STATE OF NEW YORK
SUPREME COURT HAMILTON COUNTY

FRIENDS OF THAYER LAKE LLC; BRANDRETH PARK ASSOCIATION, CATHRYN POTTER, AS TREASURER; AND WILLIAM L. BINGHAM, JR., INDIVIDUALLY AND AS A REPRESENTATIVE MEMBER OF THE BRANDRETH PARK ASSOCIATION,

Plaintiffs,

-against-

PHIL BROWN AND JANE DOE (THE "LADY IN RED") AND ANY OTHER PERSON, KNOWN OR UNKNOWN,

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, Assigned Justice

DEFENDANT PHIL BROWN'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

CAFFRY & FLOWER
Attorneys for Defendant Phil Brown
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
Phone: 518-792-1582

August 31, 2012

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT

This motion for summary judgment is made on the following grounds:

A. The Mud Pond Waterway is navigable-in-fact;

B. The cause of action for trespass may not be maintained against a member of the public who exercised the public right of navigation on a navigable-in-fact waterway;

C. Plaintiffs' claim to a real property interest may not be granted because the waterway is navigable-in-fact;

D. Plaintiffs failed to properly plead their RPAPL claim;

E. The public should not barred from navigating on the Mud Pond Waterway because the public right of navigation takes precedence over Plaintiffs' rights;

F. The public right of navigation includes the right to portage around the rapids on the Plaintiffs' land; and

G. Defendant should be granted a declaratory judgment that the Mud Pond Waterway is navigable-in-fact.

STATEMENT OF THE FACTS

This action arose from Defendant Phil Brown's trip on May 20-21, 2009, in which he traveled by canoe from Little Tupper Lake to Lake Lila, both of which are on State Forest Preserve

land in the Adirondack Park.[1] Amended Complaint ¶¶ 1-2.[2] In doing so, he also carried his canoe and camping gear on five portages, or "carries". Brown Aff.[3] ¶¶ 27-52. This trip is sometimes called the Little Tupper Lake to Lake Lila Traverse. Caffry Aff.[4] ¶30; Cilley Aff.[5] ¶29.

Of the 17 miles which Defendant traveled, about 15 miles were on State land and about two were on the Plaintiffs' private property, known as "Brandreth Park". Brown Aff. ¶54; Houghton Aff.[6] Ex. A. The portion of the trip on Brandreth Park includes part of the Lilypad Pond Narrows, Mud Pond, Mud Pond Outlet, and part of Shingle Shanty Brook, which the Plaintiffs have collectively labeled the "Mud Pond Waterway". Amended Complaint ¶22; Caffry Aff. ¶¶ 25, 46-57. Of the two miles of the Waterway on Plaintiffs' property, all but about 500 feet is navigable by canoe. There is a single 500-foot carry around a short stretch

---

[1] The Forest Preserve is protected as "forever wild" by Article 14, § 1 of the New York State Constitution, and is "forever reserved and maintained for the free use of all the people...". Environmental Conservation Law ("ECL") § 9-0301(1).

[2] Plaintiffs' Amended Complaint, dated February 4, 2011 ("Amended Complaint").

[3] Affidavit of Defendant Phil Brown, sworn to on August 23, 2012 ("Brown Aff.").

[4] Affidavit of Defendant's attorney, John W. Caffry, sworn to on August 31, 2012 ("Caffry Aff.").

[5] Affidavit of David E. Cilley, sworn to on July 26, 2012 ("Cilley Aff.").

[6] Affidavit of Josh Houghton, sworn to on August 1, 2012 ("Houghton Aff.").

of rapids on the Mud Pond Outlet. Amended Complaint ¶22(c); Caffry Aff. ¶¶ 50-52, 129-132, 158; Brown Aff. ¶48.

The Mud Pond Waterway is actually just a short part of a much longer 10.2 mile navigable waterway connecting Salmon Lake and Lake Lila. Caffry Aff. ¶¶ 25-69. For purposes of this motion, this is referred to as the "Salmon River Waterway". Caffry Aff. ¶27. In addition, the Mud Pond Waterway is part of the Little Tupper Lake to Lake Lila Traverse, and is part of a vast network of waterways throughout the northern and western Adirondacks. Caffry Aff. ¶¶ 70-83.

As a result of Defendant's May 2009 trip, the Plaintiffs filed this action against him, alleging that he trespassed on their property. Amended Complaint ¶¶ 70-84. Defendant believes that because the Mud Pond Waterway is navigable-in-fact, it is subject to the public's right of navigation and he was within his rights to travel upon it. Brown Aff. ¶¶ 11-20, 43.

The facts of the case are more fully set forth in the Brown Aff. and the Caffry Aff.

STANDARD OF REVIEW

To succeed on a motion for summary judgment, the movant must "establish[] a prima facie entitlement to summary judgment as a matter of law by presenting competent, admissible evidence demonstrating the absence of triable issues of fact." Allegro v. Youells, 67 A.D.3d 1081, 1082 (3d Dept. 2009); see CPLR

§ 3212(b). Once that initial burden is met, the non-movant must set forth sufficient, admissible evidence to create a genuine issue of material fact requiring a trial of the issue. See State v. Arthur L. Moon, Inc., 228 A.D.2d 826, 828 (3d Dept. 1996); Besicorp Group v. Village of Ellenville, 205 A.D.2d 944, 945 (3d Dept. 1994). A motion for summary judgment "cannot be defeated by mere conjecture." Naylor v. CEAG Elec. Corp., 158 A.D.2d 760, 762 (3d Dept. 1990).

The Plaintiffs' complaint does not create genuine issues of material fact to be resolved at trial, but presents "question[s] of law" to be decided by the Court. Morgan v. King, 18 Barb. 277, 285 (1854); see Montfort v. Benedict, 199 A.D.2d 923, 925-926 (3d Dept. 1993). Therefore the Plaintiffs' causes of action should all be summarily decided as a matter of law. See Williams v. McNee, 80 A.D.3d 1020, 1021 (3d Dept. 2011); Ryan v. Posner, 68 A.D.3d 963, 964-965 (2d Dept. 2009).

POINT I:
THE MUD POND WATERWAY IS NAVIGABLE-IN-FACT

The common law of New York provides that:

> in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation. Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 603 (1998).
>
> [E]vidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has a practical utility for trade or travel. Id. at 600.
>
> 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. Id. at 603.

Thus, so long as a waterway has the capacity for practical utility for transportation, **either** for trade, **or** for travel, it is navigable-in-fact. This practical utility may be proven by recreational use, commercial use, or any other form of transportation use. Where a waterway is navigable-in-fact, the public has an easement to use it for navigation, even if the bed and banks of the waterway are privately owned. Id. at 601.

The Plaintiffs have nevertheless argued that, despite the holding of the Adirondack League Club decision, a waterway is only navigable-in-fact if it has a history of use for commercial purposes, such as log drives. They claim that the Adirondack League Club decision did not endorse a recreational use test for navigability-in-fact, and that Defendant and the State seek to "expand the common law definition of navigability-in-fact to include a purely recreational test, regardless of a waterway's

practical utility for transportation, trade or travel." Plaintiff's Memorandum of Law in Opposition to State's Motion to Intervene, May 3, 2011 ("Pltf. 2011 Mem. Law"), pp. 1, 8-9.

Both the so-called Mud Pond Waterway, and the much longer Salmon River Waterway of which it is but a short part, connect publicly owned water bodies and tracts of State Forest Preserve land.[7] The undisputed facts show that the Mud Pond Waterway is navigable-in-fact, both itself, and as part of the Salmon River Waterway, no matter whose version of the legal test is applied.

Equally important, the Plaintiffs' theory of the law is incorrect, and should be rejected by the Court. The Adirondack League Club decision did in fact hold that recreational use alone is sufficient to prove that a waterway is navigable-in-fact.

A. The Public Right of Navigation in New York Has Its Origins in the Common Law

Under the common law of the State of New York, the navigable waters of the State and the soils under them are held in trust by the State for the People of the state. See Long Sault Development Company v. Kennedy, 212 N.Y. 1, 10 (1914) (St. Lawrence River); Fulton Light, Heat and Power Company v. State of New York, 200 N.Y. 400, 418 (1911) (regarding the Oswego River, the State is the "trustee of a special public servitude"). These rights are a property right, Fulton Light, 200 N.Y. at 416, and

[7] These two waterways are described in detail in Caffry Aff. ¶¶ 46-57 and ¶¶ 25-69, respectively.

the State's powers in trust for the People include preserving the public's right to navigate upon such waters and to recreate, and the right of the State to control the waters for other purposes. See People v. System Props., 2 N.Y.2d 330, 344-345 (1957) (Lake George and Ticonderoga River). These rights derive from the ancient Roman doctrine of the Public Trust, and come into American law as part of our heritage of English common law. See Canal Appraisers v. People ex rel. Tibbits, 17 Wend. 571, 590-595 (1836); Lewis Blue Point Oyster C. Co. v. Briggs, 198 N.Y. 287, 291 (1910); David C. Slade, Ed., Putting the Public Trust Doctrine to Work, 2d Ed., Coastal States Organization 1997, pp. 4, 27-29;[8] Humbach, Public Rights in the Navigable Streams of New York, 6 Pace Envt'l L. Rev. 461, 465-466 (1989).[9]

These rights apply to all rivers that are navigable-in-fact, even if the bed and banks of a river are privately owned. The Public Trust doctrine recognizes two separate components to ownership of lands under water. The *jus privatum* pertains to the ownership of the soil under the water. See Lewis Blue Point, 198 N.Y. at 291-292. It is commonly sold or transferred by the State. See People v. New York & Ontario Power Co., 219 A.D. 114, 116 (3d Dept. 1927). The *jus publicum* includes the waters, the right to navigate upon the waters and the right to use the lands

[8] This report is available at http://www.coastalstates.org/ (click on "Publications & News").

[9] A copy of this article was filed by the State with its motion papers.

under those waters in connection with the public's navigational servitude. This is true even where the bed is privately owned, pursuant to a conveyance of the *jus privatum*.

> The title to the beds of boundary line streams, a *jus privatum*, is in the State as sovereign in trust for the people and so remains unless specifically granted. (cites omitted) The State may convey the title to the land under the waters as a naked land title. Such a conveyance gives no title to the waters and is generally subject to the sovereign right to control the stream. Lewis Blue Point Oyster C. Co. v. Briggs, 198 N.Y. 287, 292.)
>
> The waters of the stream are not separately owned by any one. The stream is a public highway. The State holds as trustee for the people the right to control the stream and its bed for commerce and navigation, a *jus publicum*. This is a sovereign right and generally may not be abdicated. People v. New York & Ontario Power, 219 A.D. at 116.

In general, conveyances of land under water by the State convey only the *jus privatum* and not the *jus publicum*, retaining the *jus publicum* rights in trust for the public. Id. The public right of navigation is inalienable, and the State can never make a conveyance that completely surrenders the public's rights to a navigable waterway. See System Props., 2 N.Y.2d at 344-345; People v. New York and Ontario Power, 219 A.D. at 116; Long Sault, 212 N.Y. at 10.

A non-tidal river may be navigable in fact, and subject to the public's navigational servitude, even where the bed and banks of the river have been conveyed by the State to a private owner, because the owner's rights are "subordinate to the public

easement of passage." Fulton Light, 200 N.Y. at 418. See System Props., 2 N.Y.2d at 344-345.

> The navigational servitude does not arise because of the public ownership of lands under water but because of the common-law principle that the navigable waters of the State are held in trust by the State for the benefit of the people of the State, without regard as to who owns the banks and beds of the waterway. Salvador v. State of New York, 205 A.D.2d 194, 201 (3d Dept. 1994)(emphasis added), lv. denied, 85 N.Y.2d 810 (1995), citing, Long Sault, 212 N.Y. at 10.

These doctrines apply to freshwater lakes and ponds, as well as to rivers. See Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d 881 (3d Dept. 2003) (Mariaville Lake); Hanigan v. State of New York, 213 A.D.2d 80 (3d Dept. 1995) (Stewart Pond); Salvador, 205 A.D.2d 194 (Lake George).

Where a waterway is navigable-in-fact, then "it is considered a public highway, notwithstanding the fact that its bed and banks are in private hands." Adirondack League Club, 92 N.Y.2d at 601. The public has "a servitude for transportation" over such waters. Id. at 602. This navigational servitude is a common law easement in favor of the public. See id. at 604.

In the present case, the State and DEC have intervened as defendants in order to protect the public navigational easement on the Mud Pond Waterway. See Amato Aff. ¶27.[10] This Court has previously found that under the Public Trust Doctrine, the State is the "trustee of the public rights". Friends of Thayer Lake v.

[10] Affidavit of former DEC Assistant Commissioner for Natural Resources Christopher A. Amato sworn to on February 15, 2011 ("Amato Aff.").

Brown, Decision and Order (Sup. Ct., Hamilton Co., August 12, 2011)(Aulisi, J.), p. 3; see Amato Aff. ¶¶ 3-6 (the State is the "guardian of the public trust").

B. A Waterway's Capacity for Use for Either Trade or Travel Can Prove that it is Navigable-In-Fact

In order to prove that a waterway is navigable, it must be shown to have "practical utility to the public as a means for transportation" for "trade or travel". Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 603 (1998). Contrary to Plaintiffs' claim (Pltf. 2011 Mem. Law, p. 1), there is no requirement that this practical utility must be a utility for commercial purposes. Id. at 604. Either trade or travel is sufficient. See id; see also Morgan v. King, 35 N.Y. 454 (1866); Dale v. Chisholm, 67 A.D.3d 626, 627 (3d Dept. 2009) (suitability for canoeing and kayaking, plus "capacity for transport, whether for trade or travel"); Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d at 883-884 ("navigable body of freshwater [must] be capable of supporting transportation").

If, as Plaintiffs would have the Court believe, only trade can satisfy the legal test, the words "or travel" in Adirondack League Club v. Sierra Club (92 N.Y.2d at 603) would be meaningless. This Court should not assume that the Court of Appeals intended such a result. See also Dale v. Chisholm, 67 A.D.3d at 627.

In the present case, the record shows that for over a century the residents of Brandreth Park, and the owners of the Mud Pond Camp in particular, have regularly used the waterway at issue herein as a means of transportation: for personal travel, for recreational travel, for trade in the form of shipping of building materials, furniture, and other goods into the Mud Pond Camp, and for trade in the form of shipping to market beaver, mink and otter furs trapped in the vicinity. Caffry Aff. ¶¶ 84-105.

The record also shows that the Mud Pond Waterway is but a short piece of a longer travel route that is navigable-in-fact, referred to herein as the "Salmon River Waterway". Caffry Aff. ¶27. There is a long history of travel on this route by small boats as well. Caffry Aff. ¶89. Therefore, the Mud Pond Waterway is navigable-in-fact, under the common law test as stated 14 years ago in Adirondack League Club v. Sierra Club (92 N.Y.2d at 603), and as recently applied in Dale v. Chisholm (67 A.D.3d at 627), Mohawk Valley Ski Club v. Town of Duanesburg (304 A.D.2d at 883-884), and Hanigan v. State of New York (213 A.D.2d at 84-85).

C. Proof of Recreational Use of a Waterway Is Enough to Establish its Navigability

Recreational use of a waterway is equally competent as proof that a waterway is navigable-in-fact as is its use for commercial purposes or any other use:

> "[E]vidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has a practical utility for trade or travel." Adirondack League Club v. Sierra Club, 92 N.Y.2d at 600.

In that decision, the Court of Appeals specifically rejected the appellant landowner's argument (id. at 601, 602) that only commercial utility could be considered. The Court explained that:

> The fact that before the middle of the 20th century a river's practical utility was measured by its capacity for getting materials to market does not restrict the concept of usefulness for transport to the movement of commodities. Id. at 602.
>
> ... evidence of recreational use will support a finding that a river is susceptible to commercial use. Beyond this, however, evidence of a river's practical utility for transport need not be limited to evidence of its capacity for the movement of commercial goods. Id. at 603.
>
> Rivers, long-recognized as unique natural resources, are no longer primarily subjects of commercial exploitation and gain but instead are valued in their own right as a means of travel. Id. at 603.
>
> ... we are satisfied that recreational use should be part of the navigability analysis. Id. at 603.
>
> We do not broaden the standard for navigability-in-fact, but merely recognize that recreational use fits within it. Id. at 603.

> We only hold that such transport need not be limited to moving goods in commerce, but can include some recreational uses. Practical utility for travel or transport nevertheless remains the standard. Id. at 604.
>
> ... recreational use can be considered in addition to commercial use, a conclusion we now endorse. Id. at 604.

The Court in Adirondack League Club did find that there were issues of fact warranting a trial. See id. at 607. However, contrary to Plaintiffs' position (Pltf 2011 Mem. Law pp. 1, 8-9), that finding did not result from any holding that evidence of recreational use must be supplemented by proof of commercial use, or capacity for commercial use, in order to find a waterway to be navigable-in-fact. Instead, the Court found that the quantity of the evidence of recreational use in the record before it

> is not enough to demonstrate that the river periodically has sufficient natural volume for a sufficient portion of the year to make it useful as a means for transportation. The record contains conflicting or inconclusive evidence regarding the river's ability to sustain commercial boating or canoeing operations or its capacity to float individual canoeing excursions for any given period. Id. at 607 (emphasis added).

This was entirely consistent with the longstanding test of "capacity of the river for transport, whether for trade or travel..." (id. at 603)(emphasis added), as well as the Court's recognition that recreational use could satisfy the "or travel" and "transportation" aspects of the test. Id. at 604.

The three recent cases involving small lakes or ponds did not change the standard set forth in Adirondack League Club. In Dale v. Chisholm (67 A.D.3d 626), Mohawk Valley Ski Club v. Town of Duanesburg (304 A.D.2d 881), and Hanigan v. State of New York (213 A.D.2d 80), the courts found that recreational use of a small private water body by small boats, standing alone, was not adequate to prove that the waterway in question was navigable-in-fact. However, none of these three courts held that the missing element of proof in the case was a lack of evidence of commercial use, or of some other non-recreational use. See id. Instead, each found that a lack of public access, and the fact that these ponds were isolated and did not provide a route for transportation, required a finding that the waterway was non-navigable. See id. The purpose of the use of the boats on these waters was not a factor in these decisions. See id. Therefore, these cases are entirely consistent with the recreational use test for navigability.

Adirondack League Club made it clear that evidence of travel, alone, can be all that is needed to establish navigability, and that recreational use is travel. In the present case, there is extensive evidence of the use of the Mud Pond Waterway for recreational purposes by its owners and by the general public. Caffry Aff. ¶¶ 84-90, 106-161. As discussed below, all other elements of the test for navigability are also

satisfied. Therefore, the Mud Pond Waterway is navigable-in-fact.

D. Proof of Use of a Waterway by Small Boats Is Enough to Establish its Navigability

Plaintiffs argue that the fact that parts of the Mud Pond Waterway are too narrow for passage in any other vessels but canoes somehow shows that it is not navigable-in-fact. See Pltf 2011 Mem. Law pp. 8-9.

"[N]avigability does not depend on the particular mode in which such use is or may be had -- whether by steamboats, sailing vessels or flatboats ... ." Van Cortlandt v. New York Cent. R.R. Co., 265 N.Y. 249, 254-255 (1934). Passage by boats is not necessary, and the mere ability to float single logs can prove navigability-in-fact. See Morgan v. King, 35 N.Y. 454, 459 (1866). Morgan also recognized that boating, alone, could establish a river as navigable-in-fact, in discussing the lowest twenty miles of the Racquette River, as "boatable" and thus a public highway. Id. at 455, 458; see Morgan v. King, 30 Barb. 9, 18-19 (1858), rev'd on other grounds, Morgan v. King, 35 N.Y. 454. Numerous cases decided in New York since then have found rivers or other waterways to be navigable in fact based primarily or solely upon recreational small craft use.

In Adirondack League Club, the Court held that the defendants trip down the South Branch of the Moose River in

canoes and a kayak "is evidence of navigability". Adirondack League Club v. Sierra Club, 92 N.Y.2d at 600, 607.

In People ex rel. Lehigh Val. Ry Co. v. State Tax Commn., a railroad bridge special franchise tax proceeding, the Court of Appeals in ruling on the navigability in fact of two small creeks, Cascadilla Creek and Six Mile Creek in the City of Ithaca:

> Both creeks are navigable streams, though only for small craft. Motor boats, rowboats, rafts and skiffs navigate the two streams above and below the [railroad] crossings. People ex rel. Lehigh Val. Ry Co. v. State Tax Commn., 247 N.Y. 9, 11 (1928).

The Court recognized that travel by small boats alone was sufficient to support a finding of navigability in fact. See id. at 9. The fact that the boats in question in that case were motor boats, rowboats and skiffs, and not canoes, as in the present case, is irrelevant, as the type of vessel involved is not a pertinent consideration. See id. at 2; People ex rel. New York Cent. R.R. Co. v. State Tax Commn., 258 A.D. 356, 361 (3d Dept. 1940), aff'd, 284 N.Y. 356 (1940); Van Cortlandt v. New York Cent. R.R. Co., 265 N.Y. at 254-255.

The Third Department, as affirmed by the Court of Appeals, also found in another case that a river's capacity to support small boat travel is alone a sufficient basis upon which to make a determination that the river is navigable and a public highway. People ex rel. Erie R.R. Co. v. State Tax Commn., 266 A.D. 452

(3d Dept. 1943), aff'd, 293 N.Y. 900 (1943). Erie Railroad was also a franchise tax challenge by a railroad, which alleged that the Chemung River was not navigable and that there was no evidence of commercial use during the years in question. See id. Nevertheless, the Court, relying upon Lehigh Valley Railway (247 N.Y. at 11), ruled that for the years 1918-1924, the Chemung River was navigable. Id. at 454, 455. The Court therefore found that the river's capacity to support recreational small boat traffic, such as rowboats and canoes that "were utilized for traffic, fishing and trapping", was a sufficient basis upon which to make a determination that the river was navigable and a public highway during the period in question. Id.

In another case, after a discussion of the various tests of navigability, it was held that "[s]treams so shallow as to accommodate small size craft only are now determined to be navigable in fact," and that the mode of commerce was irrelevant to a finding of navigability. People ex rel. New York Cent. R.R. Co. v. State Tax Commn., 258 A.D. at 361. The Court in New York Central was examining a tidal bay, and also a non-tidal creek, and it expressly found the creek to be navigable in fact. See id. at 360-361. There was evidence of navigation of the creek by small craft for both commerce and pleasure and the Court relied equally upon both. See id. at 360.

Therefore, as a matter of law, it is irrelevant what types of boats are used to navigate the Mud Pond Waterway, so long as navigation can occur. Here, the record shows that Mud Pond and the Lilypad Pond Narrows on Plaintiffs' land, and the interconnected Lilypad Pond on State land, are navigable by both canoes and guideboats, which are a form of rowboat. Caffry Aff. ¶¶ 88, 89, 92-97, 103, 106, 152, 158. The entire Mud Pond Waterway is navigable by canoe, with but a single carry. Caffry Aff. ¶¶ 89-161. Therefore, the Mud Pond Waterway is navigable-in-fact.

E. Occasional Periods of Low Water Do Not Render the Mud Pond Waterway Non-Navigable

A waterway may be considered to be navigable even if it is not passable at all seasons of the year.

> Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state, *at all seasons of the year*, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. Morgan v. King, 35 N.Y. at 459 (1866)(emphasis in original).

To be navigable-in-fact, a waterway must have "sufficient natural volume for a sufficient portion of the year to make it useful as a means for transportation." Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 607 (1998).

In the present case, despite occasional periods of low water that may temporarily make parts of it impassable or difficult to canoe, the Mud Pond Waterway is "useful as a means for transportation." Id. It has a long history of extensive use for various forms of transportation. Caffry Aff. ¶¶ 89-161. Plaintiffs' own admissions show that the occasional periods of low water do not make the Mud Pond Waterway non-navigable:

- The Mud Pond Waterway is "generally floatable by canoe". Potter Aff.[11] ¶24.
- "Below the Mud Pond Outlet Brook Rapids, with the exception of dry periods, the Mud Pond Outlet Brook is navigable by canoe". Potter Aff. ¶32.
- "During periods of ordinary water, although very shallow, Mud Pond is canoeable." Potter Aff. ¶31.
- Mud Pond is canoeable, even at low water, albeit with difficulty at low water. Pltf. 2011 Mem. Law, p. 4.
- The Mud Pond Waterway has the capacity to carry the "smallest boats", i.e. canoes. Pltf. 2011 Mem. Law, p. 14.

Therefore, the Mud Pond Waterway is navigable-in-fact, despite some difficulty in navigation during dry spells. Id., at 607.

[11] Affidavit of Donald B. Potter, sworn to on April 29, 2011 ("Potter Aff.").

F. The Single Natural Obstruction in the Mud Pond Waterway Does Not Make it Non-Navigable

It is well-settled law that "the existence of occasional natural obstructions do [sic] not destroy the navigability of a" waterway. Adirondack League Club v. Sierra Club, 92 N.Y.2d at 606-607. A particular body of water may be navigable in fact even though it is not deep enough in some portions thereof to admit the passage of boats. See People ex rel. New York Cent. R.R. Co. v. State Tax Commn., 258 A.D. at 361; New York Power & Light Corp. v. State of New York, 230 A.D. 338, 342 (3d Dept. 1930); People v. New York and Ontario Power Company, 219 A.D. 114, 115 (3d Dept. 1927). In determining a river's navigability, the courts of this state have generally looked at a river as a whole rather than piecemeal. With regard to the Niagara River it has been held:

> that the fact that at the particular place in question the river is not navigable by reason of the interruption produced by the falls, does not qualify or distinguish it in that locality as a public river from its general character.
>
> Whether the Niagara river is navigable at the particular point of the defendant's intake for water used to create power is immaterial. The Niagara river being navigable in part is thus navigable in whole, so far as the control of the river for purposes of commerce and navigation is concerned. Niagara Falls Power Co. v. Water Power & Control Comm., 267 N.Y. 265, 270 (1935), quoting, Matter of Commissioners of State Reservation at Niagara, 37 Hun. 537, 547 (1883), app. dism'd, 102 N.Y. 734 (1886).

Rifts and shallows do not affect a river's general character as a navigable stream. See New York Power & Light Corp. v. State of New York, 230 A.D. at 342 (Mohawk River). "Navigability is not destroyed because of occasional natural obstructions or portages ... ." People ex rel. Erie R.R. Co. v. State Tax Commn., 266 A.D. at 454; see Consolidated Hydro, Inc. v. FERC, 968 F.2d 1258, 1261-1263 (D.C. Cir. 1992) (Maine river navigable despite need for portages); James Frazee Milling Co. v. State of New York, 122 M. 545, 547 (Court of Claims 1924) (Seneca River); West Virginia Pulp and Paper Co. v. Peck, 189 A.D. 286, 292 (3d Dept. 1919) (Hudson River at Mechanicville). The Ticonderoga River has been held to be navigable despite the fact that 1.25 miles of its 3.50 mile length (36%) was non-navigable due to the existence of falls, requiring portages. People v. System Props., 281 A.D. 433, 442-444 (3d Dept. 1953), aff'd on other grounds, 2 N.Y.2d 330 (1957).[12]

In comparing two small and shallow creeks navigable only by small craft, with the "large and important" Oswego River, the Court of Appeals has held that "[t]he difference between the navigable quality of such a river and that of the creeks spanned by these bridges is one solely of degree." People ex rel. Lehigh

[12] The finding of navigability was vacated by the Court of Appeals (2 N.Y.2d at 343) without addressing its merits, due to an affirmance on other grounds that rendered the navigability finding unnecessary. The Court of Appeals did not reverse the finding of navigability on the merits or question its accuracy.

Val. Ry Co. v. State Tax Commn., 247 N.Y. 9, 12 (1928). The two creeks in question were then found to be navigable in fact. See id.

In this case, the Mud Pond Waterway is about 2 miles long. Caffry Aff. ¶64. The only obstruction affecting its navigability is the 0.1 mile (500') long rapids on the Mud Pond Outlet. Caffry Aff. ¶¶ 50-52. This is a mere 5% of its length. In the context of the 10.2 mile long Salmon River Waterway (Caffry Aff. ¶63), this is just 0.1%. Overall, about 88.2% of the Salmon River Waterway is navigable, with just three sections of rapids totaling about 1.2 miles that must be carried around. Caffry Aff. ¶65.[13]

Perhaps most relevantly for this case, the Defendant traveled the 9.2 miles of the Salmon River Waterway from the Hardigan Pond carry trail near Touey Falls, to Lake Lila. Caffry Aff. ¶¶ 126-128; Brown Aff. ¶¶ 35-54. Of this, he was able to paddle about 8.9 miles, or 96.7%, with just two short carries of about 0.3 miles, or 3.3%. Caffry Aff. ¶65; Brown Aff. ¶¶ 37-40, 47-48.

Thus, "the existence of [these] occasional natural obstructions do [sic] not destroy the navigability of" the Mud

[13] The first carry trail, around the rapids on the Little Salmon Pond Outlet, is twice as long as it really needs to be. Caffry Aff. ¶¶ 42-45. Thus, about 9.0 miles (97.8%) out of this 9.2 mile section is actually navigable. Caffry Aff. ¶¶ 42-45, 65.

Pond Waterway and the Salmon River Waterway. Adirondack League Club v. Sierra Club, 92 N.Y.2d at 606-607; see People v. System Props., 281 A.D. 433 (river was navigable in fact, despite presence of impassable falls and rapids on 1.25 out of 3.5 miles, leaving only 64% of river passable).

G. The Defendant Had the Right to Portage Around the Rapids on Mud Pond Outlet

When the Defendant carried his canoe around the rapids on the Mud Pond Outlet on May 21, 2009, he was acting within his rights under the public right of navigation:

> [I]n order to circumvent these occasional obstacles, the right to navigate carries with it the incidental right to make use, when absolutely necessary, of the bed and banks, including the right to portage on riparian lands. Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 607 (1998).

This right is not unlimited:

> [A]ny use of private river beds or banks that is not strictly incidental to the right to navigate gives rise to an action for trespass. Id.

In the present case, the Defendant did carry his canoe around the rapids. Brown Aff. ¶¶ 47-48. His use of the Plaintiffs' riparian land in doing so was strictly limited to that which was necessary to his navigation of the Mud Pond Waterway. Brown Aff. ¶¶ 47-48.

The record shows that it was "absolutely necessary" for Defendant to "make use ... of the bed and banks, including the

right to portage on riparian lands." Id. The Mud Pond Outlet rapids are not passable in a canoe or other small boat. Potter Tr. 94-100; Brown Aff. ¶¶ 47-48; Caffry Aff. ¶¶ 49-52; Amended Complaint ¶22(c). A detailed description of these rapids, with photographs, is set forth at Potter Aff. ¶18.

Donald Potter testified that no member of his family has ever run the rapids in a canoe. For many decades, they would walk on a trail along the north side of the rapids, from the foot of the rapids to the Mud Pond Camp, even when carrying heavy loads such as construction materials. Potter Tr.[14] 131-138, 168-171, 221-222, 253. In 1960, he built the current carry trail because it was an easier and shorter route. Potter Tr. 134. It is this trail that Defendant used on May 21, 2009. Brown Aff. ¶¶ 47-48.

Therefore, it was necessary for the Defendant, like many generations of Potters and Brandreths before him, to carry his canoe around the rapids. He did so by the most direct route possible. This was strictly incidental to his navigation of the Mud Pond Waterway, and was not a trespass. See Adirondack League Club v. Sierra Club, 92 N.Y.2d at 607.

[14] References to the transcript of the deposition of Plaintiffs' representative Donald B. Potter are abbreviated herein as "Potter Tr. ____".

H. Mud Pond's Small Size Does Not Make the Waterway Non-Navigable

A navigable-in-fact waterway "must provide practical utility to the public as a means for transportation." Adirondack League Club v. Sierra Club, 92 N.Y.2d at 603. Where the waterway in question is a small privately owned pond, "the courts have long considered the presence and nature of termini by which the public may enter or leave the waterway...". Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d 881, 883 (3d Dept. 2003). There must be "a demonstration of suitable public access or termini". Id. at 884; see Hanigan v. State of New York, 213 A.D.2d 80 (3d Dept. 1995); Dale v. Chisholm, 67 A.D.3d 626, 627 (3d Dept. 2009). In making this assessment, the Appellate Division, Third Department, looks at a "waterway" in its entirety, and not just individual water bodies. See Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d at 883; Hanigan v. State of New York, 213 A.D.2d at 85.

In the present case, the Mud Pond Waterway[15] is accessible from three publicly owned termini: (1) from the southeast via the publicly owned Lilypad Pond and the publicly owned part of the Lilypad Pond Narrows, which are in turn accessible from the upper reaches of the Salmon River Waterway (Caffry Aff. ¶¶ 31-46); (2) from the east via the Lilypad Pond Trail in the State-owned

[15] Part of the Lilypad Pond Narrows, Mud Pond, Mud Pond Outlet, and part of Shingle Shanty Brook.

Whitney Wilderness Area, which allows people to hike to Lilypad Pond (Affidavit of Kenneth Hamm, sworn to on August 1, 2012 ("Hamm Aff."), Ex. D, pp. 2-3); and (3) from the northwest via the publicly owned Lake Lila and the publicly owned part of Shingle Shanty Brook (Caffry Aff. ¶¶ 57-62). Thus, the Mud Pond Waterway has at least two termini, or public access points. See Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d at 883; Hanigan v. State of New York, 213 A.D.2d at 85.

The Salmon River Waterway, of which the Mud Pond Waterway is a part, also has at least two termini, or public access points: (1) from the east via the Hardigan Pond Carry trail (Caffry Aff. ¶¶ 38-41, 77); (2) from the east at Lilypad Pond via the Lilypad Pond Trail (Hamm Aff. Ex. D, pp. 2-3; and (3) from north via the public put-in on Lake Lila (Caffry Aff. ¶¶ 57-62). If, in the future, Salmon Lake itself were to come into public ownership, there would also be public access at the uppermost end of the waterway. Caffry Aff. ¶¶ 33-36.

Looking more specifically at Mud Pond, it is less than 40 acres in size (Potter Tr. 26-27), and the Plaintiffs are the sole owners thereof. Houghton Aff. Ex. A, Ex. B. Compare Hanigan v. State of New York, 213 A.D.2d 80 (pond of 28 acres); Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d 881 (artificial lake one quarter square mile in area). However, despite its small size, Mud Pond does "provide practical utility to the

public as a means for transportation." Adirondack League Club v. Sierra Club, 92 N.Y.2d at 603. It is part of the Mud Pond Waterway (Caffry Aff. ¶¶ 46-58), the longer Salmon River Waterway (Caffry Aff. ¶¶ 25-69), and the Little Tupper Lake to Lake Lila Traverse (Caffry Aff. ¶¶ 76, 126-128, 148-154). The Plaintiffs and their predecessors have long considered Mud Pond to be part of "an integrated stream system". Potter Tr. 274; Caffry Aff. ¶28. The Plaintiffs used to use the entire Mud Pond/Narrows/ Lilypad Pond complex as if they had a right to, even before the State bought the Whitney tract. Potter Tr. 211-217.

Indeed, "Mud Pond is but a widening in a large tributary to the Shingle Shanty Stream [sic], impounded by a bedrock sill at its outlet." *Brandreth, A History Of Brandreth Park, 1851-2010*, Caffry Aff. ¶49, Ex. A, p. 16. Therefore, it should be considered in the context of the entire tributary, described herein as the "Salmon River Waterway" (Caffry Aff. ¶¶ 25-69), and not as an isolated small lake or pond like those that were at issue in Mohawk Valley Ski Club v. Town of Duanesburg (304 A.D.2d 881), Hanigan v. State of New York (213 A.D.2d 80) and Dale v. Chisholm (67 A.D.3d 626). In that context, it clearly has public termini and plays a role in providing the requisite practical utility for transportation and travel, so as to be navigable-in-fact.

Even looking at Mud Pond in isolation from the waterways of which it is but a short part,[16] it does have two points of public access to its waters. See Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d at 884. From the southeast, the Lilypad Pond Narrows connects Mud Pond to the publicly owned Lilypad Pond.[17] Caffry Aff. ¶¶ 46-49. The boundary line between the State Forest Preserve and Brandreth Park runs across the Narrows. Caffry Aff. ¶47. From the northwest, Shingle Shanty Brook and Mud Pond Outlet provide access from the publicly owned Lake Lila.[18] Caffry Aff. ¶¶ 51-62.

The fact that the short rapids on Mud Pond Outlet are not passable by canoe does not mean that the Outlet does not provide a "termin[us] by which the public may enter or leave" Mud Pond or that there is not "a demonstration of suitable public access" to the pond. Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d at 883, 884. As shown above at Points I.F and I.G, supra, occasional interruptions do not prevent a waterway from being navigable. Compare Niagara Falls Power Co. v. Water Power & Control Comm., 267 N.Y. 265, 270 (1935) (Niagara River navigable

---

[16] It is about two miles out of about 10.2 miles of the full Salmon River Waterway; and about two miles out of about 9.2 miles of the section below Touey Falls. Caffry Aff. ¶64.

[17] The boundary line between the State Forest Preserve and Brandreth Park runs across the Narrows. Caffry Aff. ¶47.

[18] The boundary line between the State Forest Preserve and Brandreth Park runs crosses Shingle Shanty Brook between Lake Lila and Mud Pond Outlet. Caffry Aff. ¶57.

despite existence of the famous falls); People v. System Props., 281 A.D. 433, 442-444 (3d Dept. 1953) (Ticonderoga River navigable despite presence of 1.25 miles of falls and rapids).

The Mud Pond Waterway, the Salmon River Waterway, and Mud Pond all have an extensive history of use for transportation, for trade, recreation, transport and travel, by the owners of Brandreth Park and their guests, and by the public. Caffry Aff. ¶¶ 85-161. This use is all evidence of the "capacity of the [waterway] for transport, whether for trade or travel". Adirondack League Club v. Sierra Club, 92 N.Y.2d at 603. In addition, these waters are linked to much larger networks of canoe routes, providing even more capacity "for trade or travel", id., than is provided by them alone. Caffry Aff. ¶¶ 70-83.

The present case is readily distinguishable from the recent cases in which the courts have found small ponds to be non-navigable. See Dale v. Chisholm, 67 A.D.3d 626 (use of pond limited to recreational canoe or kayak use - no evidence of capacity for transport for trade or travel); Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d 881 (use of lake by motorboats not sufficient evidence of navigability in absence of suitable public access or termini; lack of evidence of public access to, and of public use of, the lake); Hanigan v. State of New York, 213 A.D.2d at 84, 85 (no claims made that outlet or inlet were navigable, or that pond had been used for transport;

use of pond was limited to recreational canoe and small boat use, no termini existed at which public may enter and leave waterway).

In this case, in sharp contrast to the water bodies in the three cases described above, Mud Pond and the Mud Pond Waterway, and the Salmon River Waterway, all have multiple points of public access and long histories of extensive public and private use, for transportation, recreation, trade and travel. The Defendant entered and left Mud Pond and the Mud Pond Waterway, and the Salmon River Waterway, from publicly owned access points. Brown Aff. ¶¶ 27, 35-36, 42, 51, 53.

As a matter of law, the Mud Pond Waterway is navigable-in-fact, despite the small size of Mud Pond itself and the existence of the rapids on the Mud Pond Outlet.

I. Point I Conclusion

The Mud Pond Waterway satisfies all of the criteria for navigability-in-fact under the common law. It has a long history of use for travel, recreation, transport and trade. It has a sufficient volume of flow to be passable by canoes in all but the driest of times. It has but a single natural obstruction, which is short and is easily avoided by a carry trail. It has ample public access points at both ends, which link it to tracts of State land, other bodies of water, and other canoe routes. Thus, it "provide[s] practical utility to the public as a means for transportation." Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 603 (1998).

POINT II:
THE FIRST CAUSE OF ACTION SHOULD BE DISMISSED

The Plaintiffs' First Cause of Action, for trespass, should be dismissed because the Plaintiffs' interests in the real property are subject to the public right of navigation, and because the Defendant did not cause harm to the Plaintiffs' property.

A. The Waterway is Navigable-In-Fact, So There Was No Trespass

A cause of action for trespass lies when a person enters "upon the land of another without permission." Golonka v. Plaza at Latham, 270 A.D.2d 667, 669 (3d Dept. 2000). "However, an action alleging trespass may not be maintained where the alleged trespasser has an easement over the land in question." Curwin v. Verizon Communications (LEC), 35 A.D.3d 645 (2d Dept. 2006). Where a water body is navigable-in-fact, the waterway is a "public highway," "subject to an implied, reserved public easement of navigation." Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 601 (1998); Douglaston Manor v. Bahrakis, 89 N.Y.2d 472, 481 (1997). "A person boating on [navigable-in-fact] waters is, therefore, not a trespasser." People v. Waite, 103 M.2d 204, 207 (Co. Ct., St. Lawrence County 1979).

As shown above (Point I, supra), the Mud Pond Waterway is navigable-in-fact. Therefore, Defendant's presence on it on May

21, 2009 did not constitute a trespass because the "public easement of navigation" applicable to the water (i.e., part of the Lilypad Pond Narrows, Mud Pond, Mud Pond Outlet, and part of Shingle Shanty Brook) located on private land authorized him to travel by canoe on the water, and to portage on the land. Douglaston Manor v. Bahrakis, 89 N.Y.2d 472 at 481. Defendant's presence on the terrestrial portion of the property did not constitute a trespass because it was "strictly incidental to the right to navigate." Adirondack League Club v. Sierra Club, 92 N.Y.2d at 607. He used the existing carry trail merely to transport his canoe around the rapids on Mud Pond Outlet. Brown Aff. ¶48. He did not use the trail for the purpose of fishing, hunting, or conducting any other recreational activity on the Plaintiffs' land. Brown Aff. ¶48.

Therefore, the First Cause of Action, for trespass, should be dismissed. See Mangusi v. Town of Mount Pleasant, 19 A.D.3d 656, 657 (2d Dept. 2005) (dismissing trespass action "where the alleged trespasser has an easement over the land in question"); People v. Kraemer, 7 M.2d 373, 384 (Police Ct., Suffolk Co. 1957) (dismissing trespass charges against boater because water on privately-owned land was subject to the public right of navigation).

B. Plaintiffs Do Not Have
Exclusive Navigational Rights

Trespass is an invasion of a property owner's property rights. See Bloomingdales, Inc. v. New York City Tr. Auth., 13 N.Y.3d 61, 66 (2009). While the Plaintiffs may have some property rights to Brandreth Park,[19] none of the Plaintiffs "have sufficient property rights to maintain an action for trespass" against Defendant based upon his use of the Mud Pond Waterway for navigation. Id.

Plaintiff Friends of Thayer Lake LLC ("FOTL")'s title to the land is expressly subject to the public right of navigation on the Mud Pond Waterway. Brown Aff. ¶13, Ex. B. Therefore, FOTL does not have sufficient rights to bring a claim of trespass against the Defendant for his use of the public right of navigation. Compare id.

Additionally, the other Plaintiffs' rights have always - since the grant of the land by the State to the first private owner - been "subject to an implied, reserved public easement of navigation." Douglaston Manor v. Bahrakis, 89 N.Y.2d at 481; see Adirondack League Club v. Sierra Club, 92 N.Y.2d at 604; Point I.A, supra. Therefore, they also cannot maintain an action for trespass against the Defendant for his exercise of the public right of navigation. See People v. Kraemer, 7 M.2d at 384.

[19] The Brandreth Park Association has not provided any evidence (e.g., deeds, wills or other title documentation) that any of its members are the actual owners of any rights to Brandreth Park.

C. Defendant's Presence Was Harmless

The Plaintiffs allege that they suffered damages (Amended Complaint, ¶84), but there is no evidence that the Defendant's use of the Mud Pond Waterway for navigation caused any physical damage to the property, or any other measurable compensatory damages. Therefore, the Plaintiffs should not be granted an award of damages. See Butler v. Ratner, 173 M.2d 783, 785-786 (City Ct. of New Rochelle 1997). Indeed, the Plaintiffs should not be awarded damages based upon the Defendant's conduct because his use of the waterway is "virtually indistinguishable" from the Plaintiffs' own use of that waterway. Danchak v. Tuzzolino, 195 A.D.2d 936, 937 (3d Dept. 1993). Just as the Plaintiffs do (Caffry Aff. ¶¶ 50-52, 86-90, 98-105), Defendant paddled his canoe on the water, and traveled on the existing Mud Pond Carry trail for a distance of few hundred feet. Brown Aff. ¶¶ 45-48. Any damages would have been the same as, or less than, the damages caused by the Plaintiffs' usage of the water and the carry trail.

D. Plaintiffs Are Not Entitled to Punitive Damages

There is no dispute that the Defendant intended to commit the act of paddling on the Mud Pond Waterway. Although the Plaintiffs' attempt to describe the Defendant's reasons for his actions, no further inquiry into his intentions, or underlying

reasoning, is necessary, because Defendant's actions did not constitute a trespass. See Points II.A and II.B, supra.

Nevertheless, if the Court determines that the waterway is not navigable-in-fact, the Defendant's careful analysis (Brown Aff. ¶¶ 11-22, 43), which resulted in his determination that he, as a member of the public, had a right to navigate the Mud Pond Waterway, should not give rise to a claim for punitive damages. See Dyke v. National Tr. Co., 22 A.D. 360, 361-362 (3d Dept. 1897).

Upon examining the Defendant's thorough research into the public right of navigation and the applicability of that right to the Mud Pond Waterway (Brown Aff. ¶¶ 11-22), and his intent, as a professional reporter and editor, to "write an in-depth story" on that issue (Brown Aff. ¶21), coupled with the fact that the State agrees with the Defendant's assessment (Hamm Aff. ¶19), it cannot be said that the Defendant "acted with actual malice involving intentional wrongdoing, or that such conduct amounted to a wanton, willful, or reckless disregard of the party's right of possession." Golonka v. Plaza at Latham LLC, 270 A.D.2d at 670 quoting Litwin v. Town of Huntington, 248 A.D.2d 361, 362 (2d Dept. 1998).

Therefore, the Plaintiffs' claim for punitive damages should be denied. Shiffman v. Empire Blue Cross & Blue Shield, 256 A.D.2d 131 (1st Dept. 1998) (finding that punitive damages were

not recoverable for "reporter's unlawful, yet non-disruptive, entry" onto private property).

Finally, the Defendant did not direct anyone else to trespass on the Plaintiffs' property. Defendant advised in his July/August, 2009 article (Brown Aff. Ex. N) that "paddlers must be mindful that their rights are limited when passing through private land . . . [and that paddlers] should respect the rights of the landowner." Even if others have since followed the route that the Defendant took during May 2009, he did not direct anyone to undertake the trip after him. See Golonka v. Plaza at Latham, 270 A.D.2d at 669. In fact, in his July/August, 2009 article he recommended that, until State authorities make a determination, "paddlers may want to stick to the waterways and trails in the state-owned Forest Preserve," rather than paddle on the Mud Pond Waterway. Brown Aff. Exhibit N. The Defendant has no control over allegedly "like-minded" people. Amended Complaint, ¶83.

In any event, as shown above, the route taken by the Defendant was covered by the public right of navigation and anyone following that route would also not be trespassing. See Point II.A, supra. Therefore, the Plaintiffs cannot be awarded damages under their First Cause of Action, and accordingly, it should be dismissed.

POINT III:
THE SECOND CAUSE OF ACTION SHOULD BE DISMISSED

The Plaintiffs' Second Cause of Action, for a determination of claims to real property, should be dismissed because the waterway is navigable-in-fact, and the Plaintiffs failed to properly plead this cause of action in the manner required by Article 15 of the Real Property Actions and Proceedings Law ("RPAPL").

A. The Waterway is Navigable-In-Fact and Open to the Public

The Plaintiffs seek a determination that the waterway "is not navigable-in-fact . . . and is not open to the public." Amended Complaint, ¶87. However, as shown above, the waterway is navigable-in-fact and is open to the public by operation of the public right of navigation. See Point I, supra. In addition, the Plaintiffs seek a determination that they "are the lawful owners and are vested with the exclusive recreational rights to the Mud Pond Parcel free of any claim by the Defendants." Amended Complaint ¶90(B).

First, a determination as to the ownership of the land is unnecessary because there is no dispute that FOTL owns the land under the waters in question. That the Mud Pond waterway is located on land which "is the exclusive private property of the Plaintiffs" (Amended Complaint ¶87) has no bearing on the public right of navigation. See Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 601 (1998); Douglaston Manor v. Bahrakis,

Douglaston Manor v. Bahrakis, 89 N.Y.2d 472, 481 (1997); People v. Kraemer, 7 M.2d 373, 381 (Police Ct., Suffolk Co. 1957). FOTL "has the right to exercise proprietary authority over its lands and waters," but because the waterway is navigable-in-fact, its right to do so is "'subject to the public right' of navigation." Melby v. Duffy, 304 A.D.2d 33, 37 (2d Dept. 2003); Point I.A, supra.

Second, FOTL cannot claim ownership of the right of navigation through its property. FOTL's deed (Brown Aff. Ex. B) from The Nature Conservancy states expressly that the deed was subject:

> to right of the public to navigate the surface waters of Lilypad Pond, Mud Pond, the outlet leading from Mud Pond to its confluence with Shingle Shanty Stream, and Shingle Shanty Steam northeasterly from its confluence with the Mud Pond outlet to the property line between the lands herein conveyed and lands owned by the State of New York. Notwithstanding the foregoing, the Grantee may place 'no trespassing' signs notifying the public that the lands are privately owned and are not accessible for hunting, hiking, fishing, picknicking, camping and other public recreational purposes.

Therefore, FOTL never acquired the right of navigation when it acquired the fee title to the land.

Third, even assuming, only for the sake of argument, that the other Plaintiffs named herein do collectively possess hunting, fishing and recreational rights to Brandreth Park,[20]

[20] The Brandreth Park Association has not provided any evidence (e.g., deeds, wills or other title documentation) that any of its members are the actual owners of any rights to Brandreth Park.

whatever recreational rights they possess are "subject to an implied, reserved public easement of navigation." Douglaston Manor v. Bahrakis, 89 N.Y.2d at 481; see Adirondack League Club v. Sierra Club, 92 N.Y.2d at 601. The public right of navigation precedes any private rights that were reserved by title holders after the State conveyed the land to the Benjamin Brandreth in 1851 (Amended Complaint ¶10). See Point I.A, supra; New York Power & Light Corp. v. State of New York, 230 A.D. 338, 342-343 (3d Dept. 1930) (holding that conveyances of land by the State are "conditional grants" that are made subject to "an implied reservation of the public right" of navigation); see also People v. New York & Staten Is. Ferry Co., 68 N.Y. 71, 78 (1877) (noting that the "public right in navigable waters [is] in no way affected or impaired by the change of title" from the State to an individual).

Therefore, despite Plaintiffs' assertions, and regardless of the rights listed in the Plaintiffs' purported 1911 and 1974 deeds (Amended Complaint ¶¶ 4-6, 11, 14), the Plaintiffs' rights related to navigational use of the waterway are not exclusive because they are subordinate to the public right of navigation. Point I.A, supra.

Indeed, with respect "to the right to use the stream for the purpose of passage or transportation," the public possesses "a right of way or easement paramount to the rights of the riparian owners." Morgan v. King, 34 N.Y. 454, 458 (1866); see Adirondack

League Club v. Sierra Club, 92 N.Y.2d at 601; Douglaston Manor v. Bahrakis, 89 N.Y.2d at 481.[21] Furthermore, the public's right to navigate is not limited by the public's purpose (i.e., recreation, trade or travel) for navigating the waterway. See People v. Kraemer, 7 M.2d at 380 (noting that the "'purpose of the navigation is not the subject of inquiry'"). Accordingly, Plaintiffs' request for a determination that they have exclusive recreational rights should be denied.

B. Plaintiffs Failed to Properly Plead a Real Property Action

A complaint brought pursuant to Real Property Actions and Proceedings Law Article 15 must set forth certain facts. The complaint must show that the defendant claims an interest in real property that is adverse to that of the plaintiff, and must show the particular nature of such interest. RPAPL § 1515(b). The Amended Complaint herein alleges only that "the Defendants claim that the Mud Pond Waterway is navigable-in-fact." Amended Complaint, ¶86. This allegation does not show that the Defendant claims an interest in the Plaintiffs' real property, or that Defendant is claiming an interest in the real property that is adverse to that of the Plaintiffs.

[21] However, the public's right to "navigation in navigable-in-fact rivers does not sweep away or displace other rights accompanying the private ownership of the bed of a navigable-in-fact river," such as exclusive fishing rights. Douglaston Manor v. Bahrakis, 89 N.Y.2d at 481.

The Defendant's claim to benefit from the public right of navigation through the property is not a claim to an interest in the real property for himself, but is pursuant to an established "navigational servitude" for the benefit of the public. Point I.A, supra; Adirondack League Club v. Sierra Club, 92 N.Y.2d at 604.[22] Therefore, a determination of claims to real property is inappropriate vis-a-vis the Defendant.

Moreover, the public right of navigation is not adverse to the Plaintiffs' real property interests because landowners "retain their full panoply of rights" incidental to ownership. Id. In other words, the Plaintiffs cannot complain about losing something (i.e., exclusive use of the water for navigation) from their bundle of property rights that they do not have, and never had. See id.; Morgan v. King, 34 N.Y. 454, 458 (1866) (discussing and applying New York's common law public right of navigation); Point I.A, supra.

Additionally, a complaint must show whether the judgment will or might affect a person or persons not in being, or ascertained, when the action is commenced who could afterward become entitled to an interest in the property involved. RPAPL § 1515(d). The Amended Complaint has failed to state whether the judgment will or might affect a person or persons not in being or

[22] "[T]he State's interest in [Mud Pond] as navigable waters is a sufficient interest for the purposes of an RPAPL article 15 action" vis-a-vis the State. Hanigan v. State of New York, 213 A.D.2d 80, 82 (3d Dept. 1995).

ascertained when the action was commenced, who could afterward become entitled to an interest in the property involved. RPAPL § 1515(d).

Therefore, the pleading on this cause of action was deficient and it should be dismissed. See Lake Minnewaska Mtn. Houses v. Smiley, 58 M.2d 1001, 1002-1003 (Sup. Ct., Ulster Co. 1969).

POINT IV:
THE THIRD CAUSE OF ACTION SHOULD BE DENIED

The Plaintiffs' Third Cause of Action, for a declaratory judgment, should be denied because the waterway is navigable-in-fact.

A. The Mud Pond Waterway is Navigable-In-Fact and Open to the Public

Plaintiffs seek a declaratory judgment that the Mud Pond Waterway is not navigable-in-fact, and thus that the public right of navigation does not exist on this waterway. Amended Complaint ¶90(C)(1). Plaintiffs also seek a declaratory judgment that the rapids at the beginning of the Mud Pond Outlet are not navigable-in-fact. Amended Complaint ¶90(C)(2).

However, as shown above, the Mud Pond Waterway is navigable-in-fact. See Point I, supra. The inability to float a canoe on the short stretch of rapids on the Mud Pond Outlet does not affect the status of the waterway as navigable-in-fact. Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 607 (1998); People v. New York & Ontario Power Co., 219 A.D. 114, 115 (3d Dept. 1927); Point I.F, supra. Therefore, the Plaintiffs' request for a declaratory judgment determining that the Mud Pond Waterway is not navigable-in-fact, and forever barring the public from use of the Mud Pond Waterway, should be denied. See Matter of McDonald v. Board of the Hudson Riv.-Black Riv. Regulating Dist., 86 A.D.3d 844, 846-847 (3d Dept. 2011).

Even if this Court determines that the Mud Pond Waterway is not navigable-in-fact, the Court should deny Plaintiffs' request for a declaratory judgment enjoining the general public from entry onto the Mud Pond Waterway. See Danchak v. Tuzzolino, 195 A.D.2d 936 (3d Dept. 1993). The "intrusion caused by [the public's use of the waterway for navigation] can best be described as de minimis." Id; see Point II.C, supra. The public's use "is virtually indistinguishable from the plaintiffs' use" of the waterway for navigation through the area. Id. In addition, the public owns most of the greater Salmon River Waterway inasmuch as the State of New York owns the relevant portions of the outlet of Salmon Lake, Little Salmon Lake and its outlet, Lilypad Pond, part of the Lilypad Pond Narrows, portions of Shingle Shanty Brook, and Lake Lila. Brown Aff. ¶9; Caffry Aff. ¶¶ 31-69. Therefore, the Plaintiffs benefit by being able to use and enjoy the State-owned portions of the Salmon River Waterway. Under these circumstances, the Court should not issue an injunction enjoining the general public from using the Mud Pond Waterway. See id.

B. The Public Has the Right to Portage Around the Rapids

Plaintiffs seek, in the alternative, that if the Court determines that the Mud Pond Waterway is navigable-in-fact, a declaratory judgment that the public can only travel on the Plaintiffs' lands to portage around the foot bridge that crosses the Mud Pond Outlet. Amended Complaint ¶90(C)(3). However, if the Court determines that the Mud Pond Waterway is navigable-in-fact, then the public has the right to portage on the Plaintiffs' riparian lands to "circumvent" any obstructions in the waterway. Adirondack League Club v. Sierra Club, 92 N.Y.2d at 607; see Point I.G, supra.

The court in Adirondack League Club v. Sierra Club determined that the public's right to portage "[f]ollow[ed] naturally" from the established common law that "the existence of occasional natural obstructions do not destroy the navigability of a river." Id. The Court reasoned that if a waterway could be navigable-in-fact despite occasional obstacles, then the public must have "the right to portage on riparian lands" to go around such obstacles. Id. However, the Court cautioned that the public's use of riparian lands must be "strictly incidental to the right to navigate." Id.

Here, the obstructions in the waterway include both the Plaintiffs' footbridge, and also the natural rapids in Mud Pond Outlet. Brown Aff. ¶¶ 47-48; Caffry Aff. ¶¶ 50-52. Therefore, by operation of law, the public has the right to portage on the

Plaintiffs' land, above the mean high water mark, to "circumvent" both the foot bridge and the rapids on Mud Pond Outlet. Adirondack League Club v. Sierra Club, 92 N.Y.2d at 607; Point I.G, supra. The ability of the public to portage on the Plaintiffs' land serves to fulfill the "underlying purposes" of the public right of navigation. Douglaston Manor v. Bahrakis, 89 N.Y.2d 472, 481 (1997). However, the public's use of the existing carry trail on the Plaintiffs' land is limited to that which is "strictly incidental to the right to navigate." Adirondack League Club v. Sierra Club, 92 N.Y.2d at 607. Therefore, the public cannot hunt or conduct other recreational activities while on the Plaintiffs' riparian lands. See id.

Accordingly, the Plaintiff's request for a declaratory judgment that the public can only travel on the Plaintiffs' lands to portage around the footbridge that crosses the Mud Pond Outlet should be denied because the public has the right to portage on the Plaintiffs' land to travel around obstacles, including, but not limited to, the Mud Pond Outlet rapids, that exist on the Mud Pond Waterway.

POINT V:
DEFENDANT SHOULD BE GRANTED A DECLARATORY JUDGMENT THAT THE MUD POND WATERWAY IS NAVIGABLE-IN-FACT

Rather than simply dismiss the Plaintiffs' cause of action for a declaratory judgment, the Court should "affirmatively declar[e] the rights of the parties to this declaratory action." Hubert v. Lumbermens Mut. Cas. Co., 117 A.D.2d 964, 965 (3d Dept. 1986); see Hirsch v. Lindor Realty Corp., 63 N.Y.2d 878, 881 (1984). Providing a declaratory judgment will "serve some practical end in quieting or stabilizing an uncertain [and] disputed" situation with respect to the rights and obligations of the parties, and the public. James v. Alderton Dock Yards, 256 N.Y. 298, 305 (1931).

Therefore, in accordance with Point I, supra, and as requested by Defendant in his Amended Answer verified on February 23, 2011 (p. 22), the Court should affirmatively declare that the Mud Pond Waterway is navigable-in-fact, and is subject to the public's right of navigation. See Points I, IV.A, supra. In addition, the Court should declare that the public has the right to portage on the Plaintiffs' land to travel around any obstacles on the Mud Pond Waterway, including, but not limited to, the Mud Pond Outlet rapids. See Points I.G, IV.B, supra.

CONCLUSION

The record contains overwhelming proof that the Mud Pond Waterway is navigable-in-fact, and there are no material questions of fact on this issue. Accordingly, the First and Second Causes of Action should be dismissed. In addition, the Third Cause of Action requesting a declaratory judgment in favor of the Plaintiffs should be denied, and declaratory judgment should be granted to Defendant declaring that the Mud Pond Waterway is navigable-in-fact.

/S/ John W. Caffry

Dated: August 31, 2012

CAFFRY & FLOWER
Attorneys for Defendant Phil Brown
John W. Caffry, of Counsel
Claudia K. Braymer, of Counsel
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582

TO: Dennis J. Phillips, Esq.
McPHILLIPS, FITZGERALD & CULLUM L.L.P.
Attorneys for Plaintiffs
288 Glen Street, P.O. Box 299
Glens Falls, New York 12801
(518) 792-1174

Kevin P. Donovan, Esq.
Assistant Attorney General
ATTORNEY GENERAL'S OFFICE OF THE
STATE OF NEW YORK
Attorneys for Intervenors-Defendants
The Capitol
Albany, New York 12224
(518) 474-4843

R:\Client.Files\Brown,Phil.2684.2710\Pleadings\MSJ\MemLaw.wpd