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**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

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**APPEAL NO. 2021-0044**

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JOHN KLEIN,  
Appellant,

v.

MADELEINE A. BASSIL,  
Appellee.

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**BRIEF FOR APPELLEE**

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On Appeal from the Superior Court of the Virgin Islands, Division of St. Thomas  
Civil No. ST-2021-CV-00148  
(Hon. Sigrid M. Tejo)

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## **COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW**

The Superior Court correctly granted a preliminary injunction in Bassil's favor upon finding that the evidence and arguments presented at the hearing established that:

- (1) Bassil had a reasonable probability of success on the merits of her trespass claim;
- (2) Klein's defense of adverse possession was not sufficiently clear and convincing to prevent Bassil's trespass claim from proceeding to trial on the merits;
- (3) the irreparable harm to Bassil's property is imminent and continuing;
- (4) Klein's encroachment and trespass interferes with Bassil's right to use and maintain her property;
- (5) Klein would not suffer greater harm by granting the injunction because the status quo would be maintained; and
- (6) the public will not be impacted by this injunction and the public's interest is served by discouraging trespass between neighbors.

## **COUNTERSTATEMENT OF RELATED CASES AND PROCEEDINGS**

A Related Case, *Klein v. Secret Harbor Beach Associates, LP, et. al.*; ST-2020-CV-00420, is assigned to Judge Kathleen Mackay. J.A. 447-456. In that case, Klein requests injunctive relief and declaratory judgment, seeking access to Secret

Harbor Beach via a path located on the Parcel No. 2D-A side of the boundary between Parcel Nos. 2D-A and 2D-13 Estate Nazareth. Klein claims he has been using this path continuously since April of 2002. Klein alleges that his daily access to Secret Harbor Beach was blocked when the Secret Harbor Resort erected a fence on August 28, 2020, preventing access to the path and beach. This related case shows that until August 28, 2020, Klein admittedly accessed Secret Harbor Beach via this path and NOT via trails across Bassil's parcel No. 2D-12 Remainder Estate Nazareth.

### **COUNTERSTATEMENT OF STANDARD OF REVIEW**

This Court has jurisdiction over “[i]nterlocutory orders of the Superior Court of the Virgin Islands ... granting, continuing, modifying, refusing or dissolving injunctions.” *Yusuf v. Hamed*, 59 V.I. 841, 846 (V.I. 2013) (quoting V.I. Code Ann. tit. 4, § 33(b)(1)). This Court’s most recent case reviewing the standard of review on a preliminary injunction states:

We review the Superior Court's decision to grant or deny an injunction for **abuse of discretion**. *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012); *see also Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 698 (V.I. 2011) (“The decision to grant or deny a permanent injunction is reviewed for abuse of discretion.”) (quoting *In re Najawicz*, 52 V.I. 311, 328 (V.I. 2009)). “An abuse of discretion ‘arises only when the decision rests upon a **clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.**’” *Stevens v. People*, 55 V.I. 550, 556 (V.I. 2011) (citing *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003)). Furthermore, we review the Superior Court's factual findings of each injunction factor for clear error, and we exercise plenary review of its conclusions of law. *Yusuf*

*v. Hamed*, 59 V.I. 841, 848 (V.I. 2013) (explaining that “we review the Superior Court's factual findings regarding likelihood of irreparable harm, harm to the nonmoving party, and whether the injunction is in the public interest only for clear error.”).

*Sam's Food Distribs., Inc. v. NNA&O, LLC*, 73 V.I. 453, 459-60 (V.I. 2020) (emphasis added).

### **COUNTERSTATEMENT OF THE CASE**

In January of 2021, Madeleine Bassil discovered that bush and vegetation had been cut across her Parcel No. 2D-12 Remainder Estate Nazareth (“Bassil’s parcel”), creating trails connecting Parcel No. 2D-11 Estate Nazareth (“Klein’s parcel”) to the Secret Harbor Beach. Bassil sought to protect her parcel and ownership rights by serving Klein with a “cease and desist” notice on February 15, 2021, demanding that he immediately stop trespassing upon her property. Klein refused to “cease and desist” and instead claimed rights to traverse Bassil’s parcel by adverse possession. The statutory period to acquire rights by adverse possession is 15 years and required Klein’s use of trails traversing Bassil’s parcel to be open, notorious, continuous and under color of title.

On April 20, 2021, Bassil filed her complaint seeking a temporary restraining order, preliminary and permanent injunction, trespass, declaratory judgment to quiet title, and damages for slander of title and intentional infliction of emotional distress. The Trial Court denied the temporary restraining order and scheduled an evidentiary hearing on the preliminary injunction. After conducting the hearing July 27 and 28,

2021, the Trial Court granted a preliminary injunction. Klein appealed the Order granting the preliminary injunction.

### **COUNTERSTATEMENT OF THE FACTS**

In 2002, Madeleine Bassil (“Bassil” or “Appellee”) and her husband, Terry Anderson, purchased the waterfront Parcel No. 2D-12 Estate Nazareth (“Parcel No. 2D-12”) through their realtor, Lisa Curreri. Curreri, Anderson, and Bassil all testified that in 2002, the parcel was undeveloped and did not have any paths or trails. J.A. 291, 226, 228, 247. Anderson testified that the parcel was covered in brush and plants with no established route down to the sea. J.A. 228-29. Bassil also testified that when she and Anderson purchased the parcel there were no trails on the property. J.A. 247. From 2002 to 2009, Anderson visited the parcel periodically and would park at the top of property along the estate road and pick his way down through the bushes to the sea to shore dive. J.A. 229-30. During all of his visits to Bassil’s parcel from 2002 to 2009, Anderson never observed any established trails. J.A. 230; *see also*, Affidavit, at J.A. 107-108.

Similarly, Bassil visited her parcel from 2002 to 2015. Notably, in 2012, Bassil stayed at the Secret Harbor Resort with her sister and her friend, when they attempted to walk the parcel but it was too overgrown. J.A. 248-49. During 2015, Bassil again visited her parcel and stayed at the Secret Harbor Resort. JA. 251. As

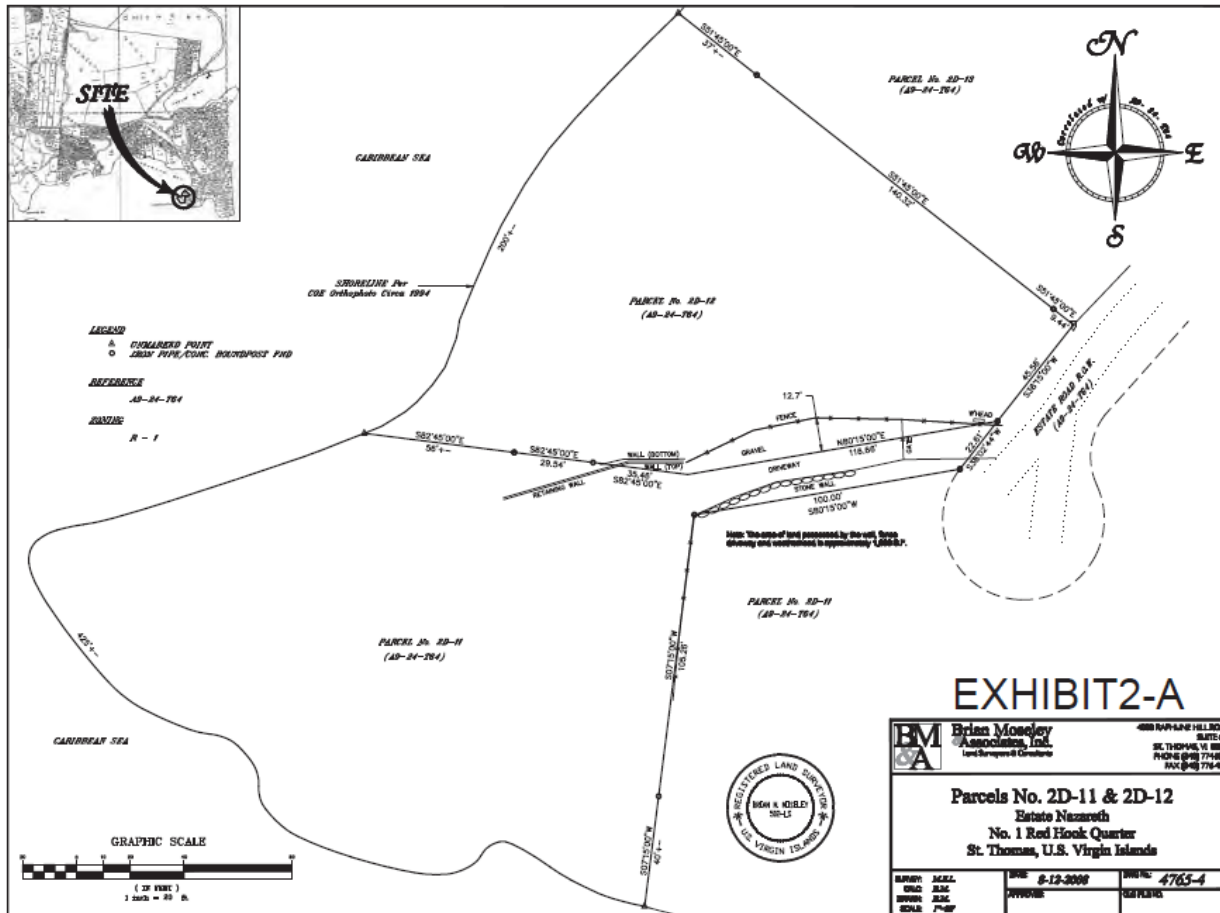


usual, she walked along the beach over to her parcel and she did not observe any trails there. J.A. 251.

In 2004, Appellant (“Klein” or “Appellant”) purchased Parcel No. 2D-11 Estate Nazareth, St. Thomas, U.S.V.I. (“Parcel No. 2D-11”), which was developed with a private residence. In 2008, Klein extended his driveway and substantially encroached upon Bassil’s parcel. J.A. 183-84. To resolve that encroachment, Klein eventually purchased the piece of Bassil’s parcel where his driveway was constructed in 2008. J.A. 183-84. However, before Klein agreed to buy the land, he sent Bassil correspondence concerning his encroachment **wherein he similarly asserted that he owned her land by adverse possession.** J.A. 187-88 (emphasis added). Bassil traveled to St. Thomas in 2008 to address the legal dispute over Klein’s encroachment, and she testified that at that time she did not observe any trails on her parcel. J.A. 250.

Following the sale of a piece of her property to Klein, Bassil’s parcel was renamed “Parcel No. 2D-12 Remainder.” Ryan Wischart, owner of Brian Moseley & Associates, confirmed that the boundary survey dated August 12, 2008 (Plaintiff’s Exhibit 2A, at J.A. 421) would have shown paths and walkways on Bassil’s parcel if they had existed in 2008. J.A. 212; 220- 21.

The survey below depicts the layout of the parcels after Klein’s driveway encroachment—Parcel No. 2D-12-1 Estate Nazareth (“Driveway Parcel”) and Parcel No. 2D-12 Remainder (“Bassil’s parcel”) (Plaintiff’s Exhibit 2A, J.A. 421):



Bassil listed her parcel for sale with Lisa Curreri in 2014, 2015, 2017, and 2020. J.A. 293, 296.<sup>1</sup> Three local realtors all testified that they never observed any established trails traversing Bassil’s parcel until they were first discovered in late 2020 or early 2021, as discussed below. J.A. 294; 329-31; 367-376.

<sup>1</sup> Klein admitted that he extended offers to purchase Bassil’s parcel in 2014 and 2015. J.A 191-192.

Sharon Hupprich, a real estate broker and owner of Calypso Realty, testified that she is very familiar with Bassil's parcel because she sold the parcel next door, 2D-13 Estate Nazareth ("Parcel 2D-13"). J.A. 366. Parcel 2D-13 is a short-term vacation rental that Hupprich managed on a weekly basis from 2005 to 2017. J.A. 367. Concerning the condition of Bassil's parcel, Hupprich testified:

Q. All right. And so during that 12-year period from 2005 to 2017, did you ever observe any established trails on my client's property next door in 2D-12?

A. Never.

Q. How would you describe the general condition of my client's property during that period?

A. It was lots of bush and lots of catch-n-keep.

J.A. 367.

In 2015, Hupprich engaged Don Hebert, a professional real estate photographer to take still and aerial photography of Parcel 2D-13. J.A. 368-69. Hupprich described the area as "a direct helicopter view down onto my client's property on the beach house and also your client's property with all the trees and the bush on it." J.A. 372-73.

Hupprich identified Hebert's photographs from Plaintiff's Exhibit 1 (J.A. 418-420), including the photograph below, which clearly show a complete absence of trails on Bassil's parcel in 2015:



Hupprich also testified that although she no longer manages Parcel 2D-13, she regularly visits the Secret Harbor Beach Resort and first observed trails on Bassil's parcel eight to nine months ago, stating: "it was like a road for goodness sake, a road way, a swat[h] [sic] cut through the property." J.A. 374-75. During the Trial Court's questioning, Hupprich testified:

THE COURT: Ms. Hupprich, you said you couldn't walk the property because of the catch-n-keep and such. But if you wanted to, would you be able with a machete to walk through that property between 2005 and 2017.

THE WITNESS: Yes, if you cut it, but I would not do that on somebody's else property. There will be no reason for me to do

that.

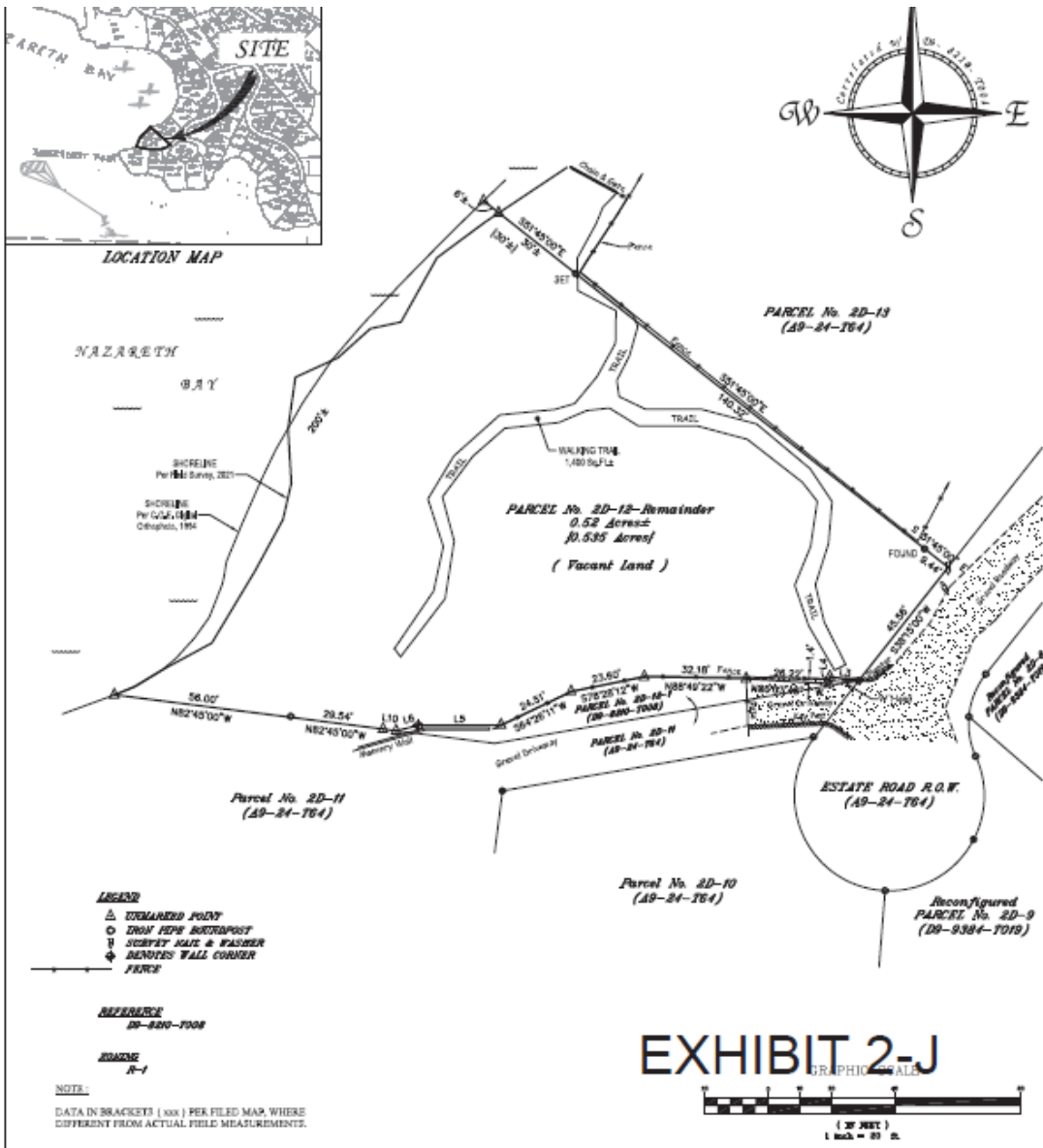
J.A. 376.

In late 2020 or early 2021, Bassil first learned of the trails on her parcel. J.A. 253. Bassil sought to protect her parcel and ownership rights by serving Klein with a “cease and desist” notice on February 15, 2021. J.A. 30-34. Klein refused and claimed that he had acquired rights to Bassil’s parcel by adverse possession.

Consequently, in early 2021, Lisa Curreri installed surveillance cameras on Bassil’s parcel at her request. Curreri testified she can view the footage on her phone via the Blink App. J.A. 301-303; 307-308. Video surveillance footage was played during the hearing, showing many of Klein’s renters traversing Bassil’s parcel without her permission. J.A. 309.

Also in 2021, Bassil hired Ryan Wisheart to prepare a land title survey of her parcel, which depicts a newly created “meandering path” labeled as a trail and a walking trail, that proceeds “from the estate road area where it intersects Parcel 2D-12-1 and 2D-11 and proceeds through the property, towards the ocean.” J.A. 205. The survey notes state “the trail meandering through the surveyed property apparently opened and utilized by the owner of Parcel No. 2D–11.” J.A. 207.

Plaintiff's Exhibit 2J, at J.A. 204; 422 is shown below:



Renix Charles is a process server and licensed hobbyist drone pilot. J.A. 271. All of Charles's drones have cameras. J.A. 272. In 2021, Charles took drone photography and video of Bassil's parcel. J.A. 272-73. Charles's drone photographs were admitted into evidence as Plaintiff's Exhibits 8 and 9. J.A. 274; 425-443. The photographs clearly depict the new paths cut through the bush on Bassil's parcel. J.A. 275-76. Charles testified that the paths were clear and he was able to walk them.

J.A. 277. When Judge Tejo asked if Charles was able to see the paths from the public road, he responded that he could not. J.A. 278.

Klein testified that he started his AirBnb rental business in January of 2021, and that his AirBnb renters sign a waiver. However, Klein admitted that Bassil is not included within the terms of the waiver and he has never discussed the waiver with her. J.A. 524-25. He advertises the trail to AirBnb renters in the following manner:

we talk about private access to the beach that you can go directly from the properties and walk down -- we call it a natural trail to get to the beach; it's a natural trail. I call it that because I haven't paved any concrete or anything like that. We just try to maintain it with rakes, a pick once in a while and cut it back. So you can walk up and down.

J.A. 499. Klein testified that Bassil's parcel is undeveloped except for the trails that he created. J.A. 521. Klein admitted to bringing workmen onto Bassil's parcel to cut the trails. J.A. 527-28. Klein also admitted that he has never paid any of Bassil's property taxes. J.A. 179.

Klein presented a number of friends to serve as witnesses to support his position that he has been traversing Bassil's parcel for at least 15 years; however, the objective evidence to the contrary cannot be disputed. J.A. 546.

When placed side by side, the photographs from 2015 (as shown above), the 2019 Google Earth Images (on the left), and photographs from 2021 (on the right) clearly show that there were no paths before late 2020 or early 2021:



J.A. 92.

Even Klein’s own witnesses admitted that they were largely unaware of the paths and one witness admitted that the paths were “secret.” J.A. 547. Alfredo Melhem testified that he knows Klein from traveling in the Virgin Islands in the 1990’s. J.A. 384. Melhem testified that when he visited Klein’s parcel in 2003 or 2004:

We went through a path that started up on the low hill and went down that path to the beach. I mean, it wasn't a very big path. It wasn't very dirty, with lots of vegetation and it seems like it was a covert path. I mean something like, I don't know if it is the right word, **a secret path**, but something like that.

J.A. 386-87. On cross examination, Melhem emphasized that it was a “secret path” when he testified: “I said, I don't know if this is a right word but you know, it was



like a **secret path**, like something was hidden, you know, with all the vegetation.”

J.A. 390. The Court inquired further into the meaning of “secret” to which Melhem testified:

I mean, when you were in the path, okay, it was very covered of vegetation. **So it seems like a secret, okay.** It is not because it is secret path that I decided, but it was a lot of bush, sometimes you would have to go through like this to advance (indicating.)

J.A. 392 (emphasis added).<sup>2</sup>

After hearing this evidence, the Trial Court requested supplemental briefs.

J.A. 578-602. By memorandum opinion and order, the Trial Court granted Bassil’s Motion for a Preliminary Injunction, filed May 7, 2021. J.A. 603. Klein then appealed that decision. J.A. 616.

### **SUMMARY OF THE ARGUMENT**

Appellant raises two issues on appeal. First, whether the Trial Court erred in its application of the preliminary injunction factors in granting Bassil’s injunction. Klein argues that Bassil cannot prove irreparable harm because this is not a case where she is experiencing imminent bodily injury, such as with domestic violence. Klein categorizes the case as a “garden-variety” dispute over whether he has a right to trespass on his neighbor’s property. The overwhelming evidence presented

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<sup>2</sup> The Court also stated, “And for the record, I don't know if you were looking at the camera or Attorney Crain, but Mr. Melhem was using his hands in a gesture that was pushing back things that were in front of him when he was walking on the path.” J.A. 393.

establishes that Klein wants full reign over the Secret Harbor waterfront, and when meets resistance, he simply claims adverse possession. Here, the overwhelming evidence shows that Klein's adverse possession claims are not supported by clear and convincing evidence. Deprivation of Bassil's use and enjoyment of her parcel is sufficient to establish the likelihood of irreparable harm under these circumstances.

The second issue Appellant raises is that the Trial Court erred in finding that Bassil will suffer irreparable harm upon the following facts established at the hearing: (1) Klein and his AirBnB renters are trespassing; (2) Bassil's parcel has been damaged; (3) Bassil faces premises liability due to AirBnB renters; (4) Klein has created a cloud of title on Bassil's parcel. Klein focuses on the irreparable harm aspect of the preliminary injunction factors because the evidence in support of the other three factors overwhelmingly favors Bassil.

Bassil submits that the Trial Court correctly applied and analyzed the preliminary injunction factors together with the evidence presented at the hearing. The abuse of discretion standard is a difficult burden to meet, and the Trial Court does not inherently abuse its discretion when it assesses credibility of witnesses.

The standard of review on the Trial Court's decision to grant the preliminary injunction is the abuse of discretion standard. Appellant has not established that the Trial Court made any findings of fact that were clearly erroneous or conclusions of law that were erroneous, or that any application of the law to the facts was improper.

Thus, this Honorable Court should defer to the Trial Court’s judgment as to credibility of the witnesses and affirm its thorough analysis of the legal issues because the Trial Court did not err in any of its decisions.

### ARGUMENT

#### **A. The Trial Court did not err in its application of the *Petrus* preliminary injunction factors.**

The Trial Court correctly applied the four *Petrus* factors using a “sliding scale test” as required by the Supreme Court of the Virgin Islands, in granting the “extraordinary and drastic remedy” of a preliminary injunction. J.A. 606. Klein argues that Bassil was required to make a clear showing that she was likely to prevail on the merits. Appellant’s Brief, at 7. This misstates the standard—Bassil was required to make a **clear showing** that she was entitled to the injunctive relief, which required her to show **reasonable probability of success** on the merits, as opposed to a clear showing on the merits. Nevertheless, Bassil presented overwhelming evidence that established that Klein cannot prove by clear and convincing evidence he has rights to Bassil’s parcel by adverse possession.

The four *Petrus* factors the Court correctly considered are:

- (1) whether the movant has shown a reasonable probability of success on the merits;
- (2) whether the movant will be irreparably injured by denial of the relief;
- (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and
- (4) whether granting the preliminary relief will be in the public interest.

J.A. 606 (citing *Yusuf v. Hamed*, 59 V.I. 841, 847 (V.I. 2013)). The Supreme Court adopted the sliding-scale test “to provide the Superior Court with **greater latitude in exercising its equitable authority.**” *3RC & Co. v. Boynes Trucking Sys.*, 63 V.I. 544, 553 (V.I. 2015) (emphasis added). The sliding scale test understands that “a strong showing on one factor may decrease the weight assessed to other factors.” *Id.* at 550-51. Although irreparable harm is an important factor, it is not the conclusive factor. Thus, under the “sliding-scale test” if the likelihood of success on the merits is very strong, then a showing of irreparable harm is less decisive. J.A. 607.

In *Yusuf*, the Supreme Court stated that to show a reasonable probability of success on the merits, it is not necessary to show that the movant “will actually prevail on the merits at trial, or that his success is ‘more likely than not,’ only that he has ‘a reasonable chance, or probability, of winning.’” *Yusuf*, at 849; *see, also*, J.A. 607. The Superior Court also correctly explained that the success on the merits factor must be evaluated in combination with injury claims. J.A. 607. This explanation from the Superior Court is consistent with the Supreme Court’s expansion on *Yusuf* in *3RC & Co.*, as it stated:

here the moving party makes out a very strong showing on the merits — for example a clear and convincing one — injunctive relief may still be appropriate even where the moving party's showing of “certain and imminent harm for which a monetary award does not adequately compensate” is much weaker, so long as the nonmoving party's likelihood of irreparable harm is similarly very low.

*3RC & Co.*, at 556. The Trial Court properly considered all four factors, while also giving greater weight to the factors of likelihood of success on the merits and irreparable injury in reaching its decision. J.A. 610.

**B. The Trial Court did not err in its balancing of the *Petrus* factors**

Klein argues that Bassil did not demonstrate irreparable harm and therefore, the Trial Court erred in granting the injunction. Appellant’s Brief, at 5. The Trial Court analyzed the irreparable harm factor thoroughly, explaining that in the Virgin Islands, the loss of a property right does not automatically constitute irreparable harm; however, that real property ownership includes “intangible benefits” for which monetary damage is not always adequate. J.A. 612-13. Indeed, Bassil’s claims against Klein merit the Court’s intervention to prevent him from completely divesting her of her real property rights. This is a case where the Trial Court’s discretion in exercising its equitable rights is clearly warranted and necessary.

**1. Klein’s continuing trespass is sufficient to establish irreparable harm because monetary damages would be difficult to calculate**

In reaching its decision, the Trial Court discussed the overwhelming evidence presented of Klein’s trespass and his encouragement of others to trespass on Bassil’s parcel. J.A. 610-11. Klein argues that the Trial Court erred in finding that his admitted trespass constitutes harm, much less irreparable harm. Yet, in its discussion of this harm, the Trial Court explained that calculating money damages based on each of these trespassers would be extremely difficult, especially since it is unclear

how many trespassers there have been. J.A. 612. Although trespass may be a harm that can be remedied by a monetary award; here, the Trial Court correctly decided the issue by considering the difficulty in calculating the monetary award. J.A. 612 (citing *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, 6 V.I. 584, 597 (V.I. 2018)). Irreparable harm can be established when monetary damages are difficult to calculate **or** are inadequate. *Yusuf*, 59 V.I. at 854 (emphasis added). Notably, the standard does not require that monetary damages be difficult to calculate and that they are inadequate; it only requires one or the other. The Trial Court correctly held that although monetary damages could be calculated, in theory, it would be so difficult under these unique circumstances that Bassil met the standard for irreparable harm.

## **2. The loss of unique real property is inherently irreparable**

At its essence this case concerns the potential loss of real property. Under general principles of law and equity, every piece of real property is unique and property ownership provides intangible benefits that cannot easily be remedied with monetary damages.” J.A. 613. The Trial Court recognized that both Bassil and Klein presented evidence of the uniqueness of Bassil’s Parcel, as one of the last undeveloped waterfront properties in Secret Harbor. J.A. 613. Further, the Trial Court correctly observed that inherent in real property rights is the ability of the property owner to control who enters or does not enter their property. Klein’s categorization of Bassil as an absentee owner does not diminish or negate her right

to protect her property by seeking Court intervention when her attempt to prevent Klein's trespass failed. J.A. 613.

Klein argues that the circumstances of Yusuf are distinguishable from this case because Hamed clearly faced irreparable harm by Yusuf's unilateral actions that were destroying components of their grocery business in such a way that these injuries could not easily be undone after trial. Appellant's Brief, at 12. Here, the Trial Court recognized that correcting the harm caused to Bassil by Klein's ongoing trespass would require a lengthy litigation process that would not necessarily be adequately resolved by a monetary award. J.A. 612-13. In *Yusuf*, this Court correctly stated that "Hamed's loss of control of a business that he has the legal right to co-manage 'would be irreparable by its very nature.'" 59 V.I. at 856. Here, just as in *Yusuf*, Bassil's loss of control of her unique parcel would also be irreparable "by its very nature."

The inherent value of real property ownership and control in the Virgin Islands is well-known. Because this dispute involves unique real property, the question of irreparable harm is the simplest of the preliminary injunction factors to satisfy and has been well-settled for decades. Courts in the Virgin Islands are familiar with the concept that the loss of real property is always an irreparable injury. In *Gladfelter v. Fairleigh Dickinson Univ.*, 25 V.I. 91 (V.I. Super Ct. 1990), the Virgin Islands Court granted plaintiffs' request for a preliminary injunction, finding that plaintiffs would

suffer irreparably injury if they lost a right of first refusal to purchase the laboratory facility. The Court stated:

“In *United Church, Etc. v. Medical Center Commission*, 689 F.2d 693, 701 (7th Cir. 1982), the court stated that “it is settled beyond the need for citation that a **given piece of property is considered to be unique, and its loss is always an irreparable injury**”. Other authorities have indicated that a preliminary injunction is appropriate where property is involved, since property is always unique under general principles of the law of equity, and its possible loss or destruction usually constitutes irreparable harm. See *Bennett v. Dunn*, 504 F. Supp. 981 (D. Nev. 1980); 42 Am. Jur. 2d “Injunctions” §§ 48-49 (1969).”

25 V.I. at 99 (emphasis added).

Several other Virgin Islands cases are also instructive on the question of irreparable harm and real property. *Hansen v. Gov't of the V.I.*, 53 V.I. 58 (V.I. Super. Ct. 1999) involved an exchange agreement that would divest plaintiffs of the use of Camp Arawak on St. Croix. Camp Arawak was donated to the Government of the Virgin Islands via a warranty deed that contained a provision that the people of the Virgin Islands and its visitors “shall enjoy the benefits of this land and the historic structures located there on in perpetuity.” 53 V.I. at 67-8. The Government of the Virgin Islands accepted Camp Arawak “knowing that it is being given to the people in perpetuity for the express and direct purpose of beach, park, and other public recreational use.” *Id.* at 68. The plaintiffs in Hansen sought an injunction to prevent the Government from implementing the exchange agreement, which would allow a sixty thousand square foot rocket factory to be erected on the Camp. *Id.* at 90. The Government argued that the plaintiffs could not be irreparably harmed because they



would still have access to alternative recreational and historical sites on St. Croix, they would still have access to the beach and shorelines of the Camp, the Coastal Zone Management process would preserve the historic structures and artifacts, and the historic buildings would be restored and available for tours. *Id.* The Court explained that the

Government and CST [Caribbean Space Technologies, LLC] simply fail to recognize the value of property ownership. They do not address the intangible benefits associated with property ownership, such as the increased sense of pride, well-being and security attendant to the right to choose when and how to use, maintain and cherish one's property or to prohibit its unauthorized use.

*Id.* at 90-1.

Here, Bassil testified about her visit in 2012, when she sought to “show off” her unique waterfront property to her friends and family. J.A. 248. Additionally, the Trial Court correctly noted that experienced realtors on St. Thomas also testified about the uniqueness of Secret Harbor and Bassil's Parcel. J.A. 613. Bassil's plight here mirrors the irreparable harm that the plaintiffs in *Hansen* faced when the Government attempted to deprive them of their use of Camp Arawak. Klein claims that he now effectively owns Bassil's parcel by adverse possession. Since the paths traverse Bassil's entire parcel, Klein intends to completely divest Bassil of her parcel, resulting in certain irreparable harm.

### **3. The purported harm Klein faces is purely speculative**

Klein complains that his short-term rental business will suffer if he cannot acquire Bassil's parcel by adverse possession. Appellant's Brief, at 23. This contrived harm is as speculative as the harms claimed by the defendants in *Hansen*. Klein testified that his rental operation has only been in existence since January 2021. J.A. 523. In *Hansen*, CST had only been in existence for 18 months and could not prove that competitors would get a head start in an increasingly competitive market. *Id.* at 92. Here, Klein cannot establish true harm if his rental guests must simply walk or drive the short distance down the road to access the beach rather than by trespassing on Bassil's Parcel. Klein also alleges harm by being unable to swim in the sea at Secret Harbor without traversing Bassil's parcel. This is simply untrue. He can use the public beach access at Secret Harbor or drive to any other beach on St. Thomas. Klein's minor inconvenience does not allow him to claim unfettered access to the entire Secret Harbor Beach area.

### **4. Klein has never had any legal right to Bassil's parcel**

Klein argues that *Sam's Food Distribs., Inc. v. NNA&O, LLC*, supports the proposition that interference with another's real property rights is not *per se* irreparable harm. 73 V.I. 453 (V.I. 2020). However, a thorough examination of the facts of *Sam's Food* reveals that "private persons, in the exercise of their constitutional right of freedom of contract, may ordinarily impose whatever restrictions upon the use of land which they convey to another that they desire to

impose.” 73 V.I. at 463-64. This right also includes the right to refrain from granting any rights whatsoever.

Here, Bassil testified that she has never granted Klein any right to access her property at all, by easement or otherwise. J.A. 266. In *Sam’s Food*, NNA&O purchased property at auction, which enabled it to obtain an express easement over the property it purchased. 73 V.I. at 458. The prior owner of the land had entered into a lease agreement with Sam’s Food’s predecessor in interest for increased access to the property for parking. *Id.* The dispute arose when NNA&O asked Sam’s Food to stop using NNA&O’s building to mount electrical conduit used to provide electricity to the neighboring building. *Id.* at 459. Sam’s Food countered that the conduit was mounted on its wall was not NNA&O’s and that NNA&O’s easement was only for ingress and egress. NNA&O sought a preliminary and permanent injunction to “enjoin SMI from: (1) blocking NNA&O’s access to any of its eight entry doors at its commercial warehouse, (2) blocking its ingress, egress, loading, unloading or parking on Lot 171, and (3) mounting its electrical conduits on NNA&O’s warehouse.” *Id.* The Superior Court relied on the holding in *Yusuf* to conclude that “NNA&O would suffer irreparable harm if SMI was not enjoined from blocking NNA&O’s access to its eight cargo bay doors, because without such access, NNA&O would effectively be incapable of utilizing its warehouse for its reasonable, intended commercial use: the storage of furniture.” *Id.* at 468. The Supreme Court affirmed the Superior Court’s finding of irreparable harm.

*Sam's Food* helps to illustrate that Klein has absolutely no rights to Bassil's parcel. He has never been granted permission, a license, easement, lease, or deed to the property he now claims. In short, he has no "color of title." Klein never even revealed to Bassil his trespass or the commercial use of the trails he cut. Then, once his trespassing was discovered, he conveniently claimed that he had been (secretly) trespassing on her parcel for 15 years.<sup>3</sup> However, this is not how claims for adverse possession or prescriptive easement prevail. Adverse possession and prescriptive easement claims to another's real property cannot be a secret; they must be open and notorious. Klein intentionally hid from Bassil his use of her parcel. Bassil has suffered and she will continue to suffer irreparable harm from the lack of control of her own parcel, just as NNA&O would have suffered irreparable harm from being incapable of using its lot for its intended use. Here, Bassil is being prevented from using her parcel for her intended use and enjoyment without Klein and his commercial guests trespassing.

**5. Real property that is irreparably harmed does not have to be a sacred monument**

Klein asserts that here, as in *SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC*, "there was not wrecking ball at the gate, preparing to knock down a sacred monument ..." Appellant's Brief, at 14 (citing 62 V.I. 168 (V.I. Super. Ct. 2015)).

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<sup>3</sup> Coincidentally, this occurred when Klein began his short-term rental business.

In *SBRMCOA*, the defendants owned the property plaintiffs claimed an easement over. Here the opposite is the case, Bassil is the record owner of Parcel 2D-12 Remainder, and Klein claims he has rights to access Bassil's parcel with no "color of title" whatsoever. In *SBRMCOA*, the dispute arose when the defendants wanted to change the easement rights that had already been granted to the plaintiffs. Again, here, Klein has **never been granted any rights to Plaintiff's Parcel**. The dispute between Bassil and Klein would more closely mirror *SBRMCOA*, if Klein had acquired rights to an easement, which he has not, and then Bassil had prevented Klein from accessing the easement. The defendants in *SBRMCOA* took physical action to prevent plaintiffs from accessing the easement and the plaintiffs wanted the access restored; the plaintiffs then sought to the Court's help to enjoin the defendant from continuing to block plaintiffs' access to the easement. Again, this is the opposite scenario of that of the instant case—here, Bassil is the rightful and record owner of her Parcel and she has not taken any physical action against Klein from which she must be enjoined. Klein, on the other hand, continued to trespass and to encouraged others to trespass on Bassil's parcel without any authority that would validate his trespass. Under these circumstances, Bassil urgently required the Court's intervention to prevent Klein from continuing his damage.

Notably, in *SBRMCOA*, the Superior Court denied plaintiffs' motions for a temporary restraining order and a preliminary injunction and noted that plaintiffs' claim on the merits was weakened by defendants' argument based on the doctrine of

unclean hands. 62 V.I. at 206.<sup>4</sup> The doctrine of unclean hands applies to the facts of this case as well. The Superior Court explained, “It is an ancient and established maxim of equity jurisprudence that he who comes into equity must come with clean hands. If a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing.” *Id.* at 205-6 (emphasis added). Evidence from multiple witnesses in this case established that Klein purposefully kept his trespasses secret. To acquire rights to real property by adverse possession, the party seeking those rights must act in a manner that is open and notorious. Here, the evidence shows that Klein’s alleged use of Bassil’s parcel has not been open and notorious.

**6. A return to the status quo is required and serves the public’s best interests**

The status quo, defined as “the last, peaceable, non-contested status of the parties.” 59 V.I. at 856. Here, the last peaceable moment was before Klein surreptitiously cut trails across Bassil’s undeveloped waterfront property, leading to this litigation. Bassil was the record owner of Parcel 2D-12 Remainder Estate Nazareth holding clear title to a valuable and unique waterfront parcel on Secret Harbor. She had complete control over her land and could choose to build a home,

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<sup>4</sup> The court found that plaintiffs had unclean hands: “[a]t the hearing, [d]efendants provided testimony from Craig Cerny [plaintiff] showing that he broke into the work area at the pool deck, destroyed barriers, trespassed on Beachside’s property, and removed Beachside’s personal property.” 62 V.I. at 206.

obtain a mortgage on the property, gift her parcel to her daughter, or sell to a third-party.

To accept the current status quo, in which Appellant and his commercial guests are actively trespassing across Bassil's parcel without her permission, creates an incentive for persons to act with impunity by taking what they want. Returning to the status quo of allowing Bassil to control her parcel is in the public's best interest. A policy that encourages parties to secretly encroach on their neighbors' property and later claim adverse possession cannot be a policy supported or encouraged in the Virgin Islands, regardless of whether the party lives here full-time, part-time, or only visits occasionally.

Klein does not hold title or any claim or color of title to any portion of Bassil's parcel. While it is true that the preliminary injunction hearing was not a trial on the merits, the record below is insufficient to establish that he has any valid legal rights to Bassil's parcel.

### **7. The public interest analysis favors Bassil**

“The public interest factor will typically favor the moving party ‘if [it] demonstrates both a likelihood of success on the merits and irreparable injury.’” *Sam's Food Distribs., Inc.*, 73 V.I. at 470. Here, the Trial Court properly found that Bassil demonstrated a likelihood of success on the merits and irreparable injury. Nevertheless, Klein argues that his AirBnB business is more important than upholding the property rights of absentee landowners who do not employ caretakers.

Appellant's Brief, at 25. Klein believes that his AirBnB business cannot be successful without being able to advertise beach access, but he cannot prove this and he has beach access just down the road in any event. *Id.* Klein argues that the Trial Court erred in failing to consider his AirBnB business when it concluded that the injunction would have little effect on public activities and the public will not be impacted. *Id.* at 26. The mere fact that Klein and his guests must now walk a short distance further down the road to access the beach does not establish a significant public impact.

Bassil is not a full-time resident of St. Thomas and Klein apparently believes that entitles him to traverse her parcel and claim rights through adverse possession. The fact that Bassil is an off-island owner does not render her property rights less valid than those of a full-time resident of the Virgin Islands.

Klein argues that tax revenue will decline because the number of tourists patronizing his AirBnB will decline. Appellant's Brief, at 25. As the decisions in *Hansen* and *Sam's Food* explained, these assertions of reduced business income are purely speculative. To prevail on the public interest factor, Klein must show that the Trial Court's decision was "completely devoid of minimum evidentiary support or ... bears no rational relationship to the supportive evidentiary data." 73 V.I. at 471. Simply stated, the Superior Court did not err in finding that granting Bassil's injunction to prevent Klein and his guests from trespassing on her parcel would not affect public activities.



## **CONCLUSION**

Appellant failed to establish that the Trial Court ignored or incorrectly considered evidence presented at the hearing, made any clearly erroneous findings of fact, errant conclusions of law, or improperly applied the law to the facts of this case. The Trial Court did not commit any reversible errors. Thus, the Superior Court's Memorandum Opinion and Order granting the Preliminary Injunction is sound and this Court should uphold the Trial Court's decision.

Respectfully Submitted,

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## **CERTIFICATIONS**

### **CERTIFICATION OF BAR MEMBERSHIP**

Counsel certifies pursuant to Virgin Islands Rule of Appellate Procedure 22(1) that he is a member of the bar of the Supreme Court of the Virgin Islands.

*/s/Matthew J. Duensing*

### **WORD COUNT CERTIFICATION**

Counsel certifies that Appellee's Brief complies with Virgin Islands Rule of Appellate Procedure 22(f) and contains 6387 words of the 7800 word limit.

*/s/Matthew J. Duensing*

### **CERTIFICATE OF SERVICE**

We hereby certify that on this 27<sup>th</sup> day of September, 2022, I electronically filed via the C-Track filing system, the foregoing with the Clerk of Court, which will send a notification to the following:

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