STATE OF NEW YORK
SUPREME COURT COUNTY OF HAMILTON

FRIENDS OF THAYER LAKE LLC, et al.

Plaintiffs,

-against-

PHIL BROWN, et al.,

Defendants,

and

THE STATE OF NEW YORK and the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Intervenors-Defendants.

Index No. 6803-10

RJI No. 17-1-11-0078

Hon. Richard T. Aulisi

PLAINTIFFS' MEMORANDUM OF LAW IN REPLY TO DEFENDANT'S AND STATE'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant Phil Brown admits to entering Plaintiffs' property (known as the "Mud Pond Parcel") without permission on May 21, 2009. Defendant intentionally paddled his canoe past posted-signs and onto Mud Pond. After paddling to the far end, he hiked his canoe 500 feet down the outlet brook, past an unfloatable rapids, and paddled the pond's outlet brook and Shingle Shanty Brook until he reentered adjacent State-owned land known as the Whitney Wilderness. Though Defendant claims otherwise, Plaintiffs have demonstrated that New York's small brooks limited to use only by canoes are not public highways under the common law standard adopted by the Court of Appeals in *Morgan v. King*, 35 NY 454 (1866), and most recently affirmed in *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591 (1998). Therefore, by virtue of Defendant's admissions with respect to his entering onto the Mud Pond Parcel, Plaintiffs have proved their trespass claim, their entitlement to a hearing on the issue of damages and their entitlement to a declaratory judgment finding the pond and small brooks at issue here are not navigable-in-fact public highways. This Court must dismiss the Defendant's and State's motions for summary judgment and grant Plaintiffs' cross-motion for summary judgment.[1]

[1] Plaintiffs submit herewith (1) an Affidavit of Dennis J. Phillips, Esq., dated Nov. 2, 2012, hereinafter referred to as the "Phillips Reply Aff." and (2) an Affidavit of Donald Brandreth Potter, dated Oct. 26, 2012, hereinafter referred to as the "Donald Potter Reply Aff." The Affidavit of John W. Caffry, Esq., dated Oct. 19, 2012, is hereinafter referred to as the "Caffry Reply Aff."

ARGUMENT

I. MUD POND, ITS OUTLET BROOK AND SHINGLE SHANTY BROOK ARE NOT NAVIGABLE-IN-FACT PUBLIC HIGHWAYS

a. Introduction

The brooks at issue here on Plaintiffs' property are small, winding affairs capable of floating only canoes and kayaks. *See* Video of the Mud Pond Outlet, Ex. A to Affidavit of Justin B. Potter, dated Sep. 25, 2012. Defendant and State theorize that "navigability is equated with floatability, including small boats, canoes, and, even single logs when a waterway will not allow passage by any boat" (State's Mem. of Law, n.3 at p.16; *see also id.* at 18); but their theory, under which any privately-owned section of brook capable of floating any boat for any purpose is a public highway, is not supported by the facts and law of 150 years of decisional case law interpreting the common law doctrine adopted in *Morgan v. King*, 35 NY 454 (1866), and affirmed in *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591 (1998). *See Mohawk Valley Ski Club, Inc. v. Town of Duanesburg*, 304 AD2d 881, 883 (3d Dep't 2003) (referring to *Adirondack League Club* and stating that "the Court of Appeals reaffirmed the rule set forth in *Morgan*").

Fundamental to the doctrine of navigability-in-fact is the assumption that not every brook or waterway has practical utility as a public highway and that some brooks remain in the exclusive use of their private owners. Plaintiffs' Mem. of Law, p.13-14. Defendant's and State's theory does not distinguish between small brooks useable by their private owners for recreation in the smallest of boats and those that have sufficient capacity for transport to make them so useful to the public as

highways. In the later case, private property rights are made subservient to the navigation rights of the public. Though both attempt to run from Plaintiffs' characterization of their theory, Defendant and State have not and cannot explain how it amounts to anything other than a rule under which every privately-owned brook in New York State that can actually float a canoe some distance, in its natural state and at its ordinary volume becomes transformed into a public highway. Their theory simply does not comport with expectations of New York's private property owners or the public at large, which have been well settled since the common law standard was adopted in *Morgan* in 1866.

b. *Adirondack League Club* Affirmed the Well-Established Common Law Standard.

Initially, it is worth examining the *Adirondack League Club* decision, in which the Court of Appeals stood by the well-established standard for determining whether a river is a navigable-in-fact public highway. The Court phrased the common law standard as:

> "in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation. Thus, while the purpose or type of use remains important, of paramount concern is the capacity of the river for transport, whether for trade or travel." *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591, 603 (1998) (citations omitted) (emphasis added).

Plaintiffs in their initial brief stressed the part of the standard which the Court of Appeals itself said was "of paramount concern."

What the Court of Appeals, like the Appellate Division, held in *Adirondack League Club* was that evidence of a river's recreational uses could be considered in

addition to "evidence of its capacity for the movement of commercial goods" in determining whether it is a navigable-in-fact public highway. *Adirondack League Club*, 92 NY2d at 603; *see* Plaintiffs' Mem. of Law, pp.18-20 (explaining the trial and intermediate appellate courts' decisions); *Mohawk Valley Ski Club, Inc. v. Town of Duanesburg*, 304 AD2d 881, 883 (3d Dep't 2003) ("in light of more modern attitudes about use of natural resources, recreational use should be considered in addition to commercial use in determining navigability").[2] Even the dissent agreed with the majority's statement of the law (but differed on whether summary judgment was appropriate). *Adirondack League Club*, 92 NY2d at 608 ("The traditional commercial viability test, used to determine navigability-in-fact of a waterway, survives (*see, Morgan v King*, 35 NY 454, 459), and is updated to include a modernized influx of realistic recreational usage." [Bellacosa, J., dissenting]).

The court, therefore, acknowledged some of the Sierra Club's contentions by finding that evidence of recreational use should be part of the analysis. *See Adirondack League Club*, 92 NY2d at 601 (noting that the League Club wanted the court to consider only evidence of log driving) (emphasis added). The evidence, whether recreational or commercial, and whether of trade or travel, must, nevertheless, be analyzed against the well-established standard adopted in *Morgan* and affirmed in *Adirondack League Club*, because the Court of Appeals' was not "broaden[ing] the standard for navigability-in-fact, but merely recogniz[ing] that

[2] "Recreational use is 'relevant evidence of the stream's suitability and capacity for commercial use' but not independent grounds for finding navigability." Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Penn State Envir. L. Rev. 1, 85 (2007) (discussing New York's common law standard).

[some] recreational use fits within it." *Adirondack League Club*, 92 NY2d at 603; *see id.* at 604 ("We only hold that such transport...can include some recreational uses.") (emphasis added). Thus, in *Adirondack League Club* "the Court of Appeals reaffirmed the rule set forth in *Morgan*." *Mohawk Valley Ski Club, Inc. v. Town of Duanesburg*, 304 AD2d 881, 883 (3d Dep't 2003).

c. The Well-Established Common Law Standard

Therefore, the fundamental question becomes a determination of what common law standard was being affirmed in *Adirondack League Club*, 92 NY2d 591(1998), and how that standard has been applied to determine which rivers have such practical utility to the public as a means of transportation so as to burden the private land with a public highway. Despite Defendant's and State's protests otherwise, it is black letter, horn book law that the right of the public in navigable-in-fact rivers "grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people." *Smith v. Rochester*, 92 NY 463, 483 (1883); *see also* Warren's Weed New York Real Property § 151.22[2] (citing Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis L. Rev. 269 [1980]; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195 [1980]; Berland, *Toward the True Meaning of the Public Trust*, 1 Sea Grant L.J. 83 [1976]; Thompson, *Title to Land Under Navigable Waters*, 21 Colum. L. Rev. 680 [1921]).

The rule stated in *Morgan v. King*, 35 NY 454 (1866), (and affirmed in *Adirondack League Club*) was twofold. First, the Court in *Morgan* adopted the

English rule that "a river is, in fact, navigable, on which boats, lighters, or rafts may be floated to market." *Morgan*, 35 NY at 458. Second, it also adopted the so called "log driving rule" by holding that rivers which are not conducive to the type of boat travel envisioned under the English rule may, nevertheless, be navigable-in-fact public highways if they have the capacity, in their natural state, and without the aid of man, to transport massive quantities of raw materials to market. Plaintiffs' Mem. of Law, pp.15-17. Even the Navigation Law, at §2(5), defines the term "navigable-in-fact" in language very reminiscent to that in *Morgan*, at 459-60.[3]

d. The Common Law Standard is Not an Exception That Swallows the General Rule

The common law standard set forth in *Morgan v. King*, 35 NY 454 (1866), addressed in numerous cases since (*see* Plaintiffs' Mem. of Law, Point I[c]) and affirmed in *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591 (1998), has never been interpreted to mean that a brook is a public highway merely because it is wide enough to float a canoe. Any other interpretation would create an exception that swallows the general rule, which is that "if a river is not navigable-in-fact, it is the private property of the adjacent landowner." *Adirondack League Club,* 92 NY2d at 601. Thus, Plaintiffs' have rightly characterized the common law rule as one under which *de minimis* capacity for transport does not suffice. Defendant's and State's repeated references to evidence of individual canoeing excursions are,

[3] "'Navigable in fact' shall mean navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation." Navigation Law § 2(5).

therefore, insufficient to show that the small brooks at issue here have public utility and capacity sufficient to make them public highways.

e. Defendant's and State's Theory is at Odds With the Facts and Law of Recent and Historical Precedent

Defendant and State pluck language from various cases to create their theory and try to, but ultimately cannot, ground the theory in the facts of those cases. They favor, for example, language such as: rivers floatable by "small boat, raft or skiff" are navigable in fact *(People ex rel. Lehigh Val. Ry. Co. v. State Tax Commn.*, 247 NY9 [1928]; *People ex rel. Erie R.R. Co. v. State Tax Commn.*, 266 AD 452 [3d Dep't 1943]; *Adirondack League Club, Inc.*, 92 NY2d 591 [1998]) and that a particular mode of boat does not matter. *Van Cortlandt v. The N.Y. Cent. Ry. Co.*, 265 NY 249, 254-55 (1934) (mentioning "steam boats, sailing vessels or flatboats"). Plaintiffs thoroughly refuted in their initial Memorandum of Law (pp.27-31) the many cases on which both State and Defendant attempted to apply to the facts here. In addition, Plaintiffs showed that courts have struggled to determine the navigability-in-fact status of much more substantial rivers. In his latest papers, Defendant attempted to rehabilitate the cases discussed below. Nevertheless, Defendant and State continuously find themselves fighting the facts of every case as they attempt to justify their theory under which any waterway useable by any boat for any purpose becomes a public highway.

1. *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591 (1998)

Defendant and State (in particular) primarily rely on *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591 (1998), where the waterway at issue, a

twelve-mile long section of the **South Branch of the Moose River**, varied in width from 100 to 200 feet. The Court of Appeals sent the case back for trial and Defendant now asserts that the Court only wanted evidence of more than one canoeing excursion. The court, however, did not clearly specify exactly what evidence would have been conclusive to a showing of navigability-in-fact. Defendant and State forget to mention that there was evidence that the river had previously been used for massive log drives, testimony to the fact that a float plane had landed on the river, evidence from the defendants' members' canoe excursion, and testimony to the fact that at least one of plaintiff's members had boated on the river. Plaintiffs' Mem. of Law, p.18. This is evident by the dissent's statement that it would have found the river navigable-in-fact based on a "double barreled justification" because there was evidence of log driving and evidence of recent canoeing. *Id.* at 610 (Bellacosa, J. dissenting). The dissenting judge went on to state "that neither [his] dissenting view nor the majority's prevailing direction for a trial, should be interpreted as a precedential Waterloo for either environmental camp in the dispute." *Id.* at 612. If floatability by canoe were enough, no remand would have been necessary.

2. ***People ex rel. Erie R.R. Co. v. State Tax Commn.*, 266 AD 452, 454 (3d Dep't 1943) *affd* 293 NY 900.**

With respect to the **Chemung River** case, *People ex rel. Erie R.R. Co. v. State Tax Commn.*, 266 AD 452, 454 (3d Dep't 1943) *affd* 293 NY 900, Defendant provides an incomplete copy of the trial transcript and points out that some of the testimony related to a canoe rental business located on the banks of the river.

Caffry Reply Aff. ¶¶ 43-46 and Ex. E thereto. He forgets to mention the part of the actual decision that referenced prior steam boat usage of the river or the fact that, as the court noted, it is common knowledge that the Chemung is not a small winding brook, but a major tributary of the Susquehanna that is formed by the convergence of two other substantial rivers. (For a detailed factual analysis see the Phillips Reply Aff. ¶¶35-36.)

3. *People ex rel. Lehigh Valley Railway Co. v. State Tax Commn.*, 247 NY 9 (1928)

Defendant's interpretation of *People ex rel. Lehigh Valley Railway Co. v. State Tax Commn.*, 247 NY 9 (1928), also revisits the trial transcript in an attempt to rewrite the decision. Caffry Reply Aff. ¶¶ 40-43 and Ex. D thereto. However, the decision clearly showed that **Cascadilla Creek** and **Six Mile Creek** were larger than the brooks here, were capable of floating various motor boats, were intensively used by the public (and not because of any nearby public lands), and were lined with multiple stores that supported thriving commerce. (For a detailed factual analysis see the Phillips Reply Aff. ¶¶23-24.)

4. *People v. Waite*, 103 Misc2d 204 (St. Lawrence Co. Ct 1979 [Duskas, J.])

Next, Defendant trots out a county court case involving the **West Branch of the St. Regis River**. *People v. Waite*, 103 Misc2d 204 (St. Lawrence Co. Ct 1979 [Duskas, J.]). The decision finds that the river was a "channel for useful commerce" and, though it mentions small boats, it does not state that the "river" was only capable of floating individual canoes. Notably, as shown on the Adirondack Park Land Use and Development Plan Map (annexed as Exhibit B to the Affidavit of

Donald B. Potter, dated Sep. 25, 2012), in the Town of Hopkinton, where the case originated, this river is large and important enough to be a designated river under the Wild, Scenic and Recreational River's Act (ECL § 15-2505 et seq.), like the South Branch of the Moose River at issue in Adirondack League Club. (For a detailed factual analysis see the Phillips Reply Aff. ¶¶37-42.)

5. *De Camp v. Thomson*, 16 AD 528 (4th Dep't 1897)

The capacity necessary to consider a river a public highway was also addressed by a unanimous Appellate Division in *De Camp v. Thomson*, 16 AD 528 (4th Dep't 1897). The court there stated that in order for the **North Branch of the Moose River** to be a public highway it must satisfy the boating prong of the test by having capacity to float rafts of logs tied together or, if the boating prong cannot be satisfied, it must have capacity to conduct log drives. *Id.* at 532. The capacity to float rafts of logs or massive log drives is certainly more substantial than that needed to float a single canoe. *Id.* at 532-33. Moreover, Defendant's attempt to sidestep this decision must fail. The unanimous Appellate Division clearly stated that it was affirming the decision of "the learned referee that the North Branch of the Moose River...is not a public highway at common law for the purpose of floating logs and timber." *De Camp*, 16 AD at 535. This particular issue did not reach the Court of Appeals because it had been determined by a unanimous Appellate Division. *De Camp v. Dix*, 159 NY 436, 438 (1899). In making its decision, the court considered the available evidence of boating, in particular, that the defendant and his wife had operated a small steamboat in the river; but the Court found that only part of the stream had been used for that purposes and that it had been "rendered

fit for such purpose by the operation of artificial means." *Id.* With such high stakes (the defendants had cut 19 Million feet of timber that was left stranded on its land after the Court of Appeals' ruling), surely the parties would have presented all relevant evidence of boat usage on the river. *See, Moose River Not a Highway*, New York Times (Jun. 7, 1899), Ex.B to Phillips Reply Aff.

f. Defendant's and State's Theory Ignores that Necessity of Use by the Public is Fundamental.

Defendant and State must also ignore the fact that "[n]ecessity of use by the public was essential to the Morgan Court when it crafted this definition from its English ancestor" in order stand by their theory under which every brook capably of floating any craft for any use is a public highway. *Adirondack League Club*, 92 NY2d 591, 601 (1998). Certainly, not every waterway in New York State can be considered necessary for use as a public highway. One factor that might indicate the public's need to use a particular waterway as a highway is its history of public use, if any.

Here, the evidence shows that the relevant waters were used almost exclusively by their private owners for the past 150 years and that any early (and essentially undocumented) uses by random members of the public had been by permission of the landowners.[4] Plaintiffs' Mem. of Law, p.27. Additionally, there is no evidence that the private owners of either the Webb Tract (now the state lands

[4] The State asks this Court to take judicial notice of the fact that Native Americans commonly used canoes to make their way through a pre-colonial wilderness. In response, Plaintiffs ask this Court to take note of the fact that "the Indians never had any idea of individual property in lands" (*Johnson v. M'Intosh*, 21 US 543 (1823) (Marshall, C.J.) and, secondly, that our State law comes from the common law of England, not the Native Americans. *Adirondack League Club*, 92 NY2d at 601.

containing Lake Lila) or Whitney Park ever used the brooks at issue to access their properties. This pales in comparison to a case like *People ex rel. Lehigh Valley Railway Co. v. State Tax Commn.*, 247 NY 9 (1928), where there was evidence of frequent and substantial public use of the waterways in the heart of the City of Ithaca as public highways. The recent surge of canoeists trespassing on Plaintiffs' property came only after Defendant published his newspaper article. A river's status as navigable-in-fact does not change over time. Plaintiffs' Mem. of Law, p.14. Certainly, no one would even be contending that any of the small brooks on Plaintiffs' property were public highways if the State had not happened to purchase the adjacent wilderness tract specifically for the water-based wilderness recreation opportunities located on the State-bought parcel. Plaintiffs' Mem. of Law, pp.37-39.

In order to trespass on Plaintiffs' land, the public canoeists, like Defendant, must leave the far reaches of the 30,000-acre Whitney Wilderness from a point miles back from the nearest point where motorized vehicles are allowed. After the trespassers reenter the same State parcel, they find themselves still at the far reaches of the Whitney Wilderness. Importantly, they could have walked between to the two points using a trail entirely on the Whitney Wilderness. Plaintiffs' Mem. of Law, p.37. Thus, the trespass across Plaintiffs' property is neither necessary, nor is it convenient since it is quite inconvenient to even reach the brooks at issue.

Additionally, the brooks on Plaintiffs' parcel are not necessary for, or capable of providing them with access to the outside world. For example, a paddle up Shingle Shanty Brook to St. Agnes landing does not take a paddler off the Mud Pond Parcel. From St. Agnes landing, it is a six mile walk or drive across a private

road on private property to reach the old rail station. Similarly, when Donald B. Potter's father once rowed materials for his private camp across Lilypad Pond and Mud Pond, he did so only after hauling the supplies eight miles down private dirt roads on Whitney Park. Donald Potter Reply Aff. ¶¶23-27; Affidavit of Donald B. Potter, dated Sept. 25, 2012, ¶56. Such usage of private small brooks and private roads on private land (especially coupled with virtually no historical public use) fails to demonstrate that these brooks are practically useful for or have any tinge of necessity for use as public highways. Otherwise, practically every foot path or hiking trail across private land could be considered a public highway. This Court should be careful about adopting Defendant's theory in which a private owner's use of his property is held against him.

g. The Brooks at Issue Have No History of or Suitability for Commerce in the Ordinary Sense

Defendant and State also try to shoehorn commerce into their canoeability theory. The fact that Plaintiffs put items in their canoes while paddling on their private land does not show they were engaged in trade as Defendant and State assert. Plaintiffs' actions do not amount to commerce by any ordinary sense of the term. Plaintiffs' Mem. of Law, pp.23-25; Donald Potter Reply Aff. ¶¶10-22 and 28-31. Plaintiffs used only canoes on the small brooks here, and it is evident that New York State considers canoes recreational pleasure vessels. *See* Navigation Law § 2(6)(c) (labeling canoes as pleasure vessels and then even exempting "rowboats, canoes and kayaks" from regulation"). Moreover, even if this Court finds that Plaintiffs' activities (like most activities in life) have some remote, tangential

relation to commerce, the common law standard exempts out *de minimis* and tangential commercial activities. *See, e.g. supra* Point I(e)(5); *and see* Navigation Law § 2(5) ("A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation."). Thus, evidence showing that items may be carried in canoes does no more than bolster Defendant's and State's canoeability theory.

Even David Cilley, who makes his business selling and renting equipment for recreational wilderness activities and who also guides paying clients through the wilderness, admits that he has run a successful business entirely on State land for almost thirty years. The State cannot take private property like Plaintiffs' for private businesses like Mr. Cilley's. Const. art. 1, § 6. Nevertheless, the State does frequently purchase additional lands which Mr. Cilley may utilize. For example, the State recently made a well-publicized announcement of its intent to acquire 69,000 additional acres of former Finch Pruyn lands, including the Essex Chain Lakes, Boreas Ponds, and OK Slip Falls. Affidavit of Colin I. Bradford, dated Sept. 25, 2012, ¶9(e).

h. Conclusion

Defendant's and State's theory, that any boating of any type for any purpose will turn a waterway into a public highway, fails because they find themselves fighting the facts of every case on which they purport to rely. It defies common sense to conclude that the courts in the above-mentioned cases thought they were dealing with waterways that had capacity to transport nothing but canoes and

kayaks for purely recreational activities. Defendant's and State's theory removes from the analysis practically all questions of a waterway's capacity and practically all questions of the need, purpose or type of use. Their theory would require this Court to take a step forward and affirmatively expand the public's navigation rights to the smallest privately-owned brooks across New York State. Such a standard surely does not represent the well-settled expectations of private property owners or the general public throughout New York State. Yet this Court should have no doubt, based on DEC's and Sierra Club's past joint-activism, that both would tout this Court's acceptance of their theory as carte blanche to take any boat up any waterway on private property so long as additional public access could be found somewhere further up the brook, regardless of the obstacles therein.

It is not unreasonable for Plaintiffs' to rely on this Court to follow the principle of stare decisis, particularly in the realm of real property (Plaintiffs' Mem. of Law, pp.36-37). Plaintiffs' position does not render the common law rule a nullity. It merely upholds the well-established common law standard affirmed in *Adirondack League Club, Inc. v. Sierra Club*, 92 NY2d 591 (1998). Though Defendant and State both make light of Plaintiffs' concerns of avoiding a judicial taking of private property, the Court of Appeals has not been so indifferent. First, it recognizes the fact that an expansion of the public's rights under the common law cannot be lawfully accomplished without there being just compensation. *See De Camp v. Thomson*, 16 AD 528, 536 (4th Dep't 1897) (holding that Legislation purporting to do just that was unlawful because it violated "the fundamental law of the State, which provides that private property shall not be taken for public use

without just compensation. (Const. art. 1, § 6; *Morgan v. King, supra; Chenango Bridge Co. v. Paige*, 83 N.Y. 178.)"). Secondly, the Court of Appeals recognizes that, with respect to private property rights in particular, courts strictly follow the principle of stare decisis. 28 NY Jur 2d, Courts and Judges § 207 (citing *People v. Hobson*, 39 NY2d 479 (1976). Lastly, the Court of Appeals has in recent memory refused to expand the public's rights under the common law. *Douglaston Manor, Inc. v. Bahrakis*, 89 NY2d 472 (1997); Plaintiffs' Mem. of Law, pp.36-37.

II. DEFENDANT'S EFFORTS TO SHIFT THIS COURT'S FOCUS TO OTHER WATERS PROVE FRUITLESS

Because he knows that the brooks at issue here on Plaintiffs' property are rather small, Defendant initially suggested that this Court render an opinion on the entire watershed from Salmon Lake to the Atlantic Ocean. Affidavit of John W. Caffry, Esq., dated Aug. 31, 2012, ¶¶25-83. Now, Defendant reduces his overly hopeful expectations, but continues to insist that this Court must render an opinion about what he claims is a 10.2 mile-long "river," the vast majority of which is on publicly-owned land where public access issues are moot.

Initially, this Court need not render a decision about the entire watershed or Defendant's arbitrary river section. Plaintiffs' Mem. of Law, pp.17 (listing numerous cases where courts addressed the navigability-in-fact status of river sections) and 25-26. In addition, it is worth noting that in *People ex rel. Lehigh Valley Railway Co. v. State Tax Commn.*, 247 NY 9 (1928), the court was not holding that Six Mile and Cascadilla Creeks were navigable-in-fact from their headwaters to their mouths. And, in *Morgan v. King*, 35 NY 454 (1866), the court discussed the various

navigable and non-navigable-in-fact sections of the Raquette but then rendered a decision about a specific section from Colton to Raymondsville. Defendant cites to *Niagara Falls Power Co. v. Water Power & Control Comm.*, 267 NY 265 (1935), but that decision related to the State's and federal government's regulatory power on the Niagara River, which serves as the boundary between two countries and provides substantial hydroelectric power to both countries. *Id.*

Lastly, Plaintiffs do not fear this Court looking at Defendant's so called "river." For Defendant has already admitted that "[t]he label attached to the waterbody's name is irrelevant." Caffry Reply Aff. ¶86. And this could not be more true with respect to Defendant's attempt to rename the small brooks here as "rivers." By all accounts, the waters on, above and below Plaintiffs' property are merely small brooks limited to use only by canoes. Donald Potter Reply Aff. ¶¶11.

III. DEED LANGUAGE DESIGNED TO PREVENT WARRANTY OF TITLE CLAIMS DOES NOT DETERMINE THE COMMON LAW NAVIGABLE-IN-FACT STATUS OF THE RELEVANT BROOKS.

Plaintiffs have already refuted Defendant's assertion that cautionary "subject to" language in Plaintiff Friends of Thayer Lake LLC's ("FOTL") deed served to create a right in the public, who were third party strangers to the deed.[5] Plaintiffs' Mem. of Law, pp.42-43. Assumed but not specifically noted there, was the fact that public highways are no exception to the rule that third-party strangers to a deed

[5] Only Defendant, who stands to suffer pecuniary loss, asserts this affirmative defense. State and DEC, who are here as agents of Charles Morrison and the Sierra Club, attempt to placate their principals simply by presenting the "canoeability" argument to see if it is adopted by this Court even though it has not met with success in the Legislature or prior courts. S*ee* Plaintiffs' Mem. of Law, pp.33-36.

can obtain no rights from the deed. *Matter of Bauer v. County of Tompkins*, 57 AD3d 1151, 1152 (2008) (holding that, absent a specific grant of a public right of way to [in that case] the County, deeds making certain properties subject to the rights of the public cannot by themselves create a public right of passage).

In his latest papers, Defendant changes tacks again and attempts to prove his affirmative defense by claiming that the cautionary "subject to" language in Plaintiff FOTL's deed was actually a reservation by The Nature Conservancy, Inc. ("TNC") or a stipulation between the parties to the deed, who were only TNC and Plaintiff FOTL. The relevant deed language clearly begins with the words "subject also to" not "reserving" or "excepting". Plaintiffs' Mem. of Law, pp.42-43. Moreover, as stated previously, even an implied reservation in favor of a third-party has no force and effect in law. Lastly, Defendant's last-ditch attempt to save his affirmative defense is not supported by the law. In every case he presents, the reservations or stipulations were between the parties to the transaction. The courts will not find that rights can be stipulated to (or granted to or from) anyone other than the parties to the transaction. In this way, these cases respect and preserve the rule that rights cannot be granted or reserved to third-party strangers to a deed. Defendant cites the following inapplicable cases:

- The facts of *Wilson v. Ford*, 209 N.Y. 186 (1913), are readily distinguishable because the rights at issue were found to stem not from the disputed deed but from a prior written and recorded agreement. *Id.* at 198-200.

- In *Holden v. Palitz*, 2 Misc. 2d 433 (Westchester Co. Ct 1956), the Court examined one transaction involving three parties, a written contract and three deeds. When all four documents were

read together, the Court found that a person who was a party to the contract but not the deed had obtained the easement rights called for in the contract. *Id.* at 438.

- The facts of *Hathaway v. Payne*, 34 NY 92 (1865), are voluminous and dense, but, at the heart of the matter, the question was about what rights the deed grantor had retained or gained in the property described in the deed. The grantor claimed his rights emanated from his reservation that–unlike here–explicitly utilized the word "reserving."*Id.* at 104. The Court found that even if the grantor did not have the rights to reserve, the grantee, who was already the owner of the other rights in the property, had impliedly agreed to grant the disputed rights to the grantor as part of the deed conveyance. *Id.* at 108-09. Neither party claimed that any rights had been created in a third-party stranger to the deed.

Therefore, the "subject to" language in Plaintiff FOTL's deed operates in its normal capacity, which is "to prevent a claim under a warranty of title or warranty of freedom from encumbrances." REAL ESTATE TITLES § 7.17 (James M. Pedowitz ed., 3d ed. 2007). This language merely protects TNC as grantor from any claims by Plaintiff FOTL in the unlikely event that all small brooks in New York capable of floating canoes are navigable-in-fact public highways.

IV. PLAINTIFFS ARE ENTITLED TO A HEARING ON THE ISSUE OF DAMAGES FOR THEIR TRESPASS CLAIM

Because Plaintiffs have succeeded in their action for trespass against Defendant, they have a right to damages. 104 NY Jur 2d, Trespass § 35. "As the law infers some damage without proof of actual injury from every direct invasion of the person or property of another, the plaintiff is always entitled to at least nominal damages in an action of trespass....Therefore, even the most innocent of trespassers

is liable for nominal damages as a minimum." 104 NY Jur 2d, Trespass § 36. Here, though, Defendant acted far from innocently.

Defendant entered onto Plaintiffs' private property in his capacity as a writer and lead editor of the *Adirondack Explorer* newspaper after he had previously determined to publish a story designed to promote public usage of Plaintiffs' private property. Afterwards he proceeded to publish his story and, subsequently, Plaintiffs have seen an increase of trespassers on their property. Phillips Reply Aff. ¶¶44-48. Notably, it is unclear whether Defendant was acting only as agent of the newspaper or whether he might have also been acting in connection with other groups. When asked a question that might have explained who else or what other groups were involved, he refused and invoked the Shield Law. Phillips Reply Aff. ¶45. The First Amendment does not insulate Defendant from a damage award in the trespass action. *Le Mistral, Inc. v. Columbia Broadcasting System*, 61 AD2d 491 (1st Dep't 1978) (specifically rejecting the defendant broadcasting company's First Amendment defense by stating that "the First Amendment is not a shibboleth before which all other rights must succumb" and also ordering a trial on the issue of punitive damages). Plaintiffs are thus entitled to have a hearing on the issues of Defendant's intents and motives, his indifference to the rights of others, and the effect of his publication on encouraging others to trespass on Plaintiffs' property.

CONCLUSION

This Court must follow the well-established common law standard recently affirmed in *Adirondack League Club* by denying Defendant's and State's motions for summary judgment and granting the Plaintiffs' cross-motion for summary judgment. Accordingly, this Court should

(1) Grant Plaintiffs' First cause of action by finding that Defendant trespassed on Plaintiffs' property, and schedule a trial on the issue of damages;

(2) Grant Plaintiffs' Second cause of action by finding that Defendant, as a member of the public, does not own or benefit from any right to enter upon or cross the Mud Pond Parcel;

(3) Grant Plaintiffs' Third cause of action by declaring that the Mud Pond Waterway is not a navigable-in-fact public highway under the common law of the State of New York;

(4) Deny Defendant's request for a declaration that the Mud Pond Waterway is navigable-in-fact under the common law of the State of New York;

(5) Deny State's First counterclaim by declaring that the Mud Pond Waterway is not navigable-in-fact under the common law of New York;

(6) Deny State's Second counterclaim and its requests for an injunction by finding that Plaintiffs' posting and fencing of their property boundary lines and prosecuting of trespassers does not constitute a public nuisance;

(7) Deny State's request for a declaration that the Bargain and Sale deed dated December 21, 2007, and recorded in the Hamilton County Clerk's Office on page 549 of book 243 is void and of no legal effect;

(8) Award Plaintiffs the costs and disbursements of this action; and

(9) Grant such other and further relief as is just and proper.

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Respectfully submitted,

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