SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

THOUSAND ISLANDS LAND TRUST, INC., Plaintiff, -against- RON CLAPP and CARLETON VILLA, LLC, Defendants.	Index No.: EF2024-00001583

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Dated: April 22, 2024

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INTRODUCTION

Defendants Ron Clapp and Carleton Villa, LLC (collectively "**Defendants**"), submit this Memorandum of Law in response to the application of Plaintiff, Thousand Islands Land Trust, Inc. ("**TILT**"), for a preliminary injunction. Defendants also seek vacatur of the temporary restraining order presently in place ("**TRO**").

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In order to avoid duplication, reference is made to the Affirmation of Julian B. Modesti, dated April 22, 2024 for the procedural history, and to the Affirmation of Ron Clapp, dated April 22, 2024, on the factual issues. Mr. Clapp's Affirmation states, in part, the following critical facts.

Carleton Villa, LLC. A New York Limited Liability Company, is the current owner of the property located on Carleton Island within the Town of Cape Vincent (the "**Town**"), known as Lot 1, having a tax map number of 39.27-1-16 (the "**Property**"). Defendants have development plans for the Property, with applications pending before the Town.

TILT holds a Conservation Easement pursuant to a Deed of Conservation Easement in Gross Carleton Island Shoreline Buffer Zone recorded in Book 1037, Page 256 in the Jefferson County Clerk's Office (Dkt 3). Specifically, the Conservation Easement protects a "100' shoreline buffer strip" which includes "all lands within 100' (horizontal distance) of the Saint Lawrence River shoreline." The prohibited uses and practices outlined within the Conservation Easement buffer strip are as follows:

> (a) The construction or placement of any structures, permanent or temporary, with the exception of duck blinds, docks, and boathouses.
>
> (b) The cutting of more than 50% of the natural vegetation. Within any 300' frontage there must be one contiguous strip of at least 100' parallel and perpendicular to the shore retained in natural vegetative condition. Except those lots of less than 200' frontage must retain a contiguous

50% of-said frontage in natural vegetative cover but said natural vegetative strip may be less than 100' in frontage.

(c) Temporary, seasonal or permanent occupancy of the shoreline buffer zone for residential purposes shall be prohibited.

(d) Man-caused fires in protected vegetation areas in the shoreline buffer zone are a management technique that is not permitted.

(e) Portions of downed trees extending outside the 100' shoreline buffer zone may be removed.

(*id.* at ¶5-7).

In addition to the Conservation Easement, the Property is also subject to a Declaration of Restrictions of Carleton Island ("**Declaration of Restrictions**"), recorded in Book 1038, Page 211 in the Jefferson County Clerk's Office (Dkt 4). Section 3 of the Declaration of Restrictions requires that "[n]o structures are permitted between the inland side of the 100' buffer zone and the waterward portion of the parcel that is less than 300 feet in width (parallel to shoreline)." Further, Section 9 of the Declaration of Restrictions prohibits "[c]onstruction of all structures within the 100' shoreline buffer area […] with the exception of duckblinds [*sic*], docks and boathouses." (*id.* at ¶¶8-10).

Since December 2023, Mr. Clapp has been in routine communications with Jake Tibbles, Executive Director of TILT, regarding Defendants' development plans for Carleton Villa (*id.* at ¶¶25-32). At that time, Mr. Clapp provided TILT copies of Defendants' applications to the Town for a special use permit and site plan review (*id.*).

With regard to the present action, TILT objects to Defendants' property maintenance activities, despite TILT's representatives being on-site and voicing no objection during the activities. Notably, those property maintenance activities – which involved clearing out dead and downed trees, collecting dead underbrush, and reseeding and laying hay in those areas, all on the

unrestricted portions of Property (outside of the 100' shoreline buffer zone) – have been completed (*id.* at ¶¶42 and 53).

Pursuant to the Conservation Easement, TILT has a right to conduct a monitoring visit of the Property, and sent notice on April 5, 2024 to Defendants' counsel, that TILT would be visiting the Property on April 9, 2024 (*id.* at ¶39). Mr. Spencer Busler and Mr. Ken Nims, with TILT, arrived at the Property in the morning of April 9, 2024 (*id.* at ¶40). Mr. Clapp had a very friendly conversation with Mr. Busler and Mr. Nims while they were on the Property (*id.* at ¶41). Mr. Busler observed Mr. Clapp marking off the "100' shoreline buffer strip" with yellow "Caution" tape around the area that was not to be touched, in preparation for the property maintenance activities (*id.* at ¶42). As Mr. Clapp was marking the protected area, he explained to Mr. Busler and Mr. Nims that he was marking off a much larger area than what was required under the Conservation Easement (*id.* at ¶43). Along the South Bay, approximately a 200' buffer was marked off as opposed to the required 100' buffer zone (*id.*). At no point during Mr. Busler's and Mr. Nim's visit to the Property did either of them indicate to Mr. Clapp that there was a problem with the property maintenance activities that were occurring on site (*id.* at ¶44). They watched Mr. Clapp tape off the protected area and also took photographs of the site with a drone (*id.*). To conduct the necessary property maintenance on the Property, an excavator was used to clear the dead and downed trees, and a skid-steer-mounted brush hog was also on site in order to collect the dead underbrush (*id.* at ¶45).

Mr. Clapp planted grass seed on the Property and had planned to have a tractor on site to lay hay to protect the newly planted grass seed. Neither planting grass seed nor laying hay to protect such grass seed are prohibited by the Conservation Easement or the Declaration of Restrictions, based on Defendants' interpretation of same (*id.* at ¶46). Moreover, Defendants

contend neither the Conservation Easement nor the Declaration of Restrictions prohibit property maintenance activities such as clearing dead and downed trees, and addressing dead underbrush (*id.* at ¶47). Again, Mr. Clapp marked the areas protected by the Conservation Easement with bright yellow "Caution" tape while being watched by Mr. Busler and Mr. Nims, without their objection (*id.*).

On April 12, 2024, TILT's counsel informed Defendants' that TILT wanted the hay application stopped immediately, thus leaving the newly planted grass seed unprotected (*id.* at ¶48).

On April 15, 2024, Mr. Clapp was informed that TILT had obtained a Temporary Restraining Order that stated he could not begin or continue any development work or activities prohibited by the Conservation Easement or the Declaration of Restrictions (*id.* at ¶49).

On the morning of April 15, 2024, Mr. Clapp's contractor had spoken with Mr. Busler and Mr. Jake Tibbles, both with TILT, and was informed they were potentially going to approve the completion of the haying process (*id.* at ¶50). Later that morning on April 15, 2024, Mr. Clapp's contractor, who was on site, received verbal approval from Mr. Tibbles, who was also on site at that time, to seed and hay (*id.* at ¶51). Mr. Clapp had also received an email that morning from Mr. Tibbles, acknowledging that the contractor was seeding and haying (*id.* at ¶51).

Defendants request that the Temporary Restraining Order be vacated and that the Preliminary Injunction be denied, because they are being harmed by TILT's extremely restrictive interpretation of the Conservation Easement. To date, if TILT's interpretation of the Conservation Easement is correct (which Defendants dispute), Defendants would be required to obtain TILT's approval before performing basic property maintenance activities that are permissable to any property owner (and are not otherwise prohibited by the Conservation Easement). TILT's

interpretation is not consistent with Defendants' interpretation, and TILT has not been forthcoming in its communications with Mr. Clapp to either state or clarify its differing interpretation (*id.* at ¶3).

ARGUMENT

I.

PLAINTIFF CANNOT SUSTAIN ITS HIGH BURDEN FOR A PRELIMINARY INJUNCTION

"Preliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Delphi Hospitalist Servs. LLC v Patrick*, 163 AD3d 1441 [4th Dept 2018]). A party seeking a preliminary injunction has the burden of demonstrating, by clear and convincing evidence:

(1) a likelihood of success on the merits;

(2) an irreparable injury in the absence of injunctive relief; and

(3) a balance of the equities in its favor

(*Eastman Kodak Co v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]).

"It is an anodyne proposition that [i]rreparable injury, for purposes of equity . . . mean[s] any injury for which money damages are insufficient" (*Eastview Mall, LLC v Grace Holmes, Inc*, 182 AD3d 1057, 1058 [4th Dept 2020] [emphasis added]). In other words, if "plaintiff has an adequate remedy in the form of monetary damages, [then] injunctive relief is both unnecessary and unwarranted" (*Eastman Kodak Co v Carmosino*, 77 AD3d 1434, 1436 [4th Dept 2010]).

The issuance of a preliminary injunction is a determination entrusted to the sound discretion of the motion court (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

In this case, Plaintiffs cannot sustain their burden, by clear and convincing evidence, for a preliminary injunction.

A. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THERE IS NO EXISTING CONTROVERSY – THE PROPERTY MAINTENANCE ACTIVITIES IN DISPUTE HAVE BEEN COMPLETED (IN LARGE MEASURE WITH PLAINTIFF'S KNOWLEDGE AND CONSENT) – THEREFORE PLAINTIFF'S REQUEST FOR AN INJUNCTION IS MOOT

Defendants' property maintenance measures are admittedly complete, and therefore there remains no actual controversy to address. Consequently, TILT's application for a preliminary injunction is moot.

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy" (*Matter of Dreikausen v Zoning Bd of Appeals of the City of Long Beach*, 98 NY2d 165, 172 [2002]).

In this case, there is no actual controversy; the property maintenance activities of which TILT complains are completed, and therefore the controversy is moot (*Citineighbors Coalition of Historic Carnegie Hill v NY City Landmarks Preserv Commn* 2 NY3d 727, 729 [2004]). Courts may neither render advisory opinions (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]), nor rule on "academic, hypothetical, moot, or otherwise abstract questions" *Hearst Corp v Clyne*, 50 NY2d 707, 714 [1980]).

Moreover, the exception to the mootness doctrine does *not* apply to the extent "[t]here is a realistic likelihood that the issues presented here will recur with an adequately developed record and with a timely opportunity for review" (*Matter of Gold-Greenberger v Human Resources Admin. of the City of N.Y.*, 77 NY2d 973, 974-975, [1991]). In other words, although Defendants' property maintenance activities are completed, if TILT believed for any reason that Defendants' future actions were in violation of the Conservation Easement or Declaration of Restrictions, it could seek a new preliminary injunction based on newly available evidence presented by TILT.

For these reasons, TILT's request for a permanent injunction should be denied as moot.

B. TILT'S FACTUAL ALLEGATIONS ARE IN SHARP DISPUTE AND ARE DENIED BY DEFENDANTS – CREATING AN ISSUE OF FACT THAT PREVENTS THE ISSUANCE OF INJUNCTIVE RELIEF

Defendants strongly deny TILT's claims that Defendants' property maintenance activities violated the Conservation Easement and Declaration of Reservations.

TILT and Defendant have different interpretations of both the Conservation Easement and Declaration of Reservations. Simply put, TILT believes both documents prohibit Defendants from performing basic property maintenance, such as the removal of dead trees and decaying brush. Defendants disagree. In light of the parties' differing interpretations of the operative documents, injunctive relief is not available to TILT (*see Rivera-Ortiz v Cook*, 2024 NY App Div LEXIS 1407, *4 [4th Dept Mar. 15, 2024] [denying plaintiffs' motion for an injunction because the parties "bore the burden of establishing that their construction of the agreement [wa]s the only construction which can fairly be placed thereon"] [quotations omitted]; *Finster Inc v Albin*, 152 AD3d 922, 925 [3d Dept 2017] [holding that plaintiffs' motion for summary judgment, which sought an "injunction ordering that the impediments to using the disputed driveway be removed and that defendants not take any actions that restrict access to the disputed driveway," should have been denied in its entirety because "the relevant deeds provide[d] an ambiguous description of the location of [the] easement," and there were "material issues of fact" as to what the easement included]; *SportsChannel America Assoc v National Hockey League*, 186 AD2d 417, 418 [1st Dept 1992] [holding that the lower court did not abuse its discretion in denying the plaintiff's motion for a preliminary injunction against the defendant's performance of its agreement because the plaintiff "failed to demonstrate that it [wa]s likely to succeed on the merits, the terms of [the agreement] being too imprecise and ambiguous to warrant that conclusion," and noting that the plaintiff "itself offer[ed] several conflicting interpretations" of the agreement, making injunctive

relief "inappropriate" because the "contractual language . . . leaves the rights of the parties open to doubt and uncertainty"]).

Moreover, if there are material factual disputes which must be resolved in determining whether a plaintiff meets the elements required for injunctive relief, then the Court should conduct an evidentiary hearing (*see Town of Tully v Valley Realty Development Co Inc*, 254 AD2d 835, 835 [4th Dept 1998] [since "[i]ssues of fact exist" as to whether plaintiff was entitled to injunctive relief, "the court erred in summarily denying the motion for a preliminary injunction without holding a hearing"]).

> (c) Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

CPLR 6312(c).

TILT has not maintained its burden by clear and convincing evidence. Therefore, either Plaintiff's application for a preliminary injunction should be denied, or a hearing should be scheduled, at a minimum, to address the issues of fact in sharp dispute.

C. PLAINTIFF CANNOT SUFFER IRREPARABLE HARM BECAUSE IT HAS AN ADEQUATE REMEDY AT LAW (MONEY DAMAGES) FOR ANY PROPERTY DAMAGE

An injunction is not available where the movant has an adequate remedy at law if damaged (*see Dana Distr, Inc v Crown Imports, LLC*, 48 AD3d 613 [2008] ["Where, as here, a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue"]; *see White Bay Enterprises v. Newsday*, 258 AD2d 520, 521 (1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money

damages); *Schrager v Klein*, 267 AD2d 296, 297 (1999) [lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages]).

In this case, to the extent the property governed by the Conservation Easement or Declaration of Reservations was mistakenly damaged by Defendants (it was not), TILT would have a remedy in the form of compensatory damages for restoration of the damaged property, thus precluding TILT from receiving an equitable remedy such as a preliminary or permanent injunction (*see Buck v Libous*, 2005 US Dist LEXIS 51687 [NDNY June 20, 2005] [denying plaintiffs' motion for a preliminary injunction seeking defendants' removal of obstructions from plaintiffs' easement and barring defendants from interfering with plaintiffs' enjoyment of the easement because "a party may not obtain injunctive relief where it is claiming a loss that can be adequately remedied by an award of money damages"]; *Friends of Pine St. v Everett*, 2022 US Dist LEXIS 109869, *10 [D. Vt. June 17, 2022] [holding that the removal of trees "d[id] not constitute an irreparable environmental harm" because "[w]hile they cannot be replaced overnight, they can be replaced if necessary with new plantings" and, if the plaintiff were to prevail in the lawsuit, "there w[ould] be an opportunity to discuss possible remedies to restore the land to its prior condition"][1]; *Porter v Chem-Trol Pollution Services, Inc.*, 60 AD2d 987 [4th Dept 1978] [denying plaintiff's motion for a preliminary injunction and holding that the record failed to show that defendant's excavation would result in irreparable injury to the plaintiff]; *Jennings v Fisher*, 258 AD2d 722 [3d Dept 1999] [denying plaintiff's motion seeking a preliminary injunction to enjoin defendants from maintaining a fence along a subject property and occupying a subject property because, "while plaintiff is unable to use the subject property in the way she allegedly

[1] Defendants understand *Friends of Pine St* applies Vermont law. Nevertheless, *Friends of Pine St* applies the same common law principles and injunctive relief elements that are applicable under New York law to this case.

had used it in the past, she has offered no evidence that would indicate that she will be injured irreparably during the pendency of this action"]; *Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011] [denying plaintiffs' motion to permanently enjoin the defendants from constructing a structure in the vicinity of the driveway because plaintiffs "failed to demonstrate that any injuries they would suffer would not be compensable by money damages"]; *Stieglitz v 284-285 Cent. Owners Corp*, 2021 NY Misc LEXIS 6492 [Sup Ct, Queens Cnty Dec. 2, 2021] [denying plaintiffs' motion seeking a preliminary injunction compelling the defendant to comply with a remediation stipulation as "both unnecessary and unwarranted" because "any injury caused to [plaintiffs] [could] be compensated by money" and "plaintiff ha[d] an adequate remedy . . . in the form of monetary damages"]; *Gutman v Cabrera*, 2009 NY Misc LEXIS 3820 [Sup Ct, Kings Cnty Feb. 5, 2009] [denying plaintiff's motion for a preliminary injunction because "an award of monetary damages would allow plaintiff to restore defendant's unit to its original condition," such that "plaintiff fails to make a showing of irreparable harm"] [citations omitted]; *EdCia Corp. v McCormack*, 44 AD3d 991 [2d Dept 2007] [denying plaintiffs' "motion for a preliminary injunction enjoining the defendants from interfering with the operation of its business of removing waste . . . and other construction debris" because "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm"]).

Even where courts have found irreparable injury in environmental cases, the court has only done so "where substantial danger to the environment, in addition to a violation of procedural requirements, is established" (*Town of Huntington v Marsh*, 884 F2d 648, 653 [2d Cir 1989]), including "the cutting and burning of timber, the movement of massive amounts of earth, the construction of large earthworks, and the relocation of roads and bridges" (*Town of Brookhaven v Sills Rd. Realty LLC*, 2014 US Dist LEXIS 85202, *20 [EDNY June 23, 2014], quoting

Environmental Defense Fund v Tennessee Val. Authority, 468 F2d 1164, 1183 [6th Cir 1972]). Consequently, "where the trespass neither extinguishes the property's value, nor prohibits its use entirely," courts have denied injunctive relief (*Gordon v New Eng. Cent. R.R., Inc.*, 2017 US Dist LEXIS 202405, *29 [D. Vt. Dec. 8, 2017] [citing cases] ["Plaintiffs have not shown that by virtue of [defendant's] placement of rip-rap rock on a small portion of their property, they have been denied all effective use of the property, sustained irreparable physical damage to it, or have lost the property's entire fair market value. They have therefore failed to establish irreparable harm. This conclusion is underscored by the fact that the damages they allege are readily compensable through a monetary award."][2]).

While TILT cites to *Karabatos v Hagopian* 39 AD3d 930 [3d Dept 2007] as establishing that a landowner has sufficiently demonstrated irreparable injury based on activities consisting of excavation and removal of trees and/or vegetation, the court in *Karabatos* based its decision on the fact that the "defendant submitted no proof that he would be harmed by maintenance of the status quo" (*Karabatos v Hagopian*, 39 AD3d 930, 932 [3d Dept 2007]). In this case, Defendants would be harmed by being compelled to abide by TILT's overly restrictive interpretation of both the Conservation Easement and Declaration of Reservations. Under TILT's interpretations, the basic property rights that are available to all property owners generally, and to Defendants specifically in this case, including general property maintenance, would require TILT's prior approval. Most certainly, this restriction or denial of a basic property right is a direct and distinct harm to Defendants from maintaining the status quo under TILT's proposed injunction.

Further, while TILT cites to *Walsh v St. Mary's Church,* 248 AD2d 792 [3d Dept 1998] as establishing that tree removal constitutes irreparable injury, the plaintiff in *Walsh* was threatened

[2] See footnote 1 with regard to the application of Vermont law to this case.

with removal of several large trees *and the remains of family pets*. Here, by contrast, TILT is not threatened with the removal of the remains of family pets, which could not be replaced. Moreover, TILT does not even assert that it suffered from actual tree removal, or is threatened with further tree removal, but rather seeks compensation for damage that it alleges has already been done—namely, the undertaking of clearing of vegetation; this is the precise purpose for which RPAPL 861 ["Action for cutting, removing, injuring or destroying trees or timber, and damaging lands thereon"] exists and provides *monetary* relief.

Finally, TILT cannot rely upon the argument that only an equitable remedy is available to it by claiming that any potential damages incurred are difficult to calculate in money damages:

> Plaintiffs' arguments for why money damages are not the appropriate remedy here are unconvincing. It argues that such damages are difficult to calculate because of the unique, custom nature of the project . . . But courts have tools to address such difficulties — from expert testimony and appraisals to the use of alternative remedies such as quantum meruit, when appropriate. I do not say — and need not find — that Capri would ultimately, be entitled to a recovery in this case.

(*Dimeo v Evans*, 74 Misc 3d 1203[A] [Sup Ct, Albany County 2021]). An adequate remedy at law may be found "even if the monetary damages in this case are capable of calculation only 'with some difficulty' (*SportsChannel Am Assoc v National Hockey League*, 186 AD2d 417, 418 [1992]).

For the above reasons, TILT is not entitled to any equitable relief.

D. A BALANCING OF THE EQUITIES FAVORS DEFENDANTS – TILT'S ALLEGATIONS OF ALLEGED HARM ARE CONCLUSORY, CONTESTED BY DEFENDANTS, AND WOULD REQUIRE AN IMPERMISSIBLE CREDIBILITY DETERMINATION BASED ON AFFIDAVITS

A motion for a preliminary injunction must also be denied where a petitioner fails to establish that a balancing of the equities is in its favor (*Town of Brookhaven v MMCCAS Holdings, Inc*, 137 AD3d 1258, 1259 [2016]).

A balance of the equities cannot be supported by mere conclusory allegations (*Core Dev. Group LLC v Spaho*, 2019 NY Slip Op 33053[U] at *2 [Sup Ct, NY County 2019]). In this case, TILT has failed to prove by clear and convincing evidence that Defendants have violated the Conservation Easement and Declaration of Reservations.

In any case, credibility determinations cannot be made based on affidavits (*Bryne v Bryne*, 194 AD2d 640, 641 [1993]) ["the conflicting affidavits submitted by the parties raised clear issues of credibility which were to be determined by the trier of fact."]).

For these reasons, the balance of equities lies in Defendants' favor.

E. TILT'S FIRST CAUSE OF ACTION FOR A PERMANENT INJUNCTION SHOULD BE DISMISSED

Defendants request dismissal of TILT's Second Cause of Action for a Permanent Injunction.

This Court may dismiss TILT's cause of action seeking a permanent injunction despite there being no formal cross-motion for such relief; a motion for a preliminary injunction allows the Court, on its own initiative and without notice, to pass on the sufficiency of the underlying pleading, unlike a grant of summary judgment for one party *sua sponte*, which requires notice under CPLR 3211(c) (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 272, [1977]).

II.

AN UNDERTAKING IS REQUIRED IF A PRELIMINARY INJUNCTION IS ORDERED

The Court should deny Plaintiff's request for a preliminary injunction. However, in the event the Court grants Plaintiff's request for a preliminary injunction, in order to be effective, the Court must also order Plaintiff to provide a bond sufficient to satisfy any damages Defendants may suffer due to the injunction.

CPLR 6312(b) mandates that the movant provide an undertaking (usually a bond) contemporaneously upon the Court's issuance of a preliminary injunction order (*see Livas v Mitzner*, 303 AD2d 381, 383 [2003] ["CPLR 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking"]).

As the Court of Appeals has explained:

> To afford reasonable protection to the defendant against an erroneous grant of this special provisional remedy [a preliminary injunction], the plaintiff as beneficiary thereof is required to post an undertaking in an amount fixed by the court. If it is later finally determined that the preliminary injunction was improperly granted there will then be a ready source from which the defendant may recover for damages which he may have sustained.

(*Margolies v Encounter, Inc*, 42 NY2d 475, 479 [1977]).

Pursuant to CPLR 6312(b), the amount of the undertaking in an "amount [that is] rationally related to the amount of potential damages which the defendant established that she might sustain by virtue of the preliminary injunction if it were later determined that the plaintiff was not entitled to the preliminary injunction."

To the extent the Court grants TILT a preliminary injunction, Defendants request that the parties obtain leave to provide separate submissions with regard to the amount of the undertaking as TILT's proposed preliminary injunction would substantially interfere with Defendants' development plans.

III.

TILT SHOULD NOT BE PERMITTED TO MAKE NEW ARGUMENTS FOR THE FIRST TIME IN THEIR REPLY MOTION PAPERS

To the extent TILT attempts to make new arguments in its reply papers, the Court should disregard same (*see Dannasch v Bifulco,* 184 AD2d 415, 417 [1992] ["The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit

the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion"]).

CONCLUSION

For the foregoing reasons, Defendants Ron Clapp and Carleton Villa, LLC, respectfully request an Order:

(1) vacating the temporary restraining order;

(2) denying Plaintiff's motion for a preliminary injunction;

(3) to the extent the Court is inclined to provide a preliminary injunction, permitting the parties to brief separately the amount of the undertaking required by TILT under CPLR 6312(b); and

(4) providing such other and further relief which the Court deems just and proper.

Dated: April 22, 2024

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/s/ Julian B. Modesti

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Rule 202.8-b(c) of the Uniform Civil Rules for the Supreme Court and the County Court that, within the foregoing Memorandum of Law, the total number of words, inclusive of point headings and footnotes and exclusive of pages containing the caption, signature block and certificate of compliance, or any authorized addendum containing statutes, rules, and regulations, etc. is 4,548 and thus complies with Rule 202.8-b(a).

Dated: April 22, 2024
Syracuse, New York

HARRIS BEACH PLLC

/s/ Julian B. Modesti

Julian B. Modesti