when there is a legal right to be vindicated against an invasion that has produced no actual, present loss of any kind or where, from the nature of the case, some injury has been done but the proof fails to show the amount." Kerns v. Wells Fargo Bank, N.A., 296 Va. 146, 159-60 (2018) (quoting Town & Country Props., Inc. v. Riggins, 249 Va. 387, 399 (1955). An award of nominal damages:

> represents an award of a token or symbolic recovery amount that is designed to vindicate plaintiff[s'] rights by making a legal declaration that the plaintiff has been wronged and that the judicial

> system recognizes that the defendant has been shown culpable under the applicable elements of a claim and burdens of proof, though a measurable amount of loss either has not been established or is not warranted for other reasons on the facts of the case. Plaintiffs' prevailing status is recognized and vindicated by such an award, even without payment of a significant amount of monetary damages.

Id. at 160 (quoting Kent Sinclair on Virginia Remedies § 1-1, at 1-5 (5th ed. 2016)) (edit in original).

On the instant trespass claim, the Court finds that the unauthorized Construction was undertaken while the Defendant was trespassing. Therefore, a measurable amount of loss, i.e. the cost to restore the Property, has been established and an award of nominal damages is not indicated. The parties have stipulated that the cost to restore the Property to its condition prior to the Defendant's Construction is $102,175.00. See Court Exhibit 1 ¶ 17. The Court, therefore, finds that the Plaintiffs have proven damages for trespass in the amount of $102,175.00.

The Plaintiffs also seek damages for the Defendant's use of the Property after the termination of the 1952 License Agreement. However, this analysis of damages is inextricably interwoven into the consideration of damages under the Plaintiffs' claim of unjust enrichment. For that reason, the Court has considered the claim for such damages within its analysis of Count Three. For reasons stated in that analysis, no additional damages are awarded for trespass.

Further, by virtue of ownership of the Property, the Plaintiffs are entitled to possession thereof. The Plaintiffs have sought to enjoin the Defendant from continued use or occupation of the Property. Because an injunction is an extraordinary remedy, a plaintiff generally "has a high burden of showing that the failure to enjoin the alleged improper action will result in irreparable harm for which the law will afford him no adequate remedy." Levisa Coal Co. v. Consolidation Coal Co., 276 Va. 44, 53 (2008). Given the unique nature of real property and the high value the law places on it, the burden is greatly relaxed for injunctions against trespass. Id. at 54. "[W]hen the injunction is sought to enforce a real property right[,] a continuing trespass may be enjoined 'even though each individual act of trespass is in itself trivial, or the damage is trifling, nominal, or insubstantial, and despite the fact that no single trespass causes irreparable injury. The injury is deemed irreparable and the owner protected in the enjoyment of his property ..." Id. (quoting Boerner v. McCallister, 197 Va. 169, 172 (1955)).

Considering that Plaintiffs terminated the License Agreement in 2004 and the Defendant has, nonetheless, continued to operate on the Property to date, the Court finds it likely that, absent and injunction, the trespass will continue. As the trespass inhibits the Plaintiffs' exclusive use and possession of its Property, the Court finds that the Plaintiffs have adduced sufficient proof to enjoin the Defendant's continued presence and operation of the ferry on the Property. The Court, therefore, finds that a permanent injunction shall issue prohibiting the Defendant from continuing to use or to occupy any part of the Property, including the Current Virginia Landing area and Approach.

II. Count Two - Damage to Property

The Plaintiffs' second count is for damage to the Property due to the 2004 Construction. As discussed above, the Construction was outside of the scope of the License Agreement and the Plaintiffs did not consent to the Construction. Thus, the Court finds in favor of the Plaintiffs with respect to this count.

The parties stipulate that the cost to restore the Property to its prior condition is $102,175.00, so the Plaintiffs are awarded damages in that amount. See Court Exhibit 1 ¶ 17. As to the issue of interest, post-judgment interest is mandated by statute, however, pre-judgment interest is discretionary and serves the purpose of making the plaintiff whole. Upper Occoquan Sewage Auth. v. Blake Const. Co., Inc./Poole & Kent, 275 Va. 41, 63 (2008). This is not a case in which the Plaintiffs are seeking recovery of funds expended. Also, there is no evidence that the Plaintiffs have experienced additional loss by the continued existence of the Construction. As such, the Court finds that pre-judgment interest would not serve to make the Plaintiffs whole and is thus, not appropriate in this action. The Plaintiffs are awarded $102,175.00 plus post-judgment interest at the statutory rate.

III. Count Three - Unjust Enrichment

To prevail in an allegation of unjust enrichment, a plaintiff must establish that:

> (1) he conferred a benefit on the defendant; (2) the defendant knew of the benefit and should reasonably have expected to repay the plaintiff; and (3) the defendant accepted or retained the benefit without paying for its value.

Schmidt v. Household Fin. Corp., II, 276 Va. 108, 116 (2008) (internal citations omitted).

As discussed above, the Plaintiffs have established that the Defendant continued to use the Property in operating its ferry even after the termination of the License Agreement. As such, the Defendant should reasonably have expected to pay the Plaintiffs for any benefit received, although no compensation has been provided. Still, the Plaintiffs have the burden to establish the value of the benefit the Defendant received to prove the amount of damages. As noted above, a plaintiff claiming damages must establish the amount due with reasonable certainty. Southern Ry. Co. v. Burton & Briel, 149 Va. 364, 370 (1928).

The Plaintiffs have presented evidence and argument of their requested damages by estimating the value of rent that the Defendant would have expected to pay each year for the use of the Property in operating its ferry. As the Plaintiffs' argument is intertwined with its claim of trespassing, the Court has also examined the law on damages properly awardable for trespass.

Historically, if a trespasser simply used the property of another (even to his financial benefit), the owner of the land was required to establish special damages or otherwise be limited to the recovery of nominal damages. Raven Red Ash Coal Co. v. Ball, 185 Va. 534 (1946). However, the Supreme Court of Appeals of Virginia later held that "[t]o limit plaintiff to the recovery of nominal damages for the *repeated* trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received." Id. at 548 (emphasis added). As such, a plaintiff is entitled to recovery of at least the value of the use of the property for the period he is kept out of possession. Id. at 550. In calculating the value of the use of the land, the Court in Raven Red Ash Coal Co. received evidence of the amount of coal transported across the plaintiff's land and attributed a certain amount of money to each ton of coal. Id.[7] In light of the precedent established in Raven Red Ash Coal Co., the Court finds that

[7] The Court rejects the applicability of Preston Mining Co. v. Matney because that case explicitly pertains to use and occupation based on an express contract that did not amount to a formal lease. 197 Va. 520, 526 (1955). In this case, there was no such express contract because Defendant's

the Plaintiffs would be entitled to additional damages, if they are proven, for the unjust enrichment of the Defendant resulting from business conducted while trespassing.

A technical issue arises because the Plaintiffs did not file their Complaint in this action until July 2009. Even though the consideration is couched in the context of a trespass action, the damages sought are those of unjust enrichment, which is governed by a three-year statute of limitations. See Belcher v. Kirkwood, 238 Va. 430, 432-33 (1989). Thus, to the extent that damages are proven, the Plaintiffs cannot receive damages for unjust enrichment prior to July 2006.

On the issue of valuing the enrichment enjoyed by Defendant and the associated claim of damages, the Plaintiffs presented evidence through an accounting expert, Wallace Owings. Owings used financial data from the Defendant and from an unspecified set of businesses in the category, as defined by the IRS, as "air, train, and water transport companies." Owings characterized the set of businesses as being "in a similar type of transportation area." The number of businesses in the category was approximately 4,200 per year, although the number varied from year to year. On cross examination, Owings testified that the category was "the smallest categorization that he could find direct IRS data from." Also on cross examination, he stated that the category potentially includes American Airlines, Amtrak, and U.S.-based companies that manage cruise ships and sea cargo ships.

First, Owings testified that, through his analysis of available financial information about the Defendant (including tax returns, financial statements, interrogatory responses, and document responses), the Defendant enjoyed substantially higher net profit margins in the years 2004-2017 (a low of 26.56% in 2008 and a high of 52.99% in 2012, with an average of 41.32%) than other "similarly situated businesses" (collective average for these entities between 2004 and 2017 was 7.23%). This computation included not only profits from the operation of the ferry, but also the Defendant's income from investment portfolios and from the operation of a retail store. In summary, Owings opined that the Defendant "could afford to pay more rent."

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use of the Property was outside of the scope of the License Agreement. The License Agreement did not allow for the Construction and was terminated the same year, thus, there was no contract governing the use of the Property. For this reason, Preston Mining Co. is not applicable to the facts of this case.

The Defendant, however, argues that because punitive damages are not an issue, its ability to pay has no relevance in determining the fair value of its use of the Property. The Court agrees with the Defendant.

The Plaintiffs then, through Owings, offered evidence in an effort to quantify the unjust enrichment of the Defendant for having occupied and used the Property for its business operations without paying rent to use the Plaintiffs after the License Agreement was terminated. Owings testified that he computed the Defendant's unjust enrichment by "calculat[ing that] had [White's Ferry] paid a similar percentage to those in that categorization in IRS data based on that average number for the year and having applied it to their net income, what that rent calculation would be." In further testimony, he clarified that, for each year, the average percentage of rent expense for those businesses in the "categorization" would be applied to the same year's net income for the Defendant to compute the rent estimate. Owings testified that among the air, train, and water transport businesses for which he had data, the businesses paid between 5% and 9% of net income on rent. Owings arrived at the opinion by considering annual rent percentages paid by air, train, and water transportation companies, according to IRS data.

Plaintiffs' Exhibit 62 shows a yearly "Rent Estimate" for 2004 through 2017, based on Owings' methodology. The estimated amounts range from $18,453.01 in 2008 to $68,855.67 in 2015. The Plaintiffs have requested $638,423.59 for the value of the Defendant's use of its Property from July 2004 through 2018 (plus an additional amount to be calculated to date).

Owings' methodology relies heavily on two premises: a) that his calculation of the Defendant's net income is valid and material as it applies to valuing the use of the Property, and b) that employing an annual average of the percentage of rent paid by other "similarly situated businesses" is a sound approach to ascertain the amount of rent the Defendant should have been paying for use of the Property.

The Defendant attacks Owings' methodology on many fronts. In general, the Defendant argues that the basis upon which the Plaintiffs have calculated their damages claim has no reasonable relation to the fair rental value of the Property. The Defendant also raises several specific points in opposition to the claim for damages. The Defendant argues that Owings' comparison of it to the collective group of air, train and water transport entities is unreasonable because the nature and size of facilities used by the Defendant's business is not comparable to that used by some of the businesses (such as airlines, cruise lines, railroads) considered in the

IRS category. The Defendant further argues that Owings did not distinguish between the Defendant's income from its ferry operations and its income from investments or retail operations, which are unrelated to the use of the Property. The Defendant argues that calculating the amount of compensation due to the Plaintiffs based on the average income and rental expenses of certain air, train, and water transport companies is not the proper measure of determining fair rental value in trespass or unjust enrichment cases. The Defendant also argues that Owings did not consider that the amount of rent he calculated for the Defendant's use of the Property should be halved in order to account for the fact that the Defendant owns the Maryland landing, and would not need to pay rent to use it.

Despite Owings' expertise, the Court is not persuaded that his methodology yields an opinion that is well-founded in establishing the value of the benefit conferred upon the Defendant by using the Property to operate the ferry.

The Court disagrees with the Plaintiffs that Raven Red Ash is persuasive here. In that case, the holding was that the jury had sufficient evidence upon which to base its award of damages. The holding does not specify what is required to prove damages nor does it specify a fact or set of facts that serves universally as sufficient proof of damages for unjust enrichment due to trespass.

In Raven Red Ash, the evidence of the benefit conferred upon the trespassing defendant was not founded on any speculation, but instead on a methodology that allowed a determination of damages with reasonable certainty. The inquiry in that case was how much the defendant was enriched by trespassing on the plaintiff's property by transporting coal over it without paying to use the land. The jury in that case was provided evidence of what the prevailing rate was for transporting coal across another's land. That information directly and logically informed the factfinder in that case regarding the exact inquiry pending: how much did the defendant benefit by transporting coal over the plaintiff's land? The evidence provided reasonable certainty in understanding how much compensation the plaintiff would have required from the defendant to permit transport of the coal over the plaintiff's land and how much the defendant would have been willing to pay. The factfinder was not left to speculate because the evidence included a nexus between the methodology and the reality of the pertinent marketplace – that there existed a prevailing rate of payment and that it was based generally on tonnage transported over the land.

Differently, in this case, the methodology requires speculation on various fronts. First, it is speculative that the cost of land rental in general or of the Property, in particular, is based in any way upon a percentage of a potential renter's net income. It also requires speculation that the cost of land rental in general, or of the Property, in particular, relies on the type of business that the land is used for. There is no evidence that a business's net income or the type of business is a consideration in the calculations, negotiations, and ultimate agreement between a landowner and business owner. No evidence was presented to establish that the relationship between net income and rental expenditures is more than coincidental.

Additional attenuation between the evidence and a reasonably certain measure of unjust enrichment inheres in the Plaintiffs' methodology with the inclusion of investment and retail income as part of the net income used to calculate the claimed benefit received by the Defendant. There is no nexus in the evidence between either of those income streams and the Defendant's use of the Property. Therefore, the soundness of Owings' analysis is further compromised.

The Court also observes that using the broad categorization of air, train, and water transport and averaging statistics from over 4,000 business as the foundation for its damages results in ignoring the specifics of this case. It also pulls into the analysis consideration of financial data from these other businesses for which there is no evidence of a nexus (other than being in the same broad category of business) to the Defendant or the Plaintiffs. There is no evidence of a nexus between the data from these other businesses to the Property or the local commercial real estate market, which are among considerations that would naturally and probably bear on the determination of a market rental value for the Property.

The Court recognizes that the Property and the Defendant's business may not have numerous analogs to facilitate a customary approach to rental valuation. This circumstance, does not, however, serve to authorize speculation by the factfinder. Accordingly, the burden of proof of reasonable certainty remains.

When that standard is applied to the evidence, the Court finds that the Plaintiffs have not sufficiently established at what rental rate a meeting of the minds of the Plaintiffs and the Defendant would have occurred. The Plaintiffs therefore have not proven with reasonable certainty the amount of unjust enrichment. Their methodology requires speculation, which excludes reasonable certainty. In Raven Red Ash, the Virginia Supreme Court recognized that

"in the absence of proof of the value of the benefit, the court could enter no judgment for plaintiff." Raven Red Ash, 185 Va. at 550.

For these reasons, the Court finds that, although the Plaintiffs have established that the Defendant benefited from trespassing on the Property, the Plaintiffs have not proven the value of the benefit with reasonable certainty. Because a necessary element of a claim of unjust enrichment, i.e. the benefit that the Defendant accepted or retained without paying for its value, has not been proven, the Court finds for the Defendant on this claim.

IV. Count Four - Breach of Contract

The elements of a breach of contract action are "(1) a legally enforceable obligation of defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of the obligation." Filak v. George, 267 Va. 612, 619 (2004).

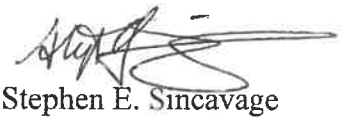
As discussed above, the parties' relationship was governed by the License Agreement. The License Agreement prohibited the Defendant's unilateral construction on the Property. The Defendant breached the License Agreement by undertaking the Construction on the Property without Plaintiffs' consent in 2004. The Construction necessarily preceded the termination of the License Agreement as the parties stipulated that "Plaintiffs gave notice of termination … after [Defendant] refused to restore the [P]roperty." See Court Exhibit 1 ¶ 16. As such, the Court finds the Defendant liable for breach of contract.

The unauthorized Construction that constituted breach of the contract caused damage to the Plaintiffs. The parties have stipulated to damages of $102,175.00 to restore the Property to its prior condition. See Court Exhibit 1 ¶17. For this reason, Plaintiffs are awarded judgment in the amount of $102,175.00 for this claim.

A plaintiff is not entitled to receive duplicative judgments for the same damages. Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 561 (2003). In the instant matter, the Court finds that damages are identical for trespass, damage to property, and breach of contract. Therefore, the monetary damages awarded for the three claims are awarded concurrently for a total award of $102,175.00.

Mr. Huber shall prepare and circulate for entry an Order consistent with this opinion, to which counsel may note exception. The matter may be placed on the docket by proper procedure for entry of an Order should a fully endorsed Order not be submitted to the Court.

Very truly yours,



Stephen E. Sincavage
Judge