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 REPLY MEMORANDUM OF LAW

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INTRODUCTION

The Plaintiffs, perhaps recognizing that they can not prevail under the existing common law, have repeatedly and blatantly misstated the test for determining navigability-in-fact, and have set up a straw man as the positions of the Defendant and the State, which they then proceed to knock down with their misstated test. The Court should not be misled by these efforts.

The settled legal test may be summarized as being that a waterway must provide practical utility to the public as a means for transportation, for both trade and travel, and that commercial shipments, travel and recreational use can all be used to prove this. See Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 600, 603 (1998). Plaintiffs instead argue that only commercial use can prove navigability. This argument ignores that the settled test permits the use of evidence of recreational use to prove that it has been met, and that the Court of Appeals expressly confirmed this in Adirondack League Club.

Defendant Phil Brown and the State's positions on this question are that the test allows both commercial use and recreational use to be used to prove navigability. Plaintiffs keep inaccurately describing the defendants' positions as being one of mere canoe floatability. Under the proper test, the Salmon River Waterway, including Mud Pond and the "Mud Pond Waterway", are navigable-in-fact. Point I, infra.

Similarly, in an attempt to shoehorn their case into the precedent set by Hanigan v. State, that small ponds which provide no capacity for transportation beyond their shores are not navigable, Plaintiffs ask the Court to ignore the fact that Mud Pond is but a mere widening in a 10.2 mile long waterway, and focus on that pond, and that pond alone. Their strategy is both legally and factually incorrect. Point II, infra.

As was held in Adirondack League Club, the Plaintiffs' concerns that a ruling in this case could adversely affect their property rights are unfounded. Point III, infra.

Plaintiffs are bound by their acceptance of the deed for the fee title to the property, which states that title is subject to the public's right of navigation. Point IV, infra.

Plaintiffs did not respond to Defendant's motion for summary judgment dismissing their Second Cause of Action for failing to properly plead a cause of action under the RPAPL, and that claim should be dismissed. Point V, infra.

Plaintiffs have not demonstrated that they are entitled to a hearing on the issue of damages, and their request for such a hearing should be denied. Point VI, infra.

The parties are in agreement that there are no material questions of fact, and that summary judgment is appropriate. For all of these reasons, judgment should be granted in favor of the Defendant, Phil Brown.

POINT I:

NAVIGABILITY-IN-FACT EXISTS WHEN A WATERWAY PROVIDES PRACTICAL UTILITY FOR TRANSPORTATION, TRADE, OR TRAVEL; COMMERCIAL USE IS NOT REQUIRED

The law of this state has been settled since at least 1998. A waterway is navigable-in-fact, and therefore subject to the public right of navigation, when it is provides a practical utility for transportation, for either trade or travel. The Plaintiffs, seemingly stuck in the past, have argued that a river must have the capacity for commercial use in order to be navigable-in-fact. That theory does not represent the common law of New York, as interpreted by the courts of this state.

A. Navigability Can Be Determined By Use for Either Trade or Travel

The current statement of the true test of navigability-in-fact is that:

> 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, supra, at 603 (citations omitted).

This practical utility and capacity for transport, trade and travel may be proven by various means:

> [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.
>
> 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 602-603.
>
> [E]vidence 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 ... are no longer primarily subjects of commercial exploitation and gain but instead are valued in their own right as a means of travel. Id.
>
> [T]ransport 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.

In their motions for summary judgment, both the Defendant and the State relied upon this test in arguing that the waterway issue herein is navigable in fact. See Defendant's Memorandum of Law dated August 31, 2012 ("Mem. Law"), Points I, I.B, I.C, I.D; State's Memorandum of Law dated August 8, 2012 ("State's Mem. Law"), Point I.A.

B. Plaintiffs' Purported Commercial-Only Test of Navigability is Not Correct

The Plaintiffs repeatedly argue that only commercial use can satisfy the test for navigability-in-fact. See e.g. Plaintiffs' September 28, 2012 Memorandum of Law ("Plaintiffs' Mem. Law") Point I.C.5. This argument ignores the plain language of the Adirondack League Club decision that "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. It appears that Plaintiffs have purposely misstated the

test. The Plaintiffs' Memorandum of Law contains the following heavily-edited quote from Adirondack League Club, 92 N.Y.2d at 603:

> "[I]n order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation....[O]f paramount concern is the capacity of the river for transport." Plaintiffs' Mem. Law pp. 8-9.

The full quote appears above at Point I.A. A comparison of the two versions shows that Plaintiffs left out the all-important phrase "whether for trade or travel" at the end of the quote, which shows that commercial use is not necessary, and that "travel" is on an even footing with "trade", in determining navigability-in-fact. Plaintiffs appear to have tried to create the false impression that the Court of Appeals in Adirondack League Club continued to mandate that only use for commercial purposes could establish navigability-in-fact. As shown above at Point I.A, this is just plain untrue.

C. Plaintiffs Have Spun the *Adirondack League Club* Decision Beyond Recognition

Point I.A above shows that the Adirondack League Club decision clearly affirmed that proof of commercial use was not the only means of proving that a waterway is navigable-in-fact. Indeed, commercial use is not even necessary. Id. at 604; see also Mem. Law Point I. The Plaintiffs, however, have tried to spin that decision in every possible direction, so as to avoid its deadly effects on their case. A close look at their

arguments, and the actual language of the decision, shows that their effort is not destined for success.

Plaintiffs' discussion (at Plaintiff's Mem. Law pp. 18-19) of the Third Department's formulation of the test of navigability-in-fact, which appeared to preserve a test reliant on "suitability and capacity for commercial use", for which recreational uses only "should be considered as relevant evidence", Adirondack League Club v. Sierra Club, 201 A.D.2d 225, 230 (3d Dept. 1994), and of that Court's subsequent decision in Hanigan v. State, 213 A.D. 2d 80 (3d Dept. 1995), makes for an interesting history lesson, but is ultimately meaningless. Both of those decisions were rendered before the Court of Appeals clarified the test in 1998, and made it clear that the test did not require proof of commercial use, and that it never had. Point I.B., supra. Therefore, the Third Department's prior formulation of the test, in Adirondack League Club and Hanigan, was superceded. Since then, the Third Department has applied the Court of Appeals' test, not its own superceded version. See Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d 881, 883-884 (3d Dept. 2003).

Despite the Court of Appeals' clear message, Plaintiffs claim at pages 19-20 of their Memorandum of Law that the Court "did not expand the common law standard which had always been rooted in commercial viability." To the contrary, the Court of Appeals made it clear that the test was one of suitability for

transportation, trade or travel. This test was not "rooted in commercial viability". Points I.A, I.B, supra. "Practical utility for travel or transport nevertheless remains the standard." Adirondack League Club, supra, 92 N.Y.2d at 604.

The Plaintiffs' Memorandum of Law (p. 20) also incorrectly states that the Court of Appeals "sent the case back for further proof about the recreational use of the river and whether commercial log driving had been accomplished only through artificial augmentation." Nor did it send the case back "for a trial on the dual issues of commercial use and recreational use." Phillips Aff. ¶69. The reason why the case was remanded for trial was not a defect in any particular class of evidence.

Instead, the Court merely felt that the evidence in that case was conflicting and that there were issues of fact requiring a trial before a trier of fact. Id. at 605. The issue on which the Court sought more evidence, of all types (recreational, commercial or other use of the river, or scientific evidence regarding the river itself), was "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." Id. at 607. The individual defendants' trip was not adequate to prove this. Id. Nor, separately, was the evidence of log drives sufficient to meet the test (id. at 606), and the existing scientific evidence was also an inadequate basis for the Court to grant summary judgment. Id. at 605, 607.

Therefore, the case was remanded for a trial "as to the river's seasonal or periodic capacity." Id. at 607.

Phillips Aff. ¶69 also claims that the Mud Pond Outlet "can be crossed by a hop, skip, or a jump." Given that the outlet is at least 13 feet wide (Caffry Reply Aff.[1] ¶37), anyone other than an Olympic athlete would get pretty wet attempting this. More importantly, the relative widths of the South Branch of the Moose River and the Mud Pond Outlet are irrelevant. Even small creeks have been held to be navigable-in-fact. See Point I.E, infra; Caffry Reply Aff. ¶¶ 39-52.

The Court of Appeals in Adirondack League Club did not preserve a navigability test that required proof of commercial use.

D. Plaintiffs' Straw Man Description Of Defendant's Statement of the Test for Navigability is Pure Fiction

Plaintiffs have repeatedly made false claims that Defendant Browns's theory of the test of navigability-in-fact is that any water that is merely "floatable by canoe" is navigable, or that "all New York brooks capable of floating a canoe are open to public use", "mere ability to float a canoe satisfies the common law standard", or that "the question is merely whether a canoe or kayak can float down the waterway in question". See Plaintiffs'

[1] Reply Affidavit of John W. Caffry, sworn to on October 19, 2012 (Caffry Reply Aff.").

Mem. Law pp. 1, 6, 20, 37 @ fn 10. To the contrary, Defendant has stated the test to be:

> 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.

Mem. Law Point I.A; See also Point I.A, supra.[2]

In order to prove that a waterway is navigable-in-fact, regardless of whether the evidence is proof of use or capacity for trade, or for travel (Adirondack League Club, supra, at 602-604), there are additional conditions, besides the ability to carry small boats, that must also be satisfied, all of which Defendant has already addressed in his papers (which has been ignored by Plaintiffs), or which are not at issue herein. These include that:

(1) It must be navigable in its natural state. Morgan v. King, 35 N.Y. 454, 460 (1866). In the present case, this is not an issue. There are no dams or other improvements that artificially affect the navigability of the Salmon River Waterway.

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[2] While the State Defendants do state that "canoeability equates to navigability" (State's Mem. Law p. 18), this is only one part of their analysis and they do address all elements of the test in their memorandum of law. State's Mem. Law Point I. It is equally disingenuous of Plaintiffs to argue that this is the State's sole test, as it is for them to argue that with regard to Defendant Brown.

(2) It must be navigable in its ordinary volume. Id. The record herein, including Plaintiffs' own testimony, shows that the Salmon River Waterway is navigable at all water levels, with only occasional interruptions during extreme periods. Caffry Aff.[3] ¶¶ 106(a)(8), 160; Mem. Law Point I.E. Plaintiffs' own papers concede that the waterway is navigable at normal water levels, and even during dry periods, although sometimes with difficulty. Caffry Aff. ¶ 106(a)(8); Caffry Reply Aff. ¶¶ 30, 38.

(3) It must have adequate legal access. Hanigan v. State, supra, at 85. Defendant's papers herein already show that there are multiple legal access points for Mud Pond and/or the Salmon River Waterway. Caffry Aff. ¶¶ 66-69, 81-82. Mem. Law Point I.H. This issue is further addressed at Caffry Reply Aff. ¶32. Plaintiffs dispute this point, but the record shows both that they frequently navigate both upstream and downstream from Plaintiffs' property onto public lands, and that the public can do so as well. Caffry Aff. ¶¶ 84-162; Caffry Reply Aff. ¶¶ 16-24; Mem. Law Points I.B, I.D.

(4) There must be "evidence of actual practical use or evidence of capacity for practical use." Adirondack League Club, supra, at 605. Defendant's papers herein already provide extensive evidence of "actual practical use" for both trade and travel by both Plaintiffs and their predecessors, and the general

[3] Affidavit of John W. Caffry, sworn to August 31, 2012 ("Caffry Aff.").

public. Caffry Aff. ¶¶ 84-162; Mem. Law Points I.B., I.D. This issue is further addressed at Caffry Reply Aff. ¶¶ 16-24. As the record shows, there have been literally hundreds of instances of travel on the Salmon River Waterway. Plaintiffs have not made a serious attempt to deny this. This may be contrasted with the Adirondack League Club case, where there was very limited evidence of actual use, which was one of the reasons that the Court of Appeals held that a trial was required and reversed the Appellate Division's grant of summary judgment:

> The individual defendants' trip down the South Branch is evidence of navigability, but that event 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 of transportation. Id., at 607.

Plaintiffs seem to have advanced their straw man theory so as to be able to easily knock it down. In this case, if Defendant Brown had claimed that his trip, and his trip alone, proved the navigability of the Salmon River Waterway, or if Mud Pond was not part of the much longer waterway (Caffry Aff. ¶ 25-83), then perhaps Plaintiffs' straw man theory of a float-a-single- canoe-test would be a legitimate description of Defendant's argument. But that theory has no relationship in reality to either Defendant's theory of the case, or to the facts of this case.

Plaintiffs' resort to this straw man stratagem has only served to demonstrate the weaknesses of their own case. They

have made no real effort to rebut the evidence that the Salmon River Waterway is navigable in its natural condition, at all water levels, with access at both ends, and that it has been used hundreds of times. Therefore, Plaintiffs' legal arguments as to the law of the right of public navigation should be disregarded.

E. There is No "*De Minimus*" Rule

Neither Defendant Brown or the State Defendants have posited a theory that *de minimus* capacity is adequate for establishing navigability. However, that did not stop Plaintiffs from setting up another straw man argument, without citation to any actual document or pleading filed by any defendant herein, claiming that:

> Contrary to Defendants' assertions, the Court in Morgan did not adopt a standard under which a river with *de minimus* capacity had practical utility for transport. Plaintiffs' Mem. Law p. 15.

Not only are there no such "Defendants' assertions" using the term "*de minimus*", none of the cases cited by Plaintiffs for the proposition that there is a *de minimus* standard actually discuss the concept of a *de minimus* standard.

While the Morgan court did say that only a few logs had come down the river (Petitioners' Mem. Law pp. 15-16), the court's point, and its rationale for finding the river to be non-

navigable, was that the logs were damaged, not the number of logs involved. 35 N.Y. at 456, 460.

In De Camp v. Thompson, 16 A.D. 528, 533, (4th Dept. 1897), the river was admittedly only navigable during the spring floods, and only with the aid of dams.[4] Moreover, the court only assessed its capacity for "floating such an immense quantity of logs." Id. The court ultimately found only that "the North Branch of the Moose river, in its natural state, is not a public highway at common law for the purpose of floating logs and timber." Id., at 535 (emphasis added). That case did not assess the river's navigability-in-fact for other purposes, such as the transport of other goods, trade, or travel, such as in small craft. See Adirondack League Club, supra, at 603. Therefore, it is not pertinent to the present case, where the Defendant does not seek to float logs and timber on the Salmon River Waterway. Likewise, the other cases cited in Plaintiffs' Mem. Law Point I.C.3 support the proposition for which they are cited.

[4] It is also worth noting that these are both cases where the party asserting navigability was relying solely on evidence of log drives and/or artificially created navigability, which is not the case here. See Morgan, supra; De Camp, supra. Also, contrary to Plaintiffs' citation at Plaintiffs' Mem. Law p. 16, the Court of Appeals in De Camp did not reach the common law navigability question and only addressed the constitutionality of a state statute related to the river at issue therein. De Camp v. Dix, 159 N.Y. 436, 438 (1899). Therefore, to the extent that De Camp is not consistent with Adirondack League Club, it has been overruled by that case and is no longer good law.

"[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). See also Mem. Law Point I.D. Despite Plaintiffs' *de minimus* theory, in People v. Waite, 103 M.2d 204 (St. Lawrence Co. Ct 1979 (Duskas, J.)), the court found the St. Regis River to be navigable based only on testimony "that in the area in question, the St. Regis River is ... capable of travel by boats and other small watercraft ..." and that the defendant "launched his small fishing craft into the river." Caffry Reply Aff. ¶¶ 42-45, Ex. F. In People ex rel. Lehigh Valley Railway Co. v. State Tax Commission, 247 N.Y. 9 (1928) the court found two small creeks were found to be navigable-in-fact, despite the complete absence of commercial use thereof. Caffry Reply Aff. ¶¶ 33-37, Ex. D.

Likewise, in People ex rel. Erie Railroad v. State Tax Commission, 266 A.D. 452 (3d Dept. 1943), aff'd, 293 N.Y. 900 (1943), the court found that the Chemung River was navigable-in-fact, based almost solely on evidence of use by rowboats and canoes. Caffry Reply Aff. ¶¶ 38-40, Ex. E. Both Lehigh Valley Railway and Erie Railroad were cited by the Court of Appeals in Adirondack League Club, supra, at 603-604, for "the view that a river navigable by small boat, raft or skiff is subject to the public easement."

Finally, the evidence of navigability in the present case is anything but *de minimus*. The Salmon River Waterway has a significant demonstrated capacity of being used for travel hundreds of times. Caffry Aff. ¶¶ 84-162; Caffry Reply Aff. ¶¶ 16-24. It also has a proven capacity for trade, as loads of furs have been shipped on it, as have a great deal of goods, including as much as 1,500 pounds of shingles in a single shipment. Caffry Aff. ¶¶ 91-12; Caffry Reply Aff. ¶¶ 16-24.

In Adirondack League Club, supra, at 607, the Court of Appeals found that the single canoe and kayak trip by the five defendants therein was not adequate proof of navigability for summary judgment to be granted. In the present case, there have been hundreds of such trips. See Caffry Aff. ¶¶ 84-162; Caffry Reply Aff. ¶¶ 16-24. The requisite capacity and level of proof appears to lie somewhere above the one trip in Adirondack League Club, but in the present case, there can be no question that there is adequate proof of the requisite capacity.

POINT II:

NAVIGABILITY MUST BE DETERMINED BASED ON THE CHARACTERISTICS OF THE ENTIRE SALMON RIVER, NOT JUST PLAINTIFFS' MUD POND

In Adirondack League Club, supra, the Court of Appeals considered the navigability-in-fact of the South Branch of the Moose River in the Adirondacks. Id. at 600. In the opening paragraph of its opinion, it stated that the "river at issue is the South Branch of the Moose River (the South Branch), 12 miles of which run through property owned by plaintiff...". Id. Although the parties asked it to rule on the plaintiff's portion of the river (id.), this was the last mention by the Court of the 12 miles owned by the plaintiff. Throughout the remainder of the opinion, the Court spoke only of "the river" or "the South Branch". Thus, it was looking at the navigability of the entire river, not just the segment owned by the plaintiff.

This analysis was consistent with the existing common law, which holds that a "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) (deciding that the Niagara River as a whole is navigable-in-fact). Whether the river was navigable at the particular

point at issue was held to be "immaterial". Id. at 270. See also Mem. Law Point I.F.

Likewise, in Fulton Light, Heat & Power Co. v. State, 200 N.Y. 400, 415, 418 (1911), the entire 25 mile long Oswego River was found to be navigable-in-fact. The claimants' properties within the riverbed were found to be subject to the public navigational servitude, even though "[a]t the part where the claimants' properties are situated, the river is not navigable for some distance to the north and the south; but above and below, it has been used for purposes of navigation and commerce." Id. at 407. "The fact is that this river is not navigable for any purpose at the City of Fulton, for some distance north and south; although in other portions it is used for navigation and commerce." Id. at 412. Despite this, that part of the river was held by the courts to be "subordinate ... to the servitude of the public, for purposes of navigation and commerce". Id. at 415. "The proprietary interest of the riparian owner is subordinate to the public easement of passage, and the state may be regarded as the trustee of a special public servitude...". Id. at 418.

In the present case, the Plaintiffs would have the Court ignore the rule that a river must be looked at as a whole, and have the Court focus solely on the small segment of the Salmon River Waterway that is located on their property, and Mud Pond in particular. See e.g. Plaintiffs' Mem. Law Point I.B. Not only

would such a limited focus be contrary to the law, it is not supported by the facts. The two miles of pond and streams located on Brandreth Park are but a small part of a 10.2 mile long waterway, that stretches from Salmon Lake in the south to Lake Lila in the north. Caffry Aff. ¶63. See also Caffry Aff. ¶¶ 25-69.

Plaintiffs and their predecessors have long treated this as a single integrated waterway. Caffry Aff. ¶¶ 15-30; Caffry Reply Aff. ¶¶ 21-24, 32-34, 36, 38. As described by their principal witness in this case, Donald B. Potter, in his history of Brandreth Park, "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*, Caffry Aff. Ex. A, p. 16. Plaintiffs' "Mud Pond Logs" show that numerous parties from their family and guests have traveled on this waterway for long distances, well beyond the confines of Mud Pond or their two mile segment. Caffry Aff. ¶¶ 84-90; Caffry Reply Aff. ¶¶ 21-24. In recent years, dozens of members of the public have done likewise. Caffry Aff. ¶¶ 108-162;

Plaintiffs rely upon Hanigan v. State, 213 A.D.2d 80 (3d Dept. 1995) for the proposition that Mud Pond is not navigable-in-fact, and, by extension, the entire segment of the waterway on their land is not navigable. Like the present case, Hanigan involved a small pond, but that is where the similarities end.

In Hanigan, there was "no claim that any of its feeder streams or its outflow is navigable." Id. at 84. In the present case, Mud Pond is but a "widening" in the navigable Salmon River, a tributary of Shingle Shanty Stream. See *Brandreth, A History*, Caffry Aff. Ex. A, p. 16. See also Caffry Aff. ¶¶ 25-31, 49-50; Caffry Reply Aff. ¶34.

Even looking at it in isolation, Mud Pond has a navigable inlet from Lilypad Pond, known as "the Narrows", which in turn is fed by the Salmon River. Caffry Aff. ¶¶ 43-49. The Salmon River above Lilypad Pond is undisputedly navigable, except for a 2/10 mile stretch of rapids between Little Salmon Pond and Lilypad Pond. Caffry Aff. ¶¶ 38-45. Because these rapids do not destroy its navigability (Mem. Law Point I.F), the inlet to Lilypad Pond is navigable. Similarly, the outlet of Mud Pond is navigable, except for a 500 foot stretch of rapids. Caffry Aff. ¶¶ 50-55. In Hanigan, there was no such inlet or outlet.

The Hanigan court also stated that there was no claim that the pond had been or could be used for transporting the products of the forests. Id. In the present case, Mud Pond and its outlet have often been used for transporting the furs of beavers and other animals to market, and to transport out deer which had been hunted nearby. Caffry Aff. ¶¶ 103-104; Caffry Reply Aff. ¶¶ 16-24. It has also been used for the shipping of goods to the

Mud Pond Camp, showing that it does have the capacity for such use. Caffry Aff. ¶¶ 91-102; Caffry Reply Aff. ¶¶ 21-24.

The Hanigan court also focused on the fact that the canoes and small boats that used the pond traveled nowhere. Id. at 84. In this case, the record shows that there are hundreds of instances in which canoes and guideboats have traveled to or from Mud Pond to St. Agnes Landing, Lake Lila, Salmon Lake, Lilypad Pond, the Hardigan Pond carry trail, and numerous other destinations, or merely passed through the pond on a longer journey. Caffry Aff. ¶¶ 84-162; Caffry Reply Aff. ¶¶ 16-24.

Finally, the Hanigan court found that "the absence of a second access is further evidence that the pond is not suitable for trade, commerce or travel." Id. at 85. Here, as discussed above, there are multiple points of access or "termini". See also Caffry Aff. ¶¶ 66-69; Caffry Reply Aff. ¶32.

The ponds at issue in Mohawk Valley Ski Club v. Town of Duanesburg, 304 A.D.2d 881 (3d Dept. 2003) and Dale v. Chisholm, 67 A.D.3d 626 (2d Dept. 2009), are similarly isolated. In both of those cases, there was no evidence presented that people had traveled above, below, or through these ponds, or had otherwise used them for transportation purposes. Merely going around in circles on a pond does not demonstrate "capacity ... for transport, whether for trade or travel". Adirondack League Club,

supra, at 603. Mud Pond, or even the connected Mud and Lilypad Ponds, are vastly different.

If the Court were to adopt Plaintiffs' argument that the short stretch of rapids at the outlet of Mud Pond renders the entire waterway non-navigable (Plaintiffs' Mem. Law Point 1.B), this would allow any landowner to use a small non-navigable segment of a river that passes through their property to claim that the entire river is not navigable. Such a result would be contrary to the well-settled case law. See Fulton Light, Heat & Power Co., supra; Niagara Falls Power Co., supra; Mem. Law Point I.F.

POINT III:

PLAINTIFFS' FEARS FOR THEIR
PROPERTY RIGHTS ARE UNFOUNDED

Contrary to the Plaintiffs' concerns, the sky will not fall in if the Court rules in Defendants' favor. See e.g. Plaintiffs' Mem. Law pp. 1 ("upset well-settled notions of private property law"), 32 ("serious and destabilizing consequences"), and 39 ("expanding public recreational rights to the detriment of private landowners"). Defendant Brown is not asking this Court to change or extend the law. He relies entirely on existing case law, particularly Adirondack League Club, supra, in which the Court of Appeals stated that its decision did "not broaden the standard for navigability-in-fact, but merely recognized[d] that recreational use fits within it." Id., at 603. Therefore, the landowner's fears that the ruling "threaten[ed] private property rights [was] unfounded". Id. "Having never owned the easement [of public navigation], riparian owners can not complain that this [common law right of public navigation] rule works a taking for public use without compensation." Id., at 604.

Likewise, a ruling in the present case in favor of the Defendants will not affect the Plaintiffs' property rights. It will merely serve to clarify them (id.) and restore them to the level that they were at over a century ago, when the public did use the waterways on Plaintiffs' property. Affidavit of Phillip G. Terrie, sworn to September 20, 2012, ¶32.

POINT IV:

PLAINTIFFS ARE BOUND BY THE FOTL DEED WHICH STATES THAT THE MUD POND PARCEL IS SUBJECT TO THE PUBLIC RIGHT OF NAVIGATION

Plaintiff Friends of Thayer Lake, LLC ("FOTL") holds fee title to the property at issue herein pursuant to a December 27, 2007 deed from The Nature Conservancy ("TNC"). That deed stated that the title to the property was subject to the right of the public to navigate the surface waters at issue herein. See Caffry Reply Aff. ¶7; Phil Brown Affidavit, Exhibit B, pp. 1-2. By accepting that deed and recording it in the Office of the Hamilton County Clerk (id.), FOTL relinquished any right to object to the public's right of navigation on those waters.

Plaintiffs deny that this statement in the deed is binding on them. Steven B. Potter Affidavit ¶¶ 29-32. However, contrary to the Plaintiffs' argument that TNC attempted to convey rights to the public as third-party strangers to the deed (Plaintiffs' Mem. Law p. 43), the deed from TNC to FOTL did not create the public right of navigation. The inclusion of this clause in the deed was a statement by the grantor, TNC, that the fee title was "subject to" the existing public right of navigation. See Point III, supra. By accepting the deed, FOTL also recognized the public's right of navigation. See Hathaway v. Payne, 34 N.Y. 92, 108 (1865) (holding that grantee who accepts deed containing reservations or stipulations is bound by such reservations or

stipulations); Holden v. Palitz, 2 M.2d 433, 438 (Westchester Co. 1956).

If the members of FOTL thought that "the language in the FOTL Deed relating to public navigation had no legal foundation" (Steven B. Potter Aff. 29), then "it was incumbent upon them . . . to have proper recitals in the deeds which they accepted." Wilson v. Ford, 209 N.Y. 186 (1913). "Having obtained and taken title, expressly subject to the" existing public right of navigation, it would be unjust to allow FOTL to now "deny[] the existence of such rights." Id.

Plaintiffs also argue that certain of them own the non-commercial recreational rights to the property, including the right to canoe on the waters, pursuant to certain reservations and conveyances of rights made in 1911 and 1974. See Amended Complaint ¶¶ 4-6. However, those recreational rights do not include the rights of navigation, transport, trade, or travel that make up the public right of navigation. See Adirondack League Club, supra, at 603. Thus, their rights have no bearing on these other rights of the public an they have no right to contest the public's right to exercise them.

Because neither FOTL, as the fee title owner, nor the other plaintiffs, can contest the public's rights of navigation, trade, transport, or travel, this action must be dismissed.

POINT V:

THERE SHOULD BE NO DETERMINATION
MADE ON PLAINTIFFS' RPAPL CLAIM

The Plaintiffs' Second Cause of Action seeking a determination of claims to real property should be dismissed because the public possesses a right of navigation over the land by operation of law, and the Plaintiffs' complaint[5] failed to satisfy the pleading requirements of Article 15 of the Real Property Actions and Proceedings Law ("RPAPL").

A. Plaintiffs' Rights are Subordinate to the Public's Right of Navigation

Plaintiffs' Memorandum of Law provides a succinct explanation of the current owners' chain of title.[6] However, Plaintiffs' explanation of the so-called exclusive recreational rights "begin[s] in 1911" (Plaintiffs' Mem. Law p. 40). By starting the analysis in 1911, Plaintiffs completely ignored the principle that the public right of navigation preceded, and was superior to, any rights later reserved by Plaintiffs'

[5] Plaintiffs' Amended Complaint dated February 4, 2011.

[6] Defendant Phil Brown does not dispute that FOTL is the owner of the fee title to the land. Additionally, Defendant Brown does not now dispute that the Brandreth Park Association members are owners of certain limited recreational rights, to the extent that proof of ownership has now been provided in the Affidavit of Marcus J. Magee sworn to September 14, 2012 ("Magee Aff."), at ¶17.

predecessors in title. Adirondack League Club, supra, at 604; Point III, supra.

The public right of navigation was impressed upon the land when the State conveyed the land to Benjamin Brandreth in 1851 (Magee Aff. ¶5). Plaintiffs admit and "acknowledg[e] the obvious: If the subject pond and brooks are navigable-in-fact, they are subject to a public highway." Plaintiffs' Mem. Law p. 42. This is because conveyances of land by the State are "conditional grants" that are made subject to "an implied reservation of the public right" of navigation. New York Power & Light Corp. v. State of New York, 230 A.D. 338, 342-343 (3d Dept. 1930); see 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); see also Mem. Law Point III.A. Therefore, despite what their deeds may or may not say, Plaintiffs' rights are inferior to those of the public, including Defendant Brown.

B. Plaintiffs Cannot Sustain Their RPAPL Claim Against Defendant Brown

First, a determination of claims to real property is inappropriate with respect to Defendant Brown. See Mem. Law Point III.B. Second, the Plaintiffs' complaint failed to conform to the pleading requirements of RPAPL § 1515(d) because it did

not state whether the judgment will or might affect a person or persons not in being or ascertained when the action was commenced, who could afterward become entitled to an interest in the property involved. See Mem. Law Point III.B. Plaintiffs' affidavits and Memorandum of Law completely failed to respond to, or address, these two points that were raised in the Defendant's Memorandum of Law. Therefore, due to the admitted deficiencies in this cause of action, Plaintiffs' Second Cause of Action should be dismissed. See Lake Minnewaska Mtn. Houses v. Smiley, 58 M.2d 1001, 1002-1003 (Sup. Ct., Ulster Co. 1969).

POINT VI:

PLAINTIFFS ARE NOT ENTITLED TO DAMAGES FOR THE DEFENDANT'S ALLEGED TRESPASS

Since the public right of navigation provides Defendant Phil Brown with an easement across the Plaintiffs' property, he cannot be found liable for trespass. See Mem. Law Points II.A and II.B. Even if, however, this Court determines that there is no public right of navigation over the Mud Pond Waterway, the Plaintiffs are not entitled to damages against Defendant Phil Brown. Moreover, contrary to the bare conclusion in the Plaintiffs' Memorandum of Law (p. 44) and Plaintiffs' Notice of Cross-Motion for Summary Judgment (¶D), Plaintiffs are not entitled to a trial or hearing on the issue of damages.

A. The Defendant's Presence Was Harmless

Plaintiffs have not met their initial burden of proving that there were any physical or other compensatory damages to Plaintiffs' property. See Mem. Law Point II.C. Plaintiffs' Memorandum of Law and other answering papers did nothing to oppose Defendant's position on this point. Plaintiffs cannot oppose this because Defendant Phil Brown's paddling of his canoe on the Mud Pond Waterway, and his walking on the established canoe carry trail, did not cause any damage to Plaintiffs' property. See Mem. Law Point II.C. At most, Plaintiffs could be

awarded "one dollar in nominal damages." Ligo v. Gerould, 244 A.D.2d 852, 853 (4th Dept. 1997).

B. Punitive Damages Against Defendant Are Unwarranted

Additionally, Plaintiffs have not met their initial "burden of proving that the alleged trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff[s'] rights." Western N.Y. Land Conservancy, Inc. v. Cullen, 66 A.D.3d 1461, 1463 (4th Dept. 2009), lv denied 14 N.Y.3d 705 (2010) quoting Ligo v. Gerould, 244 A.D.2d at 853. Defendant's research (Brown Aff. ¶¶ 11-22) "gave defendant a reasonable and factual basis to believe that" he had a right to navigate through the "disputed area". West v. Hogan, 88 A.D.3d 1247, 1252 (4th Dept. 2011) (dissenting opinion). Again, Plaintiffs' Memorandum of Law did nothing to oppose Defendant's position on this point. Therefore, punitive damages are not warranted. See Mem. Law Point II.D.

Plaintiffs, having failed to surmount these two initial hurdles, have no right to a trial or hearing on the amount or extent of such damages, and their request for one must be denied.

CONCLUSION

The Salmon River Waterway is navigable-in-fact and as such is subject to the public's right of navigation. Therefore, Defendant did not trespass when he paddled his canoe across Plaintiffs' property and carried around a short rapids. There are no material issues of fact. Defendant's motion for summary judgment should be granted, and Plaintiffs' motion must be denied.

/S/ John W. Caffry

Dated: October 19, 2012

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