UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THOMAS CANGEMI and JODI CANGEMI, MARIANN COLEMAN, FRANCIS J. DEVITO and LYNN R. DEVITO, LEON KIRCIK and ELIZABETH KIRCIK, CAROL C. LANG and TERRY S. BIENSTOCK, DANIEL LIVINGSTON and VICTORIA LIVINGSTON, ROBIN RACANELLI, JAMES E. RITTERHOFF and GALE H. RITTERHOFF, ELSIE V. THOMPSON TRUST, JOHN TOMITZ, and THELMA WEINBERG, TRUSTEE OF THE THELMA WEINBERG REVOCABLE LIVING TRUST,

Plaintiffs,

-against-

THE TOWN OF EAST HAMPTON,

Defendant.

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12 Civ. 3989 (JS)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL UNDER FED. R. CIV. P. 50 AND 59

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PRELIMINARY STATEMENT

The evidence in the trial of this action was insufficient to support the jury's verdict in Plaintiffs' favor on their claims for intentional private nuisance and trespass. No reasonable jury could have found in Plaintiffs' favor on these claims, given: (a) the Town's lack of control over the Lake Montauk Harbor jetties and inlet (the "Jetties" and "Inlet"); (b) the lack of evidence the Town engaged in any intentional conduct that caused Plaintiffs to sustain damages; (c) the lack of evidence the Jetties substantially interfered with the Plaintiffs' use and enjoyment of their properties during the relevant time period (or were the proximate cause of their damages during the relevant time period); (d) the lack of evidence that the Jetties (let alone the Town's intentional conduct) was unreasonable under all the circumstances; and (e) the lack of evidence the Town intentionally caused water to enter upon Plaintiffs' properties.

The jury should have considered these claims on a clear and convincing evidence standard, since the damages decided at trial were only incidental to Plaintiffs' injunctive relief claims. Since the jury used the same evidence to find in favor of Defendant on Plaintiffs' public nuisance claim under the clear and convincing standard, it would likely have found in Defendant's favor on all claims if charged under the correct standard.

The Army Corps maintained exclusive control over the Jetties and the Inlet. At most, the Town's actions were to request in the 1930s that the Federal government assume control of the Jetties and Inlet, and take ownership to grant the Federal government an absolute and indefeasible easement to facilitate the Federal Navigation Project ("FNP"), which occurred by Congressional Act: the Rivers and Harbors Act of 1945. This was done at a time long before Plaintiffs owned their properties, and long before the properties were even developed. The Town, therefore, did not interfere with the Plaintiffs' use and enjoyment.

The Town did not act intentionally. It did not act for the purpose of interfering with Plaintiffs' use and enjoyment of their properties; did not know that interference would, or was substantially certain to, result; and did not become aware that *its conduct* was causing substantial interference but still continued it, as the Jetties and the Inlet were under Federal control from 1945 forward. The evidence was patently insufficient to support the jury's verdict that the Town interfered with Plaintiffs' use and enjoyment of their properties, let alone that it did so intentionally.

Even if the Town had controlled the Jetties, the evidence was insufficient to support the jury's verdict that the Jetties caused substantial interference with their use and enjoyment of their properties. They failed to present any evidence demonstrating that the damages to their properties were substantially the result of interference with the littoral movement of sand by the Jetties, as opposed to other factors, when those damages accrued. Their expert, David Byrnes, could not isolate interference by the Jetties from other factors that caused erosion on the western shoreline, including the bulkheads that existed long before most of the Plaintiffs owned their properties. Rather, the only evidence at trial of substantial interference with Plaintiff's use and enjoyment of their properties was from severe weather events.

The jury charge erroneously permitted the jury to conclude that historical erosion caused by the Jetties, from any point in time from 1926 to the present, could give rise to Plaintiff's damages. The jury was erroneously led to conclude—and clearly concluded—that erosion that occurred at any points in time between 1926 and the present may be considered in deciding whether Plaintiffs sustained an interference with the use and enjoyment of their properties. No reasonable jury could have concluded, based on the evidence presented, that the Jetties themselves caused substantial interference with the use and enjoyment of Plaintiffs' properties during the statutory

period or even the period of time they owned them.

No reasonable jury could have concluded that Defendants' conduct was unreasonable under all the circumstances. Given the Town's lack of control over the Jetties, the significant public purpose they serve, and the Town's efforts to have the Army Corps address erosion, the Town's actions were reasonable under all the circumstances.

The Town did not commit a trespass. It did not intentionally cause water to enter Plaintiffs' properties, and it did nothing to make it substantially certain that would immediately occur.

The Court also permitted Plaintiffs to introduce various documents in evidence, much of which was identified on the eve of, or during the trial, substantially prejudicing the defense.

PROCEDURAL HISTORY

The Court's familiarity with the procedural history of this case is assumed. A trial by jury proceeded between June 4 and June 29, 2018 between Plaintiffs Thomas and Jodi Cangemi, Mariann Coleman, Francis and Lynn Devito, Leon and Elizabeth Kircik, Carol Lang and Terry Bienstock, Daniel and Victoria Livingston, Robyn Racanelli, James and Gail Ritterhoff, and Thelma Weinberg against the Town of East Hampton.

At the end of Plaintiffs' case, the Town moved for judgment as a matter of law. The Court reserved decision. (Trial Tr. 2506.) At the conclusion of the Town's case, the Town renewed its motion for judgment as a matter of law. The Court again reserved decision. The Court charged the jury, and provided it with a verdict sheet consisting of special interrogatories.

On June 29, 2018, the jurors rendered a verdict. It found in favor of the Town on the public nuisance claim, for which it had been charged under a clear and convincing standard. It found in favor of Plaintiffs on the private nuisance and trespass claims, for which it had been charged under a preponderance of the evidence standard. The jury awarded Plaintiffs the following damages:

- Cangemi - $61,673.60
- Devito - $122,319.00
- Kircik - $41,880.00
- Bienstock/Lang - $875.00
- Livingston - $28,775.00
- Racanelli - $0.00
- Ritterhoff - $67,961.72
- Weinberg – 32,476.95

STANDARD OF REVIEW

Where, as here, the evidence is insufficient to permit a reasonable juror to find in Plaintiffs' favor, the Court must grant defendant's motion for judgment as a matter of law. *See DiSanto v. McGraw-Hill, Inc./Platt's Div.*, 220 F.3d 61, 64 (2d Cir. 2000). Under Fed. R. Civ. P. 50, the court must set aside a verdict where there is "a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise or conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair-minded persons could not arrive at a verdict against it." *Adedeji v. Hoder*, 935 F. Supp. 2d 557, 566 (E.D.N.Y. 2013) (*quoting Brady v. Wal–Mart Stores, Inc.*, 531 F.3d 127, 133 (2d Cir.2008)); *see also Cash v. Cty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011) (Rule 50 motion may be granted where "the court, viewing the evidence in the light most favorable to the non-movant, concludes that 'a reasonable juror would have been *compelled* to accept the view of the moving party.'") (*quoting Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007)) (emphasis in original); *Cameron v. City of New York*, 598 F.3d 50, 60 (2d Cir. 2010) ("When a movant presents '[i]ncontrovertible evidence ... whose accuracy is unchallenged,' we will grant the movant's motion for judgment as a matter of law if that evidence 'so utterly discredits the opposing party's version that no reasonable juror could fail to believe the version advanced by the moving party.'") (*quoting Zellner*, 494 F.3d at 371).

Rule 59(a) "has a less stringent standard than Rule 50 in two significant respects: (1) a new trial under Rule 59(a) 'may be granted even if there is substantial evidence supporting the jury's verdict,' and (2) 'a trial judge is free to weigh the evidence [her]self, and need not view it in the

light most favorable to the verdict winner.'" *Manley v. AmBase Corp.*, 337 F.3d 244, 245 (2d Cir. 2003) (*quoting DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133-34 (2d Cir. 1998)); *see also Crews v. Cty. of Nassau*, 149 F. Supp. 3d 287, 293 (E.D.N.Y. 2015) ("a trial judge is free to weigh the evidence" for herself) (*citing DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d at 134). "As a general matter, under Rule 59(a), '[a] motion for a new trial should be granted when, in the opinion of the district court, the jury has reached a seriously erroneous result or ... the verdict is a miscarriage of justice.'" *DLC Mgmt. Corp.*, 163 F.3d at 134 (*quoting Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992)).

The Court may grant a new trial where the verdict is against the weight of the evidence. *Id.* (*citing Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525, 550 (1958)). The Court may also grant a new trial where the trial was unfair to the moving party. *See Mallis v. Bankers Trust Co.*, 717 F.2d 683, 691 (2d Cir. 1983) (*citing Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940) ("The circumstances ordinarily recognized as supporting a new trial are ... that the verdict is against the weight of the evidence, that the damages awarded were excessive, or that for stated reasons the trial was not fair to the moving party.").

Even if confronted with substantial evidence supporting the jury's verdict, the Court may grant a new trial if convinced an error occurred. *See Manley*, 337 F.3d at 246 (*citing Caruolo v. John Crane, Inc.*, 226 F.3d 46, 54 (2d Cir.2000)); C*elebrity Cruises Inc. v. Essef Corp.*, 478 F. Supp. 2d 440, 446 (S.D.N.Y. 2007).

For all the reasons set forth below, the verdict on Plaintiffs' intentional private nuisance and trespass claims should be reversed, and the case dismissed, or, in the alternative, a new trial ordered on those claims.

POINT I. THE EVIDENCE SUPPORTS JUDGMENT AS A MATTER OF LAW IN FAVOR OF THE TOWN OF ON THE PRIVATE NUISANCE CLAIM

A. There was No Reasonable Basis for the Jury to Conclude the Town Interfered with Plaintiffs' Use and Enjoyment of Their Properties

No reasonable jury could have concluded Plaintiffs satisfied the first element of their private nuisance claim, as there was no evidence the Town as absentee owner interfered with their right to use and enjoy their properties. No reasonable jury could have concluded the Town interfered because the Town had no control over the Jetties, and the Town took no action that interfered with Plaintiffs' use or enjoyment. The Jetties and the Inlet were part of a Federal Navigation Project ("FNP"), over which the Town maintained no control.

"To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with his or her right to use and enjoy land … caused by the defendant's conduct." *Kaplan v. Inc. Vill. of Lynbrook*, 12 A.D.3d 410, 412, 784 N.Y.S.2d 586, 588 (2d Dep't 2004). "[T]he duty to abate a private nuisance existing on real property arises from the power to possess the property and control the activities that occur on it." *Taggart v. Costabile*, 131 A.D.3d 243, 247, 14 N.Y.S.3d 388, 392 (2d Dep't 2015) (collecting cases). The Town did not construct or modify the Jetties, nor did the Town have notice of any potential nuisance caused by the Jetties when the Federal government took exclusive possession of them. *See Merrick Gables Ass'n, Inc. v. Town of Hempstead*, 691 F. Supp.2d 355, 365 (E.D.N.Y. 2010) (Town not liable for condition it did not create); *Stanley v. Amalithone Realty, Inc.*, 103436/2010, 2011 WL 1226895 (Sup Ct. New York Co., Mar. 17, 2011). This is a legal question that should have been decided by the Court.

Even if the Jetties had interfered with Plaintiffs' use and enjoyment of their properties (which Defendant contests), the Town did not. The Inlet is controlled and regulated by the Federal government both as a navigable waterway and as a FNP. Navigable waters of the United States

have long been under exclusive control of the Federal government under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3; *United States v. Rands*, 389 U.S. 121, 122-23 (1967); *see also* 33 U.S.C. § 1; 33 C.F.R. § 328.4 (conferring jurisdiction to Army Corps over navigable waters); 33 C.F.R. § 329.12 (extending regulatory jurisdiction to all bodies of water subject to tidal action).

Although constructed by private interests in 1926, the Jetties and the Inlet at Lake Montauk Harbor were made an FNP by the Rivers & Harbors Act of 1945 (Def. Ex. H-1), including Lake Montauk Harbor among the Federal "works of improvement of rivers, harbors, and other waterways … adopted and authorized in the interest of national security and stabilization of employment." (*Id.*) Congress fully authorized not only the Jetties' continued existence but also their location, design, configuration, length, and depth as outlined by the Corps' 1939 report to Congress. (Def. Ex. A-1, pp. 1-5; Def. Ex. H-1.)

As both a FNP and a navigable water of the United States, Lake Montauk Harbor was subject to the strictures of the Rivers and Harbors Act of 1899 (33 U.S.C. § 401 *et seq.*), enforced by the Army Corps of Engineers. *See, e.g.* 33 C.F.R. §§ 320.1, *et seq.*, 322.3, 325.1 *et seq.* No one but the Federal government is permitted to interfere with Federal navigable waterways. Section 10 of the Rivers & Harbors Act of 1899, 33 U.S.C. § 403, provides that:

> it shall not be lawful to … in any manner to alter or modify the course, location, condition, or capacity of, any port … harbor or refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Id.; see also 33 U.S.C. § 406 (providing criminal penalties for interfering with federal waterways). 33 U.S.C. § 408 makes it unlawful for anyone but the Federal government to:

> take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, **jetty, … or other work built by the United States, … used in the construction of such work under**

> **the control of the United States**, in whole or in part, **for the preservation and improvement of any of its navigable waters**, or to prevent floods….

33 U.S.C. § 408 (emphasis supplied); *see also* 33 C.F.R. § 209.170.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny permits, which "are required for structures or work in or affecting navigable waters of the United States." 33 C.F.R. §§ 322.5, 325.8. Because the Chief of Engineers has the exclusive authority to deny such permits on the FNP, it maintains exclusive control over the Jetties and the Inlet. *See United States v. Angell*, 292 F.3d 333, 336 (2d Cir. 2002) (Army Corps permit required for installation of any structure affecting its navigable waterways).

While the Secretary of the Army, on the recommendation of the Chief of Engineers, may grant permission for another party to use these public works, the Town stands on no different footing than any other party in this regard. *Id.; see also* 33 C.F.R. § 322.1, *et seq*. Nothing in the statutes, regulations, or evidence adduced at trial supports the notion that the Town had the ability to alter, modify, construct, or impair the Jetties, the channel, or the Federally-controlled navigable harbor in any way greater than any other party. It had no control over the Jetties.

In addition, Section 111 of the Rivers and Harbors Act of 1968 makes erosion caused by Federal Navigation Projects a United States government responsibility. *See* 33 U.S.C. § 426i; 33 C.F.R. § 263.27(a), (h)(1)(i). It authorizes the Army Corps to investigate, study, plan, and implement structural and nonstructural measures for the prevention or mitigation of shore damages attributable to its Federal navigation works. 33 U.S.C. § 426i. The Army Corps is authorized to proceed with measures up to $10 million without Congressional approval. *Id.* This is explained in the Army Corps' 1995 Reconnaissance Report. (Pl. Ex. 26.) (*Id.* at 70.) "The target degree of mitigation is the reduction of erosion or accretion to the level which would have existed without the influence of navigation works, at the time such navigation works were accepted as a Federal

responsibility (1945 for Lake Montauk)." (Pl. Ex. 26 at 70.) The Army Corps determined "the potential for a Section 111 study at Lake Montauk Harbor exists," and proceeded to the Feasibility Study. (*Id.*) Thomas Pfeifer from the Army Corps testified that under Section 111, the federal government "would match Corps sharing with the federal project, which in this case maintenance responsibilities for the federal project are 100 percent federal." (Tr. 1693.)

In *Ireland v. Suffolk County*, Judge Cogan, faced with the identical issue of the County's control over the Shinnecock Inlet and Georgica groins, noted:

> The Court cannot see how the County assumed a legal duty to construct and maintain or exercise any control over the groins and jetties that the USCACOE actually constructed and maintained. The County was a mere instrumentality for performance of certain plans and improvements and owed no duty to plaintiffs. Judge Hurley, to whom this case was previously assigned, found during motion practice that the decision to build these structures was a discretionary decision by the USACOE. See Ireland v. Suffolk County, 242 F.Supp.2d 178, 191 (E.D.N.Y. 2003). The decisions to construct these structures were made primarily by the USACOE. The fact that various interested constituents (including, as noted above, the Town) gave input to the USACOE as to its decision on how to proceed does not create a duty on the part of those constituencies to account for the consequences of the USACOE's decision.

Ireland, 00-cv-2412 (E.D.N.Y. Aug. 26, 2008) (Cogan, J.), *aff'd*, 367 Fed. App'x 234 (2d Cir. 2010) (Annexed to Weisbord Decl.) This is a legal determination, not a jury question.

In addition to the mandates of Federal law over the FNP, the Town granted the Federal government an absolute and indefeasible easement, which states:

> WHEREAS it is necessary that all rights-of-way and structures including such absolute and indefeasible easement in the body of water known as Lake Montauk Harbor and in the shores and bed thereof as may be necessary to insure its permanent dedication to the uses and purposes of a public navigable waterway be conveyed to the United States. (Pl. Ex. 10 at A42.)

In such easements, the dominant owner (Federal government) has the right to utilize the land subject to the easement, and the servient owner (Town) holds a simple possessory interest in the land. *See Sutera v. Go Jokir, Inc.*, 86 F.3d 298, 302 (2d Cir. 1996). "An easement is more than

a personal privilege to use another's land, it is an actual interest in that land." *Ironwood, L.L.C. v. JGB Properties, LLC*, 99 A.D.3d 1192, 1194, 952 N.Y.S.2d 346, 348 (4th Dep't 2012) (*citing Sutera*, 86 F.3d at 301). A servient owner (Town) "is under no obligation other than the passive duty to submit to use by" the dominant owner (Federal government). *See Muxworthy v. Mendick*, 66 A.D.2d 1017, 1019, 411 N.Y.S.2d 737, 739 (4th Dep't 1978) (*citing Greenfarb v. R. S. K. Realty Corp.*, 256 N.Y. 130, 134 (1931) ("No easement imposes upon the owner of a servient tenement other than a passive duty…."). "The general rule imposes the duty to maintain and repair structures upon the dominant owner." *See Cardinal v. Long Island Power Auth.*, 309 F. Supp. 2d 376, 384–85 (E.D.N.Y. 2004) (*citing Tagle v. Jakob*, 97 N.Y.2d 165, 168 (2001)); *see also Sutera*, 86 F.3d at 302 ("[T]he duty to maintain and repair structures or facilities existing under an easement rests on the dominant, not the servient, owner."); *Gates v. AT&T Corp.*, 100 A.D.3d 1216, 1218, 956 N.Y.S.2d 589, 591 (3rd Dep't 2012) (*citing Tagle*, 275 A.D.2d at 574).

This Court acknowledged the Army Corps has primary or exclusive responsibility for the construction of the Jetties. *See Cangemi v. United States*, 939 F. Supp. 2d 188, 204 (E.D.N.Y. 2013). The evidence presented at trial confirmed this. Although the Town retained title in the property subject to the easement, the Town's title is "subject to all the rights and easements to insure the permanent dedication of the Harbor to the uses and purposes of a public navigable waterway." (Pl. Ex. 10 at A45.) The Town's sole right under the easement is to use and enjoy the lands "without abridging or destroying the easement." (*Id.*)

The witnesses with knowledge at trial testified this was a Federal channel, controlled by the Federal government, a Federal responsibility. Pfeifer testified that "maintenance responsibilities for the federal project [at Lake Montauk Harbor] are 100 percent federal." (Tr. 1693; *see also* Tr. 1688, 1692 ("[F]ederal responsibilities for the jetties [go back to] 1945….")).

Larry Penny testified, "The Town didn't touch or manage [the Jetties]" (Tr. 923.) Former Supervisor Jay Schneiderman testified, "[T]his was not our inlet. This was [a] federal inlet." (Tr. 1576; *see also* 1456, 1508, 1576.) Town consultant Rameshwar Das testified "it was a federal channel and Army Corps had maintained the jetties." (Tr. 1333). The Corps' Reconnaissance Report acknowledges that in 1945 when the "navigation works were accepted as a Federal responsibility," the Federal government took responsibility for the Jetties. (Pl. Ex. 26 at 70.)

As a FNP, the Corps (not the Town) performs all maintenance on the Jetties. (Tr. 1688-89. 1693, 1775 ("The Corps maintains that channel.") [Pfeifer]; Tr. 1429 ("The Army Corps was doing the dredging and doing the maintenance. They were doing the studies.") [Das]; Tr. at 394, 549 ("[T]he Town would retain ownership of the jetties and the bottom, the sea floor, but the Corps would maintain the jetties and keep them all in place.") [Byrnes]; Pl. Ex. 191 at 660 ("[T]he inlet is a Federal channel dredged and periodically maintained by the Army Corps of Engineers."))

The Navy and Army Corps (not the Town), extended the west jetty shoreward in 1942 at the request of the Navy. (Tr. 1692-93 [Pfeifer]; Tr. 515-16 [Byrnes]; Pl. 26 at 70; Def. Ex. D-13 at 11 [Aubrey Report]; Pl. Ex. 144 at 3 [Byrnes Report]). The Corps (not the Town) extended the east jetty and repaired them in 1968. (Tr. 398, 516-17 [Byrnes]; Def. Ex. D-13 at 11.) The Army Corps (not the Town) rehabilitated the east jetty in 1995. (Def. Ex. D-13 at 11; Tr. 398 [Byrnes]; Tr. 836, 923 [Penny]; Tr. 1333 [Das]; Tr. 1694 [Pfeifer].) The Army Corps' Reconnaissance Report confirms these extensions were "both federal actions." (Pl. Ex. 26 at 70.) In any event, it is undisputed these shoreward extensions did not contribute to erosion. (Tr. at 516-18 [Byrnes]; Tr. at 2114 [Aubrey]; Tr. at 728, 886-87 [Penny]; Tr. at 1695-96 [Pfeifer]; Def. Ex. N-2.)

The Army Corps (not the Town) dredges the inlet. (Tr. 1722 [Pfeifer]; Tr. 1572-73 ("[I]t's a federal channel. The federal government does the dredging.") [Schneiderman]; Tr. 74, 94-95; Tr.

126 ("[T]he town did not have the authority to dredge…. The Army Corps of Engineers had to do any dredging.") [Bienstock]; Tr. 1332-33 ("The Army Corps was in charge of maintenance dredging.") [Das].) There was no evidence the Town exerts any control over the Jetties or Inlet, or has any power to do so.

Since the Town had no authority over the Jetties, it is not responsible for failing to act to prevent damages caused by them. In fact, municipalities have no legal duty to halt shoreline erosion or otherwise improve property in the face of flooding. *See Hall v. Suffolk County*, 231 N.Y.S.2d 235, 236 (Sup. Ct. Suffolk Co. 1962) (no duty to stop shoreline erosion); *see also Mangusi v. Town of Mount Pleasant*, 19 A.D.3d 656, 657 (2d Dep't 2005) (no duty to provide flood protection or improve plaintiff's property).

The jury could only have determined the Town interfered with Plaintiff's property because of its passive ownership of the Jetties. But since it had no authority or control over the Jetties, it did not interfere with Plaintiffs' properties. The overwhelming evidence of the Army Corps' exclusive control over the FNP to the Town's exclusion precluded a finding that the Town interfered with Plaintiffs' use and enjoyment of their properties.

B. There was No Reasonable Basis for the Jury to Conclude the Town "Substantially" Interfered with The Use and Enjoyment of Their Properties

The evidence at trial failed to demonstrate the Jetties (let alone the Town) substantially interfered with Plaintiffs' use and enjoyment of their properties. Plaintiffs' evidence was premised on the Jetties playing a role in the erosion over time, but no reasonable jury could have concluded that Plaintiffs proved substantial interference during the statutory period of time, from October 27, 2009 forward, or even during the period of Plaintiffs' ownership.

There were several fundamental problems with Plaintiffs' proof regarding substantial interference. The premise of their claim was that the Jetties contributed over time to erosion on the

shoreline, which made them more susceptible to sustaining property damage, particularly from storms. But they lacked any evidence the Jetties actually caused damage to their properties when the owned them, much less during the relevant statute of limitations period. Accordingly, the evidence failed to establish the Jetties actually interfered with their use and enjoyment, or proximately caused their damages.

Plaintiffs also failed to isolate the Jetties as the cause of the erosion on their properties from other substantial causes, including, *inter alia*, the natural (pre-Jetty) rate of erosion, the effect of bulkheads along the beach in recent years, and the significant storms that caused the beach to recede and were actually responsible for Plaintiffs' damages.

a. Plaintiffs' Evidence at Trial Failed to Demonstrate the Jetties Caused Substantial Interference During the Relevant Period of Time

Plaintiffs' evidence concerning the Jetties' role in causing erosion was presented primarily through their expert, Dr. David Byrnes. Although he attributed some (certainly not all) of the erosion to the Jetties, his testimony did not demonstrate the individual Plaintiffs themselves sustained substantial interference with their individual use and enjoyment of their properties when they sustained damages.

Dr. Byrnes did not address the appropriate timeframes in his testimony or report. His entire presentation was premised on erosion that took place since 1933, but failed to account for the statutory time period, or even the time in which Plaintiffs actually owned their properties. (Tr. 463-64.) He presented a PowerPoint that demonstrated erosion at various points since 1933. (Pl. Ex. 183.) Although he acknowledged the beaches were naturally eroding, and erosion was caused by various factors including wave uprush, sea level rise,[1] storms, astronomical tides, as well as other

[1] (Tr. 518 ("[S]ea level rise affects erosion.") [Byrnes]; Tr. at 2068 ("[S]ea level rise is a major concern now, typically with global warming.") [Aubrey]; Tr. 799-800 ("All of the beaches are retreating because of rising sea levels. I don't

structures like bulkheads, none of these factors was separately addressed in his presentation. The shoreline positions in his PowerPoint included all factors that impacted erosion—not just the Jetties. (Tr. 477, 519-20.) Dr. Byrnes was not even aware when Plaintiffs bought their properties or the statutory period of time, and assumed they bought in the 1970s, decades before most of them lived there. (Tr. 480-81, 487.) He had no way of knowing the rate of erosion on any parcel during this period, let alone the impact of the Jetties on those parcels. (Tr. 481.) He admitted the Jetties would have had the greatest impact when they were built, and diminished over time. (Tr. 494.) He testified the Army Corps' maintenance dredging in 1995 and 2000 created "a relatively good beach." (Tr. 419.) His position was there was still erosion "relative to 1933." It is not relevant.

Defendants requested that the jury charge reflect Plaintiffs were required to demonstrate the substantial interference within the relevant periods of time. (Tr. 2606 "But the language of the charge goes back ad infinitum, arguably before the plaintiffs owned their property and there is no limitation on that."). Defense counsel requested each claim be particularized to the relevant period of time. (Tr. 2608, 2634-41.) The Court only charged that damages were limited to the statutory period, and (over objection) only addressed the time period in the Verdict Sheet. (Tr. 2647.) The jury was therefore left to conclude that any impact from the Jetties, over any period of time, may be considered towards whether the Jetties (and, in turn, the Town) substantially interfered with the use and enjoyment of Plaintiffs' properties.

To reach its erroneous verdict, the jury necessarily overlooked proximate cause, which requires "there be 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2d Cir. 1999), as amended (Aug. 18, 1999) (*citing Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258,

know of one beach in East Hampton that hasn't been retreating to a certain degree.… [R]ising sea levels [ ] will be a difficult thing to counter.") [Penny]).

268, 112 S. Ct. 1311 (1992)). The court held:

> Because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history, proximate cause is used essentially as a legal tool for limiting a wrongdoer's liability only to those harms that have a reasonable connection to his actions. The law has wisely determined that it is futile to trace the consequences of a wrongdoer's actions to their ultimate end, if end there is. *Id.*

"To establish liability for harm allegedly caused by a nuisance, the acts done by the defendant must be the proximate and efficient cause of the creation of the nuisance complained of, and the nuisance must be the proximate cause of the injury and damage for which a recovery is sought." 81 N.Y. Jur. 2d Nuisances § 18.

The jury was instructed that if it finds Defendant liable, it may only award damages to compensate for injuries "proximately caused by the Defendant's conduct" without defining proximate cause. (Tr. 2880). Given the absence of any evidence the Jetties interfered with Plaintiffs' properties during the relevant times, the jury must have relied on historical evidence. This was actually Plaintiffs' theory—that the Jetties contributed to erosion over time, even before Plaintiffs' use and enjoyment was affected. During oral argument on Defendant's Fed. R. Civ. P. 50 motion, the following exchange ensued:

> THE COURT: How do you deal with the statute of limitations period? I mean, 2009?
> MR. HILL: The statute of limitations period only concerns the recoverable period of monetary damages. This has been a continuous nuisance. So while it cuts off the period of time that we could collect monetary damages for direct expenses, that does not shorten the period for which the Town is deemed liable.
> THE COURT: That doesn't make any sense, Mr. Hill. (Tr. 2501.)

This is unlike the case in which a drainpipe causes properties to periodically flood, and the property owners claim damages each time that occurs. Plaintiffs failed to show at trial the Jetties proximately or actually caused any of their damages. The dialogue continued:

> MR. HILL: It's a continuous nuisance. So there's no statute of limitations. These harms have been occurring anew every day. The impact of the jetty's

> deprivation of sand creates a constant and continuous problem.
> THE COURT: How do you make the jetties exclusive?
> MR. HILL: They don't have to be exclusive. They're the predominant cause of the downdrift erosion.
> THE COURT: You think that's what your expert testified in a clear, concise manner? (Tr. 2501-02.)

In addition, although Plaintiffs asserted no claim for loss of beach property, they presented evidence of property loss over time, which the jury must have erroneously considered in its determination. The jury charge (over objection) allowed the jury to consider this evidence, as it described substantial interference generically without tying it to any relevant time. (Tr. 2865.) Without limiting the claim to the period that actually affected Plaintiffs' use and enjoyment, the jury erroneously concluded the Jetties caused them substantial interference.[2]

It is apparent the jury improperly relied on evidence of property losses that preceded their ownership, as Plaintiffs presented no evidence of Jetty interference during their ownership. They should not have been permitted to rely on prior erosion to show interference with their own use and enjoyment, and they should not have been permitted to rely on prior erosion to suggest the properties they purchased were more susceptible to further damage. The question was whether the Jetties caused their interference.

Since the Plaintiffs' evidence of substantial interference was premised on the Jetties as the cause of erosion since 1933, Plaintiffs presented no evidence of substantial interference by the Jetties during Plaintiffs' ownership or the statute of limitations, and the jury charge (over Defendant's objection) left it with no time parameters to eliminate the historical erosion from consideration, its finding of substantial interference was in error. There was no evidence of

[2] When Mr. Bienstock testified his claim is based on the loss of his physical property, Defendant requested an instruction to avoid confusing the jury on this issue, but the Court declined. (Tr. 270.) The jury was erroneously permitted to consider loss of property in determining whether the interference was substantial even though it was not part of the case.

substantial interference by the Jetties (let alone the Town) that actually caused Plaintiffs' damages.

b. Plaintiffs' Evidence at Trial Failed to Demonstrate the Jetties, Rather Than Various Other Causes of Erosion, Substantially Interfered During the Relevant Period of Time

First, Dr. Byrnes did not evaluate any of the Plaintiffs' individual properties. (Tr. 481, 497.) He divided the shoreline into nine "Cells" without analyzing erosion on any particular property. Plaintiffs presented no evidence of impact to their individual properties caused by the Jetties, and Dr. Byrnes admitted the erosion on the different properties varied depending on shoreline position and sediment on the beach. (Tr. 463.)

Second, there was no evidence of Jetty impact over the natural rate of erosion during the relevant period of time, actually the opposite. Dr. Byrnes acknowledged the western shoreline was significantly erosive before the Jetties existed, and all the properties on Captain Kidds Path ("CKP") eroded at 2.7 feet per year even before the Jetties were constructed. (Tr. 476-77, 483-84, 496; Pl. Ex. 144.) The rate of erosion in the most recent period of time he evaluated (1972-2013) was 1.2 feet per year, far less than the natural erosion rate. (Tr. 463; Pl. Ex. 144 at 14.) He admitted all those properties may have required bulkheads even if the Jetties had not been built. (Tr. 450.) But all these properties had bulkheads *before Plaintiffs bought them*.

Dr. Byrnes premised his entire analysis on a comparison of 1892-1933 erosion rates to 1933-2013 (with a 41-year subset from 1972 to 2013), even though nearly all of the plaintiffs took ownership of their properties for a fraction of this time, *e.g.* Bienstock, 1999; Devito, 1992; Racanelli, 1988; Weinberg, 1997; Kircik, 2001; Cangemi, 2007; Livingston, 2002; Ritterhoff, 2003. The entire shoreline has been *less erosive* during the statutory period than it was prior to the Jetty construction. "Cell 8" includes all of CKP—Weinberg, Ritterhoff, Livingston, Devito, Kircik, and the Racanelli easement. All saw *lower erosion rates* in the 41 years preceding 2013 compared to the period of time prior to the jetties' existence. Dr. Byrnes determined they eroded

at a rate of 2.7 feet per year pre-Jetty, the same 2.7 feet per year they eroded after the Jetties but before any bulkheads were built, and they eroded only 1.2 feet per year from 1972 and 2013—the most recent period he analyzed. (Pl. Ex. 144, p. 13; Tr. 461.) By Plaintiffs' own analysis, those beaches were subject to 27 feet of erosion every ten years, even without any impact from the Jetties or bulkheads. (See Tr. 483-84.)

Dr. Aubrey, who actually evaluated all of the individual properties, showed they were all less erosive during the statutory and the ownership periods than before the Jetties. (Def. Ex. D-13; Y13 Table 4.4.1). In fact, all the evidence at trial showed the Plaintiffs' properties were less erosive in the past 40 years than they were before the Jetties were even built. Accordingly, Plaintiffs did not show the Jetties, let alone the Town, caused a substantial interference with Plaintiffs' use and enjoyment of their properties resulting in their damages during the statutory period.

According to Dr. Aubrey's unrebutted testimony, had the properties on Captain Kidds Path continued to erode at the historical rate of erosion, absent the Jetties by 2015 the rate of erosion would have caused the beach to recede approximately to the location it is now, and would have required preventative measures such as bulkheads or moving the homes further inland. (Tr. 2123; *see also* Tr. at 2140-41 "Rates we calculated from 1892 to 1933 would necessitate shoreline protection by now absent construction [of the] jetties."). And with the water up to the bulkheads, the properties would have had the same exposure to the major weather events that took place during the statutory period.

Third, although Dr. Byrnes admitted the bulkheads along the shoreline contributed to erosion, he acknowledged that his analysis did not separate out the impact of the Jetties from the impact of bulkheads. (Tr. 467-68, 469, 485-86, 498.)[3] By failing to do so, Plaintiffs failed to show

[3] The Army Corps studies (which Plaintiffs relied on at trial) did not separate the impact of bulkheads either, and do not account for any other factors such as the natural rate of erosion. (Tr. 1833-34 [Pfeifer].)

the Jetties themselves caused substantial interference during the relevant times.

There was overwhelming evidence the bulkheads played a significant role in erosion on the western beaches. Dr. Aubrey testified about the three well-known and documented negative effects of bulkheads: (a) they accelerate erosion by reflecting wave energies, which brings sand offshore; (b) they eliminate a sand source by containing sand on the upland property; and (c) they increase erosion around the sides of the bulkheads by prompting waves to concentrate their energies around the corners of the bulkhead. (Tr. 2111-12, 2139.) Fred Anders from the Department of State testified that bulkheads contribute to erosion. (Tr. 1871.) Supervisor Van Scoyoc testified, "My observation and research has led me to believe anytime there's a vertical bulkhead based along a beachfront that interacts with water, that beach suffers and is eroded at a much higher rate." (Tr. at 2514-16.) Schneiderman and Das gave similar testimony about bulkheads. (*See* Tr. 1390, 1435; Tr. 1480, 1580.) The Town's LWRP indicates that bulkheads cause shoreline erosion. (Pl. Ex. 191 at 326).

Dr. Byrnes' explanation for lumping the effects of the bulkheads with the effects of the Jetties was that the Jetties had caused property owners to build the bulkheads; so he claimed it's all part of the same equation. (Tr. 467.) But it's not. This fails to recognize that nearly all the bulkheads were built long before the Plaintiffs even owned their properties or the statutory period. It fails to recognize the impact of the bulkheads on Plaintiffs' use and enjoyment. By not separating the effects of the bulkheads, Plaintiffs were unable to show the Jetties themselves were responsible for a substantial interference with Plaintiffs' use and enjoyment.

Fourth, the evidence at trial showed the only substantial interference during the statutory period was that caused by storms. This shoreline gets hit hard by major weather events, which produce significant wave energy. (Tr. 825, 877-78 [Penny]; Tr. 1905 [Daley]; Tr. 519 [Byrnes];

Tr. 2514 [Van Scoyoc]; Tr.1435 [Das]; 2475 [Tuers]; 1587 [Schneiderman].) The overwhelming evidence was that the proximate cause of Plaintiffs' property damages was these major storms, not the Jetties, let alone Town conduct. *See, e.g. Nat'l R.R. Passenger Corp. v. Arch Specialty Ins. Co.*, 124 F. Supp. 3d 264, 273 (S.D.N.Y. 2015) (Hurricane Katrina's winds were the proximate cause of insured's water-related damages).

The Individual Properties - (*See* Pl. Ex. 1-B)

Mr. Cangemi purchased the easternmost of Plaintiffs' properties in 2007. At the water line it was fronted by a bulkhead that stretched for seven houses. (Tr. at 1271.) In 1999 (eight years before his purchase), all parties at a Zoning Board hearing acknowledged the water was already at the bulkhead. (Pl. Ex. 221.) He testified he lost a "small amount" of beach between 2007 and 2008, which would come back. (Tr. at 1300, 1307-08.) But he lost the beach as a result of Hurricane Ida, a severe winter storm that destroyed his bulkhead and eliminated the beach. (Tr. at 1300-01.) His damages flowed from repairs following that storm. (Tr. at 1304-05.)

Ms. Coleman owned her property since the 1960s but did not build a house on it until 2001. She does not know when she began noticing erosion on the beach. (Tr. at 1099.) She has no bulkhead, but still has a substantial beach. (Pl. Ex. 1-A.) According to Dr. Aubrey's unrebutted testimony, Ms. Coleman's beach *accreted* by .2 feet between 1999 and 2014. Before the Jetties were built, that beach had *eroded* at a rate of 1.7 feet per year. (Tr. at 2124-25; Def. Ex. D-13 at 34; Ex. Y-15 [Figure 4.4.1]). Her property was not damaged in the statutory period.

Mr. Bienstock lives in the house immediately east of those on CKP, which he bought in 2001. (Tr. at 175.) Dr. Aubrey explained that Bienstock's beach eroded under pre-Jetty conditions at the rate of 1.8 feet per year; at that same rate between 1974 and 2014; and *accreted* .5 feet per year from 1999-2014. (Tr. at 2125; Def. Ex. D-13 at 34; Ex. Y-15 [Figure 4.4.1]). Any interference

with Bienstock's property during his period of ownership was due to major weather events. He said dealing with storms is "part of living in Montauk." (Tr. 277). It was after a bad storm his beach would disappear. (Tr. 260.) His dune was damaged during the Christmas Storm of 2010. (Tr. 198.) In February 2011, Plaintiffs' counsel (on Bienstock's behalf) wrote to the DEC that "a substantial portion of [Bienstock's] property has subsequently been submerged through the avulsive impacts of repeated winter storms…." (Def. Ex. I-8.)

Ms. Racanelli purchased her property in 1988 and started occupying it in 1990. (Tr. 60.) She first noticed erosion after the severe 1991 "Perfect Storm." (Tr. 80-81.) It was one of four major storms between 1991 and 1992 that had a severe impact on the shoreline. (Tr. 825 [Penny]; *see also* Tr. 701.) Her only damages in the statutory period related to the Christmas storm.[4]

Mr. Kircik purchased his property on CKP in 2001. (Tr. 971.) He did not measure the beach, but said when be bought there was just enough room for a chair, umbrellas and 2-4 people. (Tr. 972.) At Byrnes' natural rate of erosion (2.7 F/Y) on CKP this beach would have eroded away 24.3 feet between his purchase and the Christmas storm, eliminating the beach he testified he had when he purchased. And all of his damages related to the Christmas storm and Hurricane Sandy. (Tr. at 1047-51.)

Mr. Devito purchased his property in CKP in 1992. His deed reflected between 34.6 and 37.6 feet of beach in front of his bulkhead at that time. (Def. Ex. Z-11.) Given the Byrnes natural rate of erosion, Devito's beach would have eroded nearly 50 feet by the December 2010 Christmas storm without any impact from the Jetties—well beyond the bulkhead. Devito testified the storm itself caused 50 feet of erosion to his property. (Tr. 1141-42.) All of Devito's damages were caused

[4] Meteorologist James Bria testified the 2010 Christmas was a "major storm" that was the highest wind and wave event since 2000, and one of the fifth highest wave events since the 1950s. (Tr. 2558, 2461.) He also testified the storm caused "significant beach erosion" in and around this area. (Tr. 2461.)

by the Christmas storm, which he called "the most violent storm we suffered." (Tr. at 1146-47.) And he testified that "any passing storm would come in and eat away at the beach." (Tr. 568-69.)

Mr. Livingston purchased his property on CKP in 2002. (Tr. 1188.) He sold it in 2015. By Livingston's own admissions, any substantial interference with his use and enjoyment of the property during his period of ownership was due to major weather events. He testified that the beach was "erratic"; it would come and go depending on the storms. (Tr. 1240-41.)

Ms. Weinberg purchased her property on CKP in 1997. (Tr. 1601.) By 1999, she had no beach, long before the statutory period of time, as a result of storms. (Tr. 1615, 1621-22.) Since she was on the same block of beach as the other CKP property owners, her admission of no beach in 1999 implicates their beaches. (*See also* Def. Ex. F-3.) She said she only sustained damage during winter nor'easters and hurricanes. (Tr. 1619.) All of her damage stemmed from big storms, including the Christmas storm, which she said was "ferocious." (Tr. 1618, 1622-23.)

Mr. Ritterhoff purchased his property in 2003. (Tr. 1629, 1650.) He (as all Plaintiffs) purchased his property to the mean high water mark. (Tr. 1663-64.) A 2002 survey of the property shows the high water line was up to the bulkhead and the low water line was at the revetment. (Tr. 1656-57.) His next-door neighbor, Weinberg, testified they had no beach by 1999, *four years before* Ritterhoff's purchase. Ritterhoff's retaining wall was damaged in the Christmas storm, in another storm in 2011, and then in Hurricane Sandy. (Tr. 1636, 1660.) He installed a steel bulkhead after he was told his wooden bulkhead should be replaced even though it was not damaged in the 2010 storm. (Tr. 1659-60.) He also claimed damages for having to winterize his stairs. (Tr. 1661-62.)

C. There was No Reasonable Basis for the Jury to Conclude the Town Engaged in Intentional Conduct to Interfere with the Use and Enjoyment of Their Properties

A person acts with the intent to produce a consequence if the person acts with the purpose

of producing the consequence or knowing that the consequence is substantially certain to result. Restatement (Second) of Torts 2d, § 8A. "'In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act; a mere knowledge and appreciation of a risk is not the same as the intent to cause injury.'" *Pereira v. St. Joseph's Cemetery*, 54 A.D.3d 835, 836–37, 864 N.Y.S.2d 491, 492 (2d Dep't 2008) (*citing Acevedo v. Consol. Edison Co. of New York*, 189 A.D.2d 497, 501, 596 N.Y.S.2d 68, 71 (1993) ("A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue")).

The jury was given three options to find the Town engaged in intentional conduct: "[1] if the person acts for the purpose of interfering with the owner's use and enjoyment of his or her land, or [2] if he or she knows that such interference will result or is substantially certain to result from his or her conduct, or [3] becomes aware that his or her conduct is causing substantial interference and nonetheless continues it." (Tr. 2865.) The evidence supported none of these.

First, there was no evidence the Town acted for the purpose of interfering with Plaintiffs' use and enjoyment of their land. The Town's role in securing the assumption of Federal control over the Jetties and Inlet, and its ownership, were undertaken for the purpose of preserving the harbor for the benefit of the public. The properties to the west of the Jetties were not developed, and Plaintiffs did not own them. The record is devoid of any other possible basis for such a finding.

The evidence did not support the second prong either. The Town did not engage in conduct that it knew would cause, or was substantially certain to cause, interference with Plaintiffs' use and enjoyment of their properties. Again, the Town's only *conduct* with respect to the Jetties was to secure the area as a FNP and assume ownership to grant the easement to the United States. And in the absence of any control thereafter, its later conduct could not have caused Plaintiffs' damages.

Defendant objected to the third prong of the intent charge, as the cases do not suggest, and the evidence here did not support, charging the jury with the Town's awareness that *its conduct* was causing substantial interference with Plaintiffs' properties but nonetheless continued it. (Tr. 2640-41.) The Jetties are not conduct, and the Town did not control them. In *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 571, 362 N.E.2d 968, 973 (1977), the Court of Appeals defined the intent element for a private nuisance claim as "[a]n invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct." *Id.* (internal citations omitted). The awareness of one's conduct, and continuing it, is not included as a means to prove intent. This Court's decision on Defendant's motion to dismiss cited only the first two types of intentional conduct. *See Cangemi*, 939 F.Supp.2d at 204. In any event, that prong was not applicable here, as there was no evidence the Town was aware *its own conduct* was causing substantial interference, as it was not. Once the Jetties became part of a FNP, the Town had no control over it, and its action or inaction did not cause Plaintiffs' damages.

The Court was appropriately skeptical of Plaintiffs' theory of the Town's inaction regarding its alleged ongoing conduct during the charging conference in the context of their negligence claim:

> THE COURT: What is the negligence of the Town that you are claiming here specifically? When you get up to make your summation, what are you claiming their negligence was?
> MR. HILL: A breach of their duty as an ordinary owner and a municipal owner with respect to the *utilization of the use of their property with the knowledge of the causing harm* and failure to address the known and progressive harm that that ownership and use has caused. (emphasis supplied)
> THE COURT: And how did they do that?
> MR. HILL: They did it largely by omission, by not doing anything. They also entertained the community for two decades in terms of indicating that there was some remedy afoot when there wasn't and at the end of the day there is no remedy afoot.
> THE COURT: I don't know we can base that on the facts presented. They were forever holding meetings and getting together with the Army Corps of Engineers and passing a

variety of studies back and forth. I don't see how that adds up to omission. (Tr. 2615-16.)

If this evidence of Town "omission" could not support a negligence claim, it certainly does not support intentional conduct.

In addition, the charge likely confused the jury regarding the Town's responsibility for the Jetties when it stated, "A property owner has a today [sic - should be *duty*] to exercise reasonable care in the maintenance of its property to prevent foreseeable injuries that may occur on enjoining properties." (Tr. 2866-67.) The charge allowed the jury to improperly equate the Town's technical absentee ownership with an obligation to manage or control it.

D. Plaintiffs Have Not Shown the Town's Conduct Was Unreasonable Under All of the Circumstances

The jury charge and verdict sheet provided inconsistent and confusing instructions on finding liability for unreasonableness. It instructed the jury to balance the import of the Jetties against the harm Plaintiffs suffered. (Tr. 2867.) But (over Defendant's objection) the verdict sheet only asked, "Have the Plaintiffs proved by a preponderance of the evidence that the Defendant's conduct was unreasonable under all of the circumstances?" (Tr. 2625; Court Ex. 9 at 3.)

"The determination of whether a landowner's use of property is reasonable involves a balancing of the competing interests of the plaintiff and the defendant landowner." *Cty. of Westchester v. Town of Greenwich, Conn.*, 76 F.3d 42, 45 (2d Cir. 1996) (*citing Haczela v. City of Bridgeport*, 299 F.Supp. 709, 711–12 (D.Conn.1969); *see also* 81 N.Y. Jur. 2d Nuisances § 14 (nuisance finding depends on reasonableness "*of the use* under all the circumstances") (emphasis added); *Little Joseph Realty, Inc. v. Town of Babylon*, 41 N.Y.2d 738, 744–45 (1977) ("It traditionally required that, after a balancing of risk-utility considerations, the gravity of the harm to a plaintiff be found to outweigh the social usefulness of a defendant's activity.") (*citing* Prosser, Law of Torts [4th ed], p. 581); *McCarty v. Nat. Carbonic Gas Co.*, 189 N.Y. 40, 46 (1907) ("The

law relating to private nuisances is a law of degree, and usually turns on the question of fact whether *the use* is reasonable or not under all the circumstances.") (emphasis added). Plaintiff's counsel admitted the proper inquiry is the Town's "use." (Tr. 2615-16.)

None of the Town's conduct involved the Town's actual use of the Jetties or activities on the Jetties. To determine whether the conduct was unreasonable, the jury was asked to balance the need for the Defendant's conduct, including its usefulness and social value, against the seriousness of the harm that Plaintiffs suffered. (Tr. at 2867.) But it was not Defendant's conduct that Plaintiffs claim was the nuisance; it was the Jetties, which were controlled by Army Corps.

The factors listed in the jury charge overwhelmingly supported a finding of reasonableness. (Tr. at 2867.) No reasonable jury could have found the Jetties were an unreasonable use of property. No reasonable jury could have found the Town's conduct with respect to the Jetties it did not control was unreasonable.

Factors 1 and 2: The character of the neighborhood and location of the properties

The Jetties and Inlet largely define the character of the neighborhood. Lake Montauk Harbor is the largest fishing port in New York. (Tr. 2024 [Frank]; Tr. 747, 866, 874, 933 [Penny]; Tr. 2586 [Van Scoyoc].) The harbor houses the U.S. Coast Guard, which assists the Navy in times of war, assists distressed boaters, and enforces the laws of the waterways. (Tr. 514 [Byrnes]; Tr. 2025 [Frank].) There are many businesses, including restaurants and commercial marinas, as well as a range of residential properties. (Tr. 2024-25 [Frank].) Plaintiffs purchased waterfront properties on a naturally eroding shoreline that was largely bulkheaded and less than one mile down the shore from the Jetties and Inlet. (Def. Ex. Y-15 [Figure 2.5.2]; Tr. 84 [Racanelli]; Tr. 334-335 [Bienstock]; Tr. 457 [Byrnes].) Ritterhoff testified the fact that there is a harbor so close to his home "adds ambiance to the place," which is what makes the area "a very special one." (Tr.

1658.) These factors clearly weigh in the Town's favor showing the reasonableness of the use of the property.

Factors 3 and 4: The nature and purpose of the Jetties and their value to the community

The evidence showed that any risk of property damage to Plaintiffs' properties pales in comparison to the usefulness and social value of the Jetties and Inlet. The purpose of the Jetties is to keep the inlet open for safe navigation. They are required to stabilize the inlet for navigational purposes. (Tr. 393, 406, 513 [Byrnes]; 1768 [Pfeifer]; 1459, 1560 [Schneiderman].) It is the only harbor of refuge for 50 miles for large vessels. (Tr. at 904 [Penny.]) Closing the Inlet would jeopardize the Coast Guard's operations. (Tr. 514 [Byrnes].) The Inlet is "crucial" to the fishing industry, the habitats, eelgrass. (Tr. 866, 874, 867 [Penny]; 2025 [Frank].) Closing the Inlet would affect people's enjoyment of the harbor. (*Id.; see also* 1658.) Because the Jetties are the only thing keeping the Inlet open, one cannot deny their critical value to the community. Both these factors weighed heavily in Defendant's favor.

Factor 5: The Jetties were installed before Plaintiffs occupied their land

The fact that the Jetties pre-date Plaintiffs' ownership of their properties and the existence of the subdivision itself is a factor to be considered on the issue of reasonableness. *See Benjamin v. Nelstad Materials Corp.*, 214 A.D.2d 632, 633, 625 N.Y.S.2d 281, 282 (2d Dep't 1995) ("Although not conclusive, weight must also be given to plaintiffs' awareness of the existence of the cement plant on the subject premises prior to purchasing their respective homes."); *Graceland Corp. v. Consol. Laundries Corp.*, 7 A.D.2d 89, 93, 180 N.Y.S.2d 644, 649 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 900 (1959). This should have been given considerable weight, since several Plaintiffs were aware of the erosion when they purchased, and the others did no due diligence.

Factor 6: Nature, extent, and frequency of the interference with Plaintiffs' Use and Enjoyment

As discussed above, Plaintiffs have not presented evidence showing the Jetties substantially interfered with Plaintiffs' use and enjoyment of their properties within the period of ownership or statutory period. Various other factors, such as natural erosion, bulkheads, and storm events played significant roles in erosion historically, and during the statutory period, which Plaintiffs were unable to distinguish from the effects of the Jetties. The Army Corps also dredges the Inlet every 3-5 years, and places sand on the west side of Inlet, which nourishes the shoreline. (Def. Ex. N-15 [Dredging Chart]; Pl. Ex. 144 at 3, 5 [Byrnes Report].) Byrnes admitted this created "a relatively good beach." (Tr. 419.)

Factor 7: Whether the interference can be avoided or lessened without undue hardship to the Defendant

The Town is prohibited by Federal law from removing or altering the Jetties, which Plaintiffs admit would be untenable. Even though the Town does not control or maintain the Jetties, it has done many things over the years to help alleviate the erosion issues along the shoreline. For many years, the Town urged the Army Corps to place spoils dredged from the Inlet on the west, rather than the east side, to nourish the shoreline, which required the Town to secure consent of all the property owners on the west side, and for years many would not consent. (Pl. Ex. 9; Def. Ex. O-1, T-1, V-1; Tr. 831-32, 841-43 [Penny].) The Town was ultimately successful, and the Army Corps began placing sand on the west side.

For decades the Town has urged the Federal government to address the western shoreline. In 1995, the Army Corps dredged and placed 96,000 CY of sand on the west side of the Inlet. (Tr. 419.) In 1997 and 1998, the Town Board requested that the Army Corps honor its contractual obligation under federal navigation program and commence emergency dredging at Lake Montauk and place dredge spoil on west beach. (Def. Ex. R-15; Def. Ex. U-2; Tr. at 847, 910 [Penny].) In

1999, the Town requested assistance from Congressman Forbes and Senators Moynihan and Schumer to obtain funding for maintenance dredging at the channel. (Def. Ex. S-15; Tr. 911 [Penny].) In 2000, the Army Corps dredged over 50,000 CY of sand and placed it on the west beach. (Tr. 847-48 [Penny].) Bienstock testified the Town convinced the Army Corps to place dredge spoils on the west beach. (Tr. 173.)

In 1998, the Town Board passed a resolution requesting the Army Corps study the causes of erosion and incorporate sand bypass into its periodic maintenance. (Ex. X-2; Tr. 892-93.) The Town requested the Army Corp undertake a Section 111 study. (Ex. Q-15; Tr. 896, 904.)

When the Army Corps proposed a feasibility study, the Town committed $336,000.00 of funds to it, and it and the State relied on it to perform the study and do a project. (Def. Ex. E-4; Tr. 1572.) The DOS was waiting for the Army Corps to complete the study because it was the entity doing the investigation on the alternatives. (Tr. 1856 [Anders].) It was reasonable for the Town (and the State) to rely on the Army Corps because this is what the Army Corps does. It investigates problems with storm damage from waves, storm surge, and erosion and analyzes possible ways of doing feasibility studies. (Tr. 1681 [Pfeifer].) Rick Tuers from the DOS testified (by deposition) the State partnered with the Federal government years ago because "the Corps was in the business." (Tr. 2477.) The Army Corps "does a lot of the heavy lifting in terms of the financial burden" because "the cost of construction [is] so high, brutally high." (Tr. 2476-77 [Tuers].) East Hampton is a relatively small town with limited resources. (Tr. 1575 [Schneiderman].)

It would be an undue hardship for the Town to tackle an Army Corps-level project on its own. Bienstock acknowledged, "the Town could not dredge." (Tr. 126-27.) The Town could not pump the sand. (Tr. 1487 [Schneiderman]; Tr. 710-11. [Penny].) The Town could not barge the sand. (Tr. 864-65 [Penny].) The DEC objected to the use of offshore borrow areas for

environmental reasons. (Tr. 1868 [Anders].) Byrnes admitted the 560,000 CY of sand plus 7,000 CY each year he proposed would likely cost between $15 and $20 million. (Tr. 557.) He admitted trucking the sand would have an impact on the roads; just the 7,000 CY would require 350 to 700 truckloads depending on the size of the truck. (Tr. 557 [Byrnes].)

The Town was very helpful in the aftermath of the Christmas storm. Devito testified that Town officials, including former Supervisor Bill Wilkinson, helped him obtain expedited permits from the DEC. (Tr. 612, 1148-49.)

POINT II: THE EVIDENCE SUPPORTS A JUDGMENT AS A MATTER OF LAW IN FAVOR OF THE TOWN OF EAST HAMPTON AS TO THE TRESPASS CLAIM

There was no evidence the Town engaged in any conduct that caused the waters to enter Plaintiffs' properties, let alone it did so intentionally. Incorporating the arguments above, the Town's only conduct at issue was its role with respect the Federal takeover of the Jetties and Inlet as a FNP in 1945. It did not construct or maintain the Jetties, and engaged in no relevant conduct after the assumption of Federal control.

It is well settled that "[l]andowners making improvements to their land are not liable for damage caused by any resulting flow of surface water onto abutting property as long as the improvements are made in a good faith effort to enhance the usefulness of the property and no artificial means, such as pipes and drains, are used to divert the water thereon." *Baker v. City of Plattsburgh*, 46 A.D.3d 1075, 1076, 847 N.Y.S.2d 300, 302 (3d Dep't 2007) (*citing Kossoff v. Rathgeb–Walsh, Inc.*, 3 N.Y.2d 583, 589–590, 170 N.Y.S.2d 789 (1958) (property owner may improve land in good faith "in any manner to which the land is suited, without being liable to the abutting owner for change in the flowage of the surface water provided that he does not resort to drains, pipes or ditches.")) (internal citations omitted); *see also Cottrell v. Hermon*, 170 A.D.2d

910, 910–11, 566 N.Y.S.2d 740, 741–42 (3d Dep't 1991).

In *Cottrell v. Hermon*, 170 A.D.2d at 910, the plaintiff claimed defendant's maintenance and repair of her concrete patio caused waters to divert onto plaintiff's property and seep into her living room. Since the patio was constructed and repaired in a good faith effort to enhance the usefulness of the defendant's property, and the water was not diverted by the use of artificial pipes, drains or ditches to divert surface water, the court held defendant could not be held liable for the damage admittedly caused by the patio. *Id.* The court noted the patio—like the blacktop driveway in *Kossoff*—was not the equivalent of drains, pipes or ditches affirmatively diverting water. This is legally indistinguishable from the Jetties, which were installed by Carl Fisher and maintained by the Army Corps in a good faith effort to enhance the property. *Id.; see also Rodriguez v. City of New York*, No. 94 CIV. 5864 (LAP), 1996 WL 239948, at *3 (S.D.N.Y. May 8, 1996); *Tully v. City of Glen Cove*, 102 A.D.3d 670, 671, 957 N.Y.S.2d 719, 721 (2d Dep't 2013). (Tr. 2497.) The water was not intentionally artificially diverted onto Plaintiffs' properties.

The overwhelming evidence was that the Jetties were installed for a valid public purpose; there was no evidence to the contrary, which Plaintiffs acknowledged at oral argument. (Tr. 2500.) The Jetties are nothing like pipes, drains or ditches used to divert surface water onto Plaintiffs' properties. The jury charge (over objection) did not incorporate either these points, and accordingly led the jury to find liability based generally on entry of water onto Plaintiffs' properties. (Tr. 2497) Defendant is entitled to judgment as a matter of law on this claim.

The jury charge on trespass also left out the immediacy/inevitability requirement, over Defendant's objection. (Tr. 2661, 2877-78; Dkt No. 190 [6/24/18 letter].) As this Court held, to meet the intent requirement, the intrusion must be "an *immediate or inevitable* consequence of that [defendant's] act." *Cangemi*, 2017 WL 1274060, at *11 (emphasis supplied) (*citing Volunteer Fire*

Ass'n of Tappan, Inc. v. Cty. of Rockland, 101 A.D.3d 853, 855, 956 N.Y.S.2d 102, 105 (2012).[5] Since the Jetties were built by Fisher, the Army Corps improved them, and Plaintiffs' properties were not even developed at that time, the encroachment of the waters was not an immediate or inevitable consequence of the Town's actions. Plaintiffs failed to establish the Town's intent, as the evidence at trial did not establish that the Town either acted to bring about the entry of waters onto Plaintiffs' properties, or that it was substantially certain that result would follow from its conduct. (Tr. 2878.)

POINT III. THE COURT APPLIED THE WRONG STANDARD OF PROOF TO PLAINTIFFS' PRIVATE NUISANCE AND TRESPASS CLAIMS

The Court should have charged the jury under the clear and convincing evidence standard for their private nuisance and trespass claims, as Plaintiffs' damages are only incidental to the primary claim for injunctive relief. Plaintiffs sought the benefit of a continuing tort to avoid the notice of claim requirements for their damages claim. *See Cangemi*, 939 F. Supp. 2d at 202 (money damages sought are "merely incidental" to equitable claim) (*citing Picciano v. Nassau Cty. Civil Serv. Comm'n.*, 290 A.D.2d 164, 736 N.Y.S.2d 55 (2001); *Stanton v. Town of Southold*, 698 N.Y.S.2d 258, 259, 266 A.D.2d 277, 278 (N.Y.A.D. 2 Dep't 1999)).

Had Plaintiffs not tied their damages to injunctive relief to abate an alleged continuing harm, they would have lost the benefit of the continuing claim period, and would not have been permitted to assert their damages at trial. Plaintiffs served their notice of claim on May 31, 2011. The December 2010 Christmas storm and Hurricane Ida occurred more than 90 days prior. The other storms that caused Plaintiffs' damages (including Hurricane Sandy) occurred after May 31, 2011. Because these events post-dated the notice of claim, they would not have been allowed

[5] *See also Scribner v. Summers*, 84 F.3d 554, 557 (2d Cir. 1996) (internal citation omitted); *Town of Islip v. Datre*, 245 F. Supp. 3d 397, 428 (E.D.N.Y. 2017).

either. Since the incidental damages claim does not stand on its own, it must require the same proof as the claim to which it is inextricably tied.

POINT IV. THE COURT ADMITTED EVIDENCE THAT TAINTED THE TRIAL AND PREJUDICED DEFENDANT, REQUIRING A NEW TRIAL

A. On May 31, 2018 (two business days before trial), Plaintiffs' counsel produced for the first time a PowerPoint presentation Dr. Byrnes intended to use at trial. (Dkt. 168-1.) It consisted entirely of manipulated aerial photographs and other diagrams not previously produced. (Pl. Ex. 183.) Slides 1, 2, 5, 7, 8, 9, 10, 11, 12, 13, 14 and 15 included aerial imagery taken during years not discussed in the expert report. The report did not rely on aerial imagery from 1930 (slides 1 and 13), 1938 (Slide 2), 1960 (Slide 5), 1994 (Slide 8), 2001 (Slide 9), 2004 (Slide 10), 2010 (Slide 11), 2016 (Slides 12 and 14) to depict shoreline change along the beach. The report rather uses "the four aerial images used to document [shoreline] changes [that] include 1941, 1954, 1972, and 2013." (Pl. Ex. 183.) In a June 1, 2018 letter to the Court (Dkt. No. 168), Defendant asked the Court to preclude them and limit Dr. Byrnes to the exhibits properly disclosed. (*Id.*)

Fed. R Civ. P. 26(a)(2)(B)(iii) requires disclosure of "any exhibits that will be used to summarize or support" an expert's opinions. *See United States v. City of New York*, 2010 WL 2838386, at *3 (E.D.N.Y. July 19, 2010) (*citing Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741 n. 6 (7th Cir.1988)). The PowerPoint presentation should also have been excluded under Rule 37(c) which provides, "If a party fails to provide information … as required by Rule 26(a)or (e), the party is not allowed to use that information … to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

B. The Pre-Trial Order was filed on August 25, 2017. It was 153 pages long, and listed Plaintiffs' original 692 exhibits. Plaintiffs re-numbered their exhibits just before trial, causing confusion and significant prejudice to Defendant, which prepared its cased based on the exhibits

that had been listed in the Pre-Trial Order. (Tr. 140, 143, 627-29, 631-35, 679, 940, 996, 1407.)

C. Just before and even throughout trial, Plaintiffs (over repeated objections) were allowed to sandbag Defendant with a host of other last-minute documents. In *Plaintiffs' Damages and Relief* (Dkt. Entry No. 160), filed May 21, 2018, Plaintiffs added reference to damages documents not listed in the Pre-Trial Order. On May 29, 2018, less than one week before trial, Plaintiffs emailed 17 photographs not listed in the Pre-Trial Order, unilaterally declaring they are adding them as new trial exhibits. (Dkt. No. 168-4.)

Plaintiffs' last-minute additions did not end there. Throughout trial, Plaintiffs identified photographs and damages evidence (*e.g.*, contracts, invoices, checks) not listed on the Pre-Trial Order. This was often done on the evening before a witness' testimony or the morning of the day of testimony. (*See* Tr. 527-29, 561, 627-28, 631-32, 648-60, 963-965, 969, 999-1004, 1010-13, 1028-31, 1170, 1208, 1264, 1277, 1596-97, 1642-43.) The Court acknowledged that Plaintiffs' last-minute additions was "beyond tedious" and "blatantly unfair" to Defendant. (Tr. 633, 656).

The Second Circuit has set factors for evaluating amendment of a pre-trial order: (1) the prejudice or surprise in fact to the opposing party; (2) the ability of the party to cure the prejudice; (3) the extent of disruption of the orderly and efficient trial of the case; and (4) the bad faith or willfulness of the non-compliance party. *Eberle v. Town of Southampton*, 305 F.R.D. 32, 34–35 (E.D.N.Y. 2015) (*citing Potthast v. Metro-N. R.R. Co.*, 400 F.3d 143, 153 (2d Cir. 2005)). A joint pre-trial order "shall be modified only to prevent manifest injustice," it "is not to be changed lightly," and "that which is not alleged in the Pre–Trial Order is generally deemed waived." *Commerce Funding Corp. v. Comprehensive Habilitation Services, Inc.*, 2005 WL 1026515, at *6 (S.D.N.Y. May 2, 2005); *see also Bedasie v. Mr. Z Towing, Inc.*, 2016 WL 7839436, at *3 (E.D.N.Y. Apr. 29, 2016) (precluding exhibits at trial not in JPTO where party failed to correct in

eight months between pre-trial conference and trial). Plaintiffs here did not seek to amend the pre-trial order; they repeatedly just added documents on the eve of, or during, the trial. This was trial by ambush, which took extensive time away from defense counsel's preparations in the middle of the trial, forcing counsel to scramble to sort, calculate, coordinate, evaluate, and prepare the cross-examinations regarding these exhibits, prejudicing the defense. It even resulted in discrepancies during deliberations regarding which exhibits were admitted. (*See* Tr. 2903.)

D. The Court also permitted hearsay documents, such as a summary spreadsheet prepared by counsel (Tr. 1264), and one that is also grossly inaccurate by noting a study cost in the millions rather than thousands of dollars. (Tr. 2228-2231).

CONCLUSION

For the reasons set forth above, Defendant Town of East Hampton respectfully submits that the Court should grant its motion for judgment as a matter of law under Fed. R. Civ. P. 50 or, in the alternative, order a new trial under Fed. R. Civ. P. 59, together with such further relief as the Court deems proper and just.

Dated: Carle Place, New York
July 30, 2018

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